

Tuesday  
June 21, 1988





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# Rules and Regulations

Federal Register

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 50

#### Station Blackout

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission is amending its regulations to require that light-water-cooled nuclear power plants be capable of withstanding a total loss of alternating current (ac) electric power (called "station blackout") for a specified duration and maintaining reactor core cooling during that period. This requirement is based on information developed under the Commission's study of Unresolved Safety Issue A-44, "Station Blackout." The amendment is intended to provide further assurance that a loss of both offsite power and onsite emergency ac power systems will not adversely affect the public health and safety.

**EFFECTIVE DATE:** July 21, 1988.

**FOR FURTHER INFORMATION CONTACT:** Aleck Serkiz, Division of Reactor and Plant Systems, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492-3555.

#### SUPPLEMENTARY INFORMATION:

##### Background

The alternating current (ac) electric power for essential and nonessential service in a nuclear power plant is supplied primarily by offsite power. Redundant onsite emergency ac power systems are also provided in the event that all offsite power sources are lost. These systems provide power for various safety functions, including reactor core decay heat removal and containment heat removal, which are

essential for preserving the integrity of the reactor core and the containment building, respectively. The reactor core decay heat can also be removed for a limited time period by safety systems that are independent of ac power.

The term "station blackout" means the loss of offsite ac power to the essential and nonessential electrical buses concurrent with turbine trip and the unavailability of the redundant onsite emergency ac power systems (e.g., as a result of units out for service of maintenance or repair, failure to start on demand, or failure to continue to run after start). If a station blackout persists for a time beyond the capability of the ac-independent systems to remove decay heat, core melt and containment failure could result.

The Commission's existing regulations establish requirements for the design and testing of onsite and offsite electric power systems that are intended to reduce the probability of losing all ac power to an acceptable level. (See General Design Criteria 17 and 18, 10 CFR Part 50, Appendix A.) The existing regulations do not require explicitly that nuclear power plants be designed to assure that core cooling can be maintained for any specified period of loss of all ac power.

As operating experience has accumulated, the concern has arisen that the reliability of both the onsite and offsite emergency ac power systems might be less than originally anticipated, even for designs that meet the requirements of General Design Criteria 17 and 18. Many operating plants have experienced a total loss of offsite power, and more occurrences can be expected in the future. Also, operating experience with onsite emergency power systems has included many instances when diesel generators failed to start. In a few cases, there has been a complete loss of both the offsite and the onsite ac power systems. During these events, ac power was restored in a short time without any serious consequences.

In 1975, the results of the Reactor Safety Study (WASH-1400)<sup>1</sup> showed

<sup>1</sup> Copies of all NRC documents are available for public inspection and copying for a fee at the NRC Public Document Room at 1717 H Street, NW., Washington, DC 20555. Copies of published documents may also be purchased through the U.S. Government Printing Office by calling (202) 275-2060 or by writing to the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082.

that station blackout could be an important contributor to the total risk from nuclear power plant accidents. Although this total risk was found to be small and not undue, the relative importance of the station blackout accident was established. Subsequently, the Commission designated the issue of station blackout as an Unresolved Safety Issue (USI); a Task Action Plan (TAP A-44) was issued in July 1980, and studies were initiated to determine whether additional safety requirements were needed. Factors considered in the analysis of risk from station blackout included: (1) The likelihood and duration of the loss of offsite power; (2) the reliability of the onsite ac power system; and (3) the potential for severe accident sequences after a loss of all ac power, including consideration of the capability to remove core decay heat without ac power for a limited time period.

The technical findings of the staff's studies of the station blackout issue are presented in NUREG-1032, "Evaluation of Station Blackout Accidents at Nuclear Power Plants, Technical Findings Related to Unresolved Safety Issue A-44." Additional information is provided in supporting contractor reports: NUREG/CR-3226, "Station Blackout Accident Analyses," published in May 1983; NUREG/CR-2989, "Reliability of Emergency AC Power Systems at Nuclear Power Plants," published in July 1983; NUREG/CR-3992, "Collection and Evaluation of Complete and Partial Losses of Offsite Power at Nuclear Power Plants," published in February 1985; and NUREG/CR-4347, "Emergency Diesel Generator Operating Experience, 1981-1983," published in December 1985. The major results of these studies are given below.

- Losses of offsite power can be characterized as those resulting from plant-centered faults, utility grid blackout, and severe-weather-induced failures of offsite power sources. Based on operating experience, the frequency of total losses of offsite power in operating nuclear power plants was found to be about one per 10 site-years. The median restoration time was about one-half hour, and 90 percent of the offsite power losses were restored within approximately 3 hours (NUREG/CR-3992).

- The review of a number of representative designs of onsite emergency ac power systems has

indicated a variety of potentially important failure causes. However, no single improvement was identified that could result in a significant improvement in overall diesel generator reliability. Data obtained from operating experience in the period from 1976 to 1980 showed that the typical individual emergency diesel generator failure rate was about  $2.5 \times 10^{-2}$  per demand (i.e., one chance of failure in 40 demands), and that the emergency ac power system unavailability for a plant which has two emergency diesel generators, one of which was required for decay heat removal, was about  $2 \times 10^{-3}$  per demand (NUREG/CR-2989).

• Compared to the data in NUREG/CR-2989, updated estimates of emergency diesel generator failure rates indicated that diesel generator reliability has improved somewhat from 1976 to 1983. For the period 1981 to 1983, the mean failure rate for all demands was about  $2.0 \times 10^{-2}$  per demand (i.e., one chance of failure in 50 demands). However, the data also indicate that the probability of diesel generator failures during actual demands (i.e., during losses of offsite power) is greater than that during surveillance tests (NUREG/CR-4347).

• Given the occurrence of a station blackout, the likelihood of resultant core damage or core melt is dependent on the reliability and capability of decay heat removal systems that are not dependent on ac power. If sufficient ac-independent capability exists, additional time will be available to restore ac power needed for long-term cooling (NUREG/CR-3226).

• It was determined by reviewing design, operational and site-dependent factors that the expected frequency of core damage resulting from station blackout events could be maintained near  $10^{-5}$  per reactor-year with readily achievable diesel generator reliabilities, provided that plants are designed to cope with station blackout for a specified duration. The duration for a specific plant is based on a comparison of the plant's characteristics to those factors that have been identified as the main contributors to risk from station blackout (NUREG-1032).

The staff's technical findings show that station blackout does not pose an undue risk to public health and safety. The findings summarized above show that recovery from loss of offsite power occurs for the most part in less than 4 hours, emergency diesel generator reliability is high (i.e., >0.95), and that given a station blackout the likelihood of core damage is more dependent on decay heat removal systems that are non-ac-dependent. However, plant

design and operational characteristics, plus site-dependent factors (such as anticipated weather conditions) introduce a level of variability which warrants a need for plant-specific coping analyses to provide greater assurance that core cooling can be maintained until ac power is restored. Thus the Commission believes that § 50.63 of 10 CFR Part 50 will bring about a significant increase in protection to the public health and safety. As a result of station blackout coping analyses, improved guidance will be provided to licensees regarding maintaining minimum emergency diesel generator reliability to minimize the probability of losing all ac power. In addition, the Commission is amending its regulations by adding a new § 50.63 to require that all nuclear power plants be capable of coping with a station blackout for some specified period of time. The period of time for a specific plant will be determined based on a comparison of the individual plant's design with factors that have been identified as the main contributions to risk of core damage resulting from station blackout.

These factors, which vary significantly from plant to plant because of considerable differences in design of plant electric power systems as well as site-specific considerations, include: (1) Redundancy of onsite emergency ac power sources (i.e., number of sources minus the number needed for decay heat removal), (2) reliability of onsite emergency ac power sources (usually diesel generators), (3) frequency of loss of offsite power, and (4) probable time to restore offsite power. The frequency of loss of, and time to restore, offsite power are related to grid and switchyard reliabilities, historical weather data for severe storms, and the availability of nearby alternate power sources (e.g., gas turbines). Experience has shown that long duration offsite power outages are caused primarily by severe storms (hurricanes, ice, snow, etc.).

The objective of the rule is to reduce the risk of severe accidents resulting from station blackout by maintaining highly reliable ac electric power systems and, as additional defense-in-depth, assuring that plants can cope with a station blackout for some period of time. The rule requires all plants to be able to cope with a station blackout for a specified acceptable duration selected on a plant-specific basis. All licensees and applicants are required to assess the capability of their plants to cope with a station blackout (i.e., determine that the plant can maintain core cooling with ac power unavailable for an

acceptable period of time), and to have procedures and training to cope with such an event. Licensees may use an alternate ac power source if that source meets specific criteria for independence and capacity and can be shown to be available within one hour to cope with a station blackout. A coping analysis is not required for those plants that choose this alternate ac approach if the alternate ac can be demonstrated by test to be available to power the shutdown buses within 10 minutes of the onset of station blackout. Use of an alternative ac source, one that minimizes common mode failure, is a preferred option since this approach will also benefit other safety concerns.

On the basis of station blackout studies conducted for USI A-44 and presented in the reports referenced above, the NRC staff has developed Regulatory Guide 1.155 entitled "Station Blackout," which presents guidance on (1) maintaining a high level of reliability for emergency diesel generators, (2) developing procedures and training to restore offsite and onsite emergency ac power should either one or both become unavailable, and (3) selecting a plant-specific acceptable station blackout duration which the plant would be capable of surviving without core damage. Application of the methods in this guide would result in selection of an acceptable station blackout duration (e.g., 2, 4, 8, or 16 hours) which depended on the specific plant design and site-related characteristics acceptable to the staff. However, applicants and licensees could propose alternative methods to those specified in the regulatory guide in order to justify other acceptable durations for station blackout capability. Additionally, the regulatory guide on station blackout presents guidance on quality assurance and specifications for alternate ac source(s) and non-safety-related equipment required for coping with station blackout. The equipment installed to meet the station blackout rule must be implemented so that it does not degrade the existing safety-related systems. This is to be accomplished by making the non-safety-related equipment independent to the extent practicable from existing safety-related systems. The guidance provided in the regulatory guide illustrates the specifications that the staff would find acceptable for non-safety systems and equipment. The quality assurance guidance for the non-safety-related equipment for which there are no existing NRC quality assurance requirements (e.g., Appendix B, Appendix R) embody the following elements: (1) Design control and

procurement document control, (2) instructions, procedures and drawings, (3) control of purchased material, equipment and services, (4) inspection, (5) test and test control, (6) inspection, test and operating status, (7) non-conforming items, (8) corrective action, (9) records, (10) audits. NRC inspections will focus on the implementation and the effectiveness of these quality controls as described in the regulatory guide.

Based on the rule and regulatory guide, those plants with an already low risk from station blackout would be required to withstand a station blackout for a relatively short period of time and probably would need few, if any, modifications as a result of the rule. Plants with currently higher risk from station blackout would be required to withstand somewhat longer duration blackouts. Depending on their existing capability, these plants might need to make hardware modifications (such as increasing station battery capacity or condensate storage tank capacity) in order to cope with the longer station blackout duration. The rule requires that each light-water-cooled nuclear power plant licensed to operate must be able to withstand for a specified duration and recover from a station blackout. The rule requires each plant to perform a coping analysis and identify the coping duration, along with the basis therefor and a description of procedures established for coping and recovery. If modifications to equipment or plant procedures are necessary, these are to be identified and a schedule provided for implementing such changes.

It should be noted, based on all evidence that staff has on hand, that no undue risk exists with, or without, the promulgation of the station blackout rule. However, station blackout may still remain an important contributor to residual risk. This station blackout rule will enhance safety by accident prevention and thereby reduce the likelihood of a core damage accident being caused by a station blackout occurrence. This does not mean, however, that further enhancements in reducing the overall residual risk are not achievable by additional improvements in severe accident management, given the assumption that core damage occurs, whether from station blackout sequences or other causes (such as small or large loss-of-coolant accident sequences). Initiatives that provide such safety enhancements (through improvements of core damage management procedures) are currently being pursued apart from the station blackout rule. Therefore, this rule should

be viewed as being in the same accident prevention context as the ATWS rule (§ 50.62) and the fire protection rule (§ 50.48) in that it recognizes, as the other two rules recognize, multiple failure possibilities resulting from common cause effects that should be addressed. This concern has been recognized in the Introduction to Appendix A of 10 CFR Part 50.

#### Proposed Rule

On March 21, 1988, the Commission published a proposed rule in the *Federal Register* (51 FR 9829) that would require (1) light-water-cooled nuclear power plants to be capable of coping with a station blackout for a specified duration, and (2) licensees to determine the maximum duration for which their plants as currently designed are able to cope with a station blackout. A 90-day comment period expired on June 19, 1988.

On April 3, 1988 (13 days after the proposed rule was published), the NRC published in the *Federal Register* (51 FR 11494) a notice of availability and request for comments on a draft regulatory guide entitled "Station Blackout" (Task SI 501-4). This draft guide provided guidance for licensees to comply with the proposed station blackout rule. Many letters commenting on the proposed rule also included comments on the draft regulatory guide. Responses to these comments provided below address the public comments on the draft guide as well as on the proposed rule.

#### Comments on the Proposed Rule

The Commission receives 53 letters commenting on the proposed rule.<sup>2</sup> Forty-five of these were from the nuclear industry, comprised of electric utilities, consortiums of electric utilities, vendors, a trade association, and an architect/engineering firm. Other letters were submitted by the Union of Concerned Scientists, the Department of Nuclear Safety of the State of Illinois, a representative of the Professional Reactor Operator Society, a citizens group, a consultant, and three individuals. Largely, the industry comments were opposed to generic rulemaking to resolve the station blackout issue. The Nuclear Management and Resources Council (NUMARC), formerly the Nuclear Utilities Management and Resources Committee, submitted, along with its comments on the proposed rule, a set of four industry initiatives that it believes

would resolve this issue without rulemaking. Thirty-nine of the industry letters supported NUMARC's submittal. NUMARC proposed a fifth initiative (see item 21) by letter dated October 6, 1987. On the other hand, the Union of Concerned Scientists, the Illinois Department of Nuclear Safety, and the citizens group supported the Commission's objective in the proposed rule, but did not believe the rule and guidance associated with the rule went far enough to reduce the possibility of a serious accident that could be initiated by a total loss of ac power.

Every letter was reviewed and considered by the staff in formulating the final resolution of USI A-44. Because of the large number of comments, it was not practical to prepare formal responses to each one separately. However, since many comments were on similar subjects, the discussion and response to the comments have been grouped into the following subjects:<sup>3</sup>

1. Quality classification of modifications.
2. Whether the backfit analysis adequately implements the Backfit Rule.
3. Cost-benefit and whether § 50.63 meets "substantial increase in the overall protection of the public health and safety".
4. Whether NRC should require substantial improvements in safety that go beyond those proposed in this rulemaking.
5. The need for generic rulemaking.
6. Applicability of the proposed § 50.63 to specific plants.
7. Plant-specific features and capabilities.
8. The source term used to estimate consequences.
9. Specificity on the extent of required coping studies.
10. Acceptable duration for coping with a station blackout.
11. Credit for alternate or diverse ac power sources.
12. Trends on the reliability of ac power sources.
13. Sharing of emergency diesel generators between units at multi-unit sites.
14. Certification of the definitions of station blackout and diesel generator failure.
15. Specificity and clarification of requirements.
16. Technical comments on NUREG-1032.
17. Relationship of USI A-44 to other NRC Generic Issues.
18. An alternative of plant-specific probabilistic assessments.
19. Procedures and operator actions during station blackout.
20. Schedule provisions in the proposed § 50.63.
21. Industry initiatives.

The comments and responses to each of these subjects are presented on the following pages.

<sup>2</sup> Copies are available for public inspection and copying for a fee at the NRC Public Document Room at 1717 H Street, NW., Washington, DC.

<sup>3</sup> The first four subjects are ones on which the Commissioners specifically requested public comments when the proposed rule was published.

### 1. Quality Classification of Modifications

The Commission requested comments on whether the staff should give further consideration to upgrading to safety grade the plant modifications needed (if any) to meet the proposed rule. Upgrading to safety grade would further ensure appropriate licensee attention is paid to maintaining equipment in a high state of operability and reliability.

*Comments*—The prevailing view by industry on this subject is represented by the following comments submitted by NUMARC:

*Quality classification is unnecessary*—Equipment used to prevent or respond to a station blackout should be sufficiently available and operable to meet its required function. To this extent, the Commission's desire that appropriate attention be paid to maintaining a sufficiently high state of operability and reliability is appropriate. The point of departure begins with the method for achieving this objective. Specifically, by itself, a "safety grade" classification scheme does not solely equate with high states of equipment operability and reliability. Such classification systems too often can become a documentation exercise more than a process for providing the requisite level of system functionality.

Duquesne Light agreed with this view and expressed the following comments:

Any plant modifications or additional equipment required to meet the proposed rule should not be specified safety grade. For equipment which is to be manually started and placed in service for testing or in the event of a loss of power condition there is no necessity for specifying safety grade since adequate reliability can be obtained through normal surveillance testing and the proper maintenance of commercial power plant equipment. The cost difference in safety grade vs. commercial grade modifications is significant and must be emphasized.

The opposite point of view was taken by the Illinois Department of Nuclear Safety.

No credit should be given for the capability of equipment to respond to a station blackout unless the equipment was originally designed, constructed, inspected, performance tested, qualified, certified for the intended safety-related purpose, and the equipment is maintained to the highest industry safety standards.

Gulf States Utilities commented.

The proposed rule does not provide sufficient direction on the quality classification of plant modifications that may be required to meet the rule. . . . the quality classification of plant modifications implemented to meet the proposed rule should be commensurate with classification of the system they support.

*Response*—The proposed § 50.63 does not specifically address the topic of safety classification of plant

modifications; however, detailed guidance is provided in Regulatory Guide 1.155 dealing with quality assurance and equipment specifications for non-safety-related equipment. Any safety-related equipment used either presently, or in modifications resulting from this rule, should meet the criteria currently applied to such equipment.

The technical analyses performed for USI A-44 (NUREG-1032) show that plant-centered events (i.e., those events in which design and operational characteristics of the plant itself play a role in the likelihood of loss of offsite power), and area- or weather-related events (e.g., grid reliability or external influences on the grid) are the dominant causes of loss of offsite power. Neither seismic events nor events related to single failure causes were found to be major contributors to loss of offsite power. Therefore, both the staff's findings and public comments received do not support an explicit need for plant modifications for coping with station blackout to be seismically qualified.

The substantial increase in protection sought by this rule can be achieved by modifications which meet criteria somewhat less stringent than generally required by safety grade criteria. Safety-related equipment modifications to meet all safety-grade-related criteria would be more burdensome and expensive and would likely achieve only a very small further reduction in risk. The major contributors to the residual risk of loss of offsite power are adequately dealt with by modifications which conform to the quality assurance and equipment specification guidance provided in Regulatory Guide 1.155.

### 2. Whether the Backfit Analysis Adequately Implements the Backfit Rule

In addition to comments on the merits of the proposed rule, the Commission specifically requested comments on whether the backfit analysis for this rule adequately implements the Backfit Rule, § 50.109 of 10 CFR Part 50.

*Comments*—The Commission received two differing views in response to this request. On one hand, NUMARC expressed the view that the proposed rule does not meet the backfit rule standard because the analysis of the factors set forth in § 50.109(c) were not adequately considered by the staff. Specifically, NUMARC stated:

1. Installation and continuing costs associated with the backfit have been underestimated.

2. Potential impacts on radiological exposure of facility employees should be further addressed.

3. The relationship to proposed and existing regulatory requirements should be considered further.

4. Potential impacts of differences in facility, type, design, or age should be considered further.

5. The reduction in risk from offsite releases to the public has been overestimated.

On the other hand, the Ohio Citizens for Responsible Energy (OCRE) and the Union of Concerned Scientists commented that the backfit rule should not apply to the proposed rule. OCRE took the position that "application of the backfit rule to [NRC] rulemakings . . . is plainly illegal," and the Commission is not empowered to consider costs to licensees in deciding whether to impose new requirements. The Union of Concerned Scientists commented that the cost-benefit analysis should not be applied in this case because safety improvements are needed to secure compliance with existing NRC regulations, specifically General Design Criterion 17, Electric Power Systems (Appendix A to 10 CFR Part 50).

*Response*—NUMARC's comments on the backfit analysis were taken into account by the staff in revising the draft version of NUREG-1109, "Regulatory Backfit Analysis for the Resolution of Unresolved Safety Issue A-44, Station Blackout," and a separate appendix that addresses the factors in § 50.109(c) was added to that report. All but Item 2 above are on the same subjects as letters from other commenters and are discussed in more detail under subjects 3 (Item 1), 6 (Item 4), 8 (Item 5), and 17 (Item 3) in this section. NUMARC's Item 2, the potential impact on radiological exposure of facility employees, would need to be assessed in detail only if it were a major factor in the value-impact analysis. The effect of radiological exposure on facility employees, if any, would be extremely small in comparison to the reduction in radiological exposure to the public from accident avoidance. Therefore, this factor would have no impact on the overall value-impact analysis.

Contrary to OCRE's and the Union of Concerned Scientists' comments, the Commission may subject the rulemaking process to internal controls. Moreover, the Commission is empowered to consider the costs of incremental safety improvements which go beyond the level of safety necessary to ensure no undue risk to the public health and safety. See *UCS, et al., v. NRC*, D.C. Cir. Nos. 85-1757 and 86-1219 (August 4, 1987). The improvements embodied in § 50.63 go beyond the level of safety necessary to ensure no undue risk.

Finally, contrary to the Union of Concerned Scientists' comment on GDC 17, new station blackout measures cannot be imposed on licensees as a matter of compliance with GDC 17, under the compliance exception in the backfit rule, § 50.109(a)(4)(i). GDC 17 does not explicitly require that each plant be able to withstand station blackout for a specified time, or that each licensee perform a coping assessment and make whatever modifications may be necessary in the light of that assessment. Nor are any of these highly specific requirements logically compelled by any part of GDC 17. Moreover, GDC 17 has never been interpreted by the staff or the Commission to contain these specific requirements. Thus, to impose them under GDC 17 would amount to a backfit which resulted from a new staff and Commission interpretation of GDC 17.

The issue in this rulemaking is whether some additional protection is warranted beyond that already provided. The Commission is entitled to inquire, and seek public comment on, whether additional safety measures should be imposed where there is a substantial increase in the overall protection of public health and safety and the cost of implementation is justified in view of this increased protection.

### 3. Cost-Benefit Analysis and Whether § 50.63 Meets the "Substantial Increase in the Overall Protection of the Public Health and Safety"

Chairman Zech and Commissioner Roberts requested comments on the analysis of cost benefit, value impact, and safety improvements and the station blackout standing on the overall risk (e.g., is the reduction of risk only a small percentage of the overall risk, or is it a major component of an already small risk?). Chairman Zech and Commissioner Roberts were particularly interested in specific comments assessing whether or not this proposal meets the "substantial increase in the overall protection of the public health and safety \* \* \* threshold now required by the backfit rule.

*Comments*—(A) One of the major comments by industry on the cost-benefit analysis was that the costs of implementing the proposed requirements have been underestimated. NUMARC and the Atomic Industrial Forum (AIF) commented that the cost estimates for hardware modifications reported in NUREG/CR-3840, "Cost Analysis for Potential Modifications To Enhance the Ability of a Nuclear Plant To Endure Station Blackout," were too

low. Commonwealth Edison and other utilities felt that performance of an analysis to determine the maximum duration a nuclear plant could cope with a station blackout would be substantially costlier than what is estimated in NUREG-1109. Industry also expressed concern that the interpretations associated with the proposed rule could lead to substantial costs above those addressed by the NRC staff in its backfit analysis. AIF commented that "The estimate of 120 NRC man-hours per plant [for NRC review] \* \* \* appears inadequate to account for technical review and evaluation of the determination of maximum coping capability and of the description of station blackout procedures which the rule would require each licensee to submit."

(B) Several commenters expressed the view that the NRC failed to consider all the risks associated with a station blackout in its value-impact assessment. The Union of Concerned Scientists thought independent failures, in addition to failures that lead to a station blackout, should be included. One individual stated that "both NRC reports [NUREG-1109 and NUREG-1032] are completely deficient in that neither look at sabotage." OCRE commented that seismic events should also be considered.

(C) With respect to safety improvements and overall risk, different points of view were expressed. On one hand, NUMARC commented that, while the risk reduction might be large for a limited number of plants, the risk reduction associated with the majority of plants will be small. Thus, as a general matter, the reductions in risk offered by the proposed rule constitute a small percentage of the overall risk, a risk which is already small (and acceptable). AIF stated that there is no standard by which to conclude that "substantial additional protection will be realized."

A different view was expressed by the Union of Concerned Scientists who stated that "station blackout is clearly a major component of the total risk posed by operating nuclear plants. The magnitude of the total risk is largely unknowable due to the enormous uncertainty which surrounds probabilistic assessments."

*Response*—(A) In order to adequately respond to industry's comments above, the staff and NRC contractors reviewed the cost estimates associated with implementing the station blackout rule. Based on this review, the estimated costs for hardware modifications were reviewed and are in the range of from 20

percent to almost 140 percent greater than the estimates in NUREG/CR-3840, depending on the specific modification considered. On average, the cost estimates for hardware backfit were found to be approximately 80 percent greater than estimated in NUREG/CR-3840. However, the cost estimates in NUREG/CR-3840 were not used by the staff in the value-impact analysis in the draft version of NUREG-1109 where estimates approximately 100 percent greater than the NUREG/CR-3840 estimates were used. Therefore, the revised cost estimates used in the final value-impact analysis are not significantly different from the estimates used in the draft version.

Industry's comments on the costs to assess a plant's capability to cope with a station blackout were based on the proposed rule that required an assessment of the maximum coping capability and the potentially unbounded nature of such an assessment. Based on public comments, the Commission has revised the final rule to modify the requirement for licensees to determine the maximum coping capability. (See response to public comments in subject number 9.) Instead, a coping assessment is required only for a specific duration. The cost for such a study is estimated to be from 70 to 100 percent higher than the original estimates by the staff, and these revised costs are used in the final value-impact analysis.

The staff revised its estimate of the resource burden on NRC for review from 120 to 175 person-hours per reactor. This revision was based on technical review required for other comparable NRC activities.

(B) The technical analyses performed for USI A-44 indicated that the contribution to core damage frequency from independent failures, in addition to failures that must occur to get to a station blackout, is low. Likewise, results of USI A-44 studies and other probabilistic risk assessments have shown that, for station blackout sequences, the contribution to core damage frequency from seismic events is low.

Not all events can be analyzed on a probabilistic basis. Sabotage is an example. Even though sabotage was not explicitly considered in the staff's value-impact analysis, it is discussed in NUREG-1109 under other considerations. These considerations support the conclusion that a station blackout rule will provide a substantial safety benefit.

(C) The revised value-impact analysis performed for the resolution of USI A-44

indicates that there are substantial benefits in terms of reduced core damage frequency and reduced risk to the public that result from the station blackout rule, and the costs are warranted in light of these benefits. The best estimate for the overall value-impact ratio is 2,400 person-rem per million dollars. Even if those plants with the highest risk (and therefore the greatest risk reduction) were not considered, the value-impact ratio for the remaining plants is still favorable (i.e., about 1,500 person-rem per million dollars).

Analyses reported in NUREG-1150, "Reactor Risk Reference Document" (draft issued for comment in February 1987),<sup>4</sup> indicate that station blackout is a dominant risk contributor to overall residual risk for most of the six plants analyzed. These results support the comment by the Union of Concerned Scientists in response to the Commissioner's request for comments on this subject.

#### 4. Whether NRC Should Require Substantial Improvements in Safety that Go Beyond Those Proposed in this Rulemaking

Commissioner Asselstine requested comments on whether the NRC should require substantial improvements in safety with respect to station blackout, like those being accomplished in some other countries, which can be achieved at reasonable cost and which go beyond those proposed in this rulemaking.

*Comments*—NRC received eight letters that included comments on this subject. Five of these were from the nuclear industry, none of which felt that the approach to station blackout taken in European countries should be used to justify safety improvements that go beyond the proposed § 50.63. The main justification for industry's argument is that foreign countries may have reasons for requiring activities that differ from, or exceed, those in the U.S. For example, Washington Public Power Supply Systems (WPPSS) commented, "It is not apparent that the details of U.S. grid stabilities and onsite power reliabilities are substantially similar enough to those found abroad to warrant a simple adoption of these [European] measures."

In another comment from industry on this subject, NUMARC stated that there are several reasons why many of the features for coping with a station blackout in new French nuclear power plants may already exist at most U.S.

plants. In fact, they said, "The French approach to station blackout does not appear to depart significantly from current regulatory approaches in the U.S." Similarly, AIF stated, "The assertions of extensive station blackout coping capability at foreign (notably European) nuclear power plants are not sufficiently substantiated to serve as even part of the basis for the proposed requirements."

Three other letters (Union of Concerned Scientists, OCRE, and Illinois Department of Nuclear Safety) supported the NRC rulemaking to require all plants to be able to cope with a station blackout, but urged the Commission to go beyond the proposed rule. The Illinois Department of Nuclear Safety stated that:

The goal of holding the expected frequency of core damage from station blackout to  $10^{-5}$  per reactor-year is not sufficiently stringent. With relatively modest modifications to the proposed rule, a frequency of  $10^{-7}$  appears achievable at reasonable cost. Specifically, the rule should require no less than 20 hours decay heat removal capacity instead of only four or eight hours in the proposed rule, in the event of a blackout.

*Response*—The staff agrees with industry's comments that foreign countries may have valid reasons for imposing requirements that differ from or exceed those in the U.S. For example, it appears that there is a higher frequency of losses of offsite power in France than in the U.S. This experience, along with French safety objectives, led the French to design their new standard nuclear power plants to be able to cope with a very long duration station blackout (i.e., up to three days). The French safety approach and their station blackout design features are documented in NUREG-1206, "Analysis of French (Paluel) Pressurized Water Reactor Design Differences Compared to Current U.S. PWR Designs," June 1986.

The Commission believes that the staff has adequately considered foreign approaches in preventing core melt from station blackout in developing the resolution of USI A-44. Although the rule requires plants to be able to cope with station blackout for a specific duration, that duration is not specified in the rule. Guidance to determine an acceptable duration is included in Regulatory Guide 1.155. This guidance should apply to most plants, but if there were adequate justification, different requirements (either more or less stringent than the regulatory guide) could be applied to specific plants. The use of alternate ac sources provides a means to achieve further incremental decreases in core melt frequency.

#### 5. The Need for Generic Rulemaking

*Comments*—Five letters from the nuclear industry commented that generic rulemaking is not necessary to resolve the station blackout issue. Their reasons for this issue were as follows:

A generic rulemaking is inappropriate since the historic number of sites experiencing a loss of all offsite power is small. (Texas Utilities)

The station blackout issue should be handled on a plant-specific basis and does not need to be resolved by generic rulemaking. Each plant has unique probability for a loss-of-power event based on transmission system, location of plant, and onsite power systems. (Duchesne Light)

The Commission need not pursue generic rulemaking in order to resolve a non-generic issue. In the proposed station blackout rule, the number of plants of concern is acknowledged to be limited. (NUMARC)

Station blackout has been found not to be a generic issue. Station blackout risk is plant specific and, according to the staff's own analyses, the proposal requirements are expected to result in modifications at no more than a few facilities, if at any. Requiring all licensees to undertake extensive analyses under the provisions of the proposed rules when only a small group of plants may have a need for remedial action is not appropriate. (AIF)

*Response*—The Commission believes that a rule is appropriate to ensure that station blackout is addressed at all nuclear power plants. The plant-specific features that contribute to risk for station blackout (e.g., diesel generator configuration, probability of loss of offsite power) are considered by the staff in the station blackout regulatory guide to determine an acceptable coping duration for each plant. Even though not all sites have experienced a loss of offsite power, there is not sufficient assurance that such events would not occur in the future. Since historic experience has shown that a total loss of offsite power occurs about once every 10 site-years, and many nuclear plants have operated for less than 10 years, it is not surprising that some plants have experienced a loss of offsite power while others have not.

Even though it is likely that many plants will not need hardware modifications to comply with the rule, the assessment of station blackout coping capability for a specific duration and implementation of associated procedures will affect a safety benefit for all plants. The "limited number of plants of concern" in NUMARC's letter refers to those plants having the highest risk from station blackout (i.e., those that would need hardware modifications). Without a plant-specific assessment, these plants can not be

<sup>4</sup> Free single copies may be obtained from the Division of Information Support Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

identified. Even excluding these plants from consideration, the staff's analysis has shown that the improvements in safety associated with the rule are consistent with backfit considerations set forth in § 50.109.

#### 6. Applicability of the Proposed § 50.63 to Specific Plants

*Comments*—Four letters included comments or questions regarding the applicability of the rule to specific plants. For example, does the rule apply to high-temperature gas-cooled reactors (HTGR) (i.e., Fort St. Vrain)? What about TMI-2 or plants that are near completion but will not have an operating license prior to the amendment's effective date? Houston Power and Lighting Company wrote:

Proposed Section 50.63 provides schedular guidance for implementing station blackout-related modifications on plants that already hold operating licenses or will be licensed to operate prior to the effective date of the amendment. Plants who may be NTOL's [near-term operating license] but will not be licensed prior to the amendment's effective date should be accorded the same compliance period under parts (c) and (d) of this section. Otherwise this proposed rule could be interpreted to imply that plants not licensed prior to the effective amendment date must comply with the rule and make all necessary modifications prior to receiving an O.L. [operating license]. The rule should be amended to address plants which are scheduled to receive an O.L. within a short time following implementation of this rule.

*Response*—Rather than identifying specific plants for which the rule does not apply, § 50.63(a) specifies when it does apply (i.e., "each light-water-cooled nuclear power plant licensed to operate"). Since Fort St. Vrain is an HTGR, the generic rule would not apply. Station blackout will be considered individually for that plant based on its unique design. Since TMI-2 is not licensed to operate, likewise the rule would not apply to that plant. Any plant licensed to operate after the date the rule becomes effective will comply with the same 270-day schedule for information submittal applied to plants previously licensed. This affords NTOLs the same compliance features as plants already licensed to operate.

#### 7. Plant-Specific Features and Capabilities

*Comments*—A number of utilities described plant-specific features and capabilities that reduced the risk posed by a station blackout event compared to the staff's analysis. Examples of such features are given below.

- Availability of alternate, independent ac power sources such as

diesel generators, gas turbines, or nearby "black start" ac power sources.

- Extremely reliable offsite power supplies because of multiple right-of-ways or underground feeders to back up above ground transmission lines.

- Dedicated shutdown systems and associated diesel generators to meet the fire protection requirements of Appendix R to 10 CFR Part 50.

- Common or shared systems between two units at multi-unit sites such as direct current (dc) power, auxiliary feedwater, or diesel generators.

*Response*—The analyses performed for USI A-44 clearly show that plant-specific features do affect the risk from station blackout, and the station blackout regulatory guide takes this into account in providing guidance on different acceptable coping durations depending on the most significant of these features. Those plants with extremely reliable offsite and onsite ac power supplies need only have a very short (e.g., 2-hour) coping duration to be acceptable. Plants that have a dedicated shutdown system with its own independent power supply could take credit for this system to cope with a station blackout. The final rule and Regulatory Guide 1.155 have been clarified to give credit for alternate ac power supplies (see response to subject 11).

Therefore, the Commission believes that for almost all sites, plant-specific differences have been adequately accounted for in the resolution of USI A-44, but the door is open to licensees who believe their plants have additional capability that should be considered by the staff in demonstrating compliance with the rule.

#### 8. The Source Term Used To Estimate Consequences

*Comments*—NUMARC and others in the industry commented that the consequences of offsite releases that would result from a station blackout event are overestimated, and new source term information would lead to the prediction of much lower consequences for this event. Several commenters felt that the approach taken by the staff to estimate consequences of a station blackout event was improper—decreasing by a factor of three the estimated consequences of the siting source term (SST1) from NUREG/CR-2723, "Estimates of the Financial Consequences of Nuclear Power Reactor Accidents" (September 1982).

AIF felt that "implementation of any requirements resulting from the resolution of USI A-44 should be deferred until the results of the source

term research can be taken into account." They based this statement on the premise that if the consequences used in the staff's value-impact analysis were reduced by a factor of 10, none of the alternatives would be feasible.

The Union of Concerned Scientists expressed a different point of view in their letter which said " \* \* \* available evidence indicates that the consequences of an accident involving station blackout may be even worse than those estimated either in WASH-1400 or the NRC's more recent studies."

*Response*—NRC has had an extensive research effort underway since about 1981 to evaluate severe accident source terms. The staff has reviewed the results of this research to take into account the public comments received on this subject. Since there is still a great deal of uncertainty regarding source terms and associated consequences, the staff revised its value-impact analysis for USI A-44 considering a range of estimates for consequences of a station blackout.

The NRC research on severe accident source terms has resulted in the development of significant new analytical tools by NRC contractors, as discussed in NUREG-0956, "Reassessment of the Technical Bases for Estimating Source Terms," July 1986. The analytical methods developed, generally referred to as the Source Term Code Package (STCP), have been used to analyze a number of severe accident sequences for five reference plants, namely: Peach Bottom, a BWR Mark I design; Sequoyah, a PWR ice condenser; Surry, a PWR with a sub-atmospheric containment; Grand Gulf, a BWR with a Mark III containment; and Zion, a PWR with a large dry containment (NUREG-1150, "Reactor Risk Reference Document," Draft for Comment, February 1987).

The results of these analyses show that releases from station blackout sequences can be expected to vary significantly depending upon the plant and the specific sequence. Although generalizations are difficult, it appears that calculations using the STCP yield release fractions for most of the sequences range from about one third of an SST1 release (for the case of Surry, without condensation) to roughly one order of magnitude less than this. However, the uncertainties in our present understanding also do not preclude the possibility of a large release, approaching that of the SST1 estimate.

To determine the consequences in terms of person-rem, given the above range of release fractions, data taken from NUREG/CR-2723 indicate that the

variations in person-rem associated with releases of magnitude SST1, SST2 and SST3 are virtually identical to the variations in latent cancer fatalities for the same three releases. Hence, the estimated change in latent cancer fatalities with release fractions provides a reliable indication of change in person-rem as well.

Table 10 in NUREG/CR-2723 presents variations in estimated latent cancer fatalities associated with changes in SST1 release fractions (for all elements except noble gases). This table shows that a release fraction of one-third of an SST1 release would yield a value of about 50 percent of the latent cancer fatalities (and person-rem) of an SST1 release. Similarly, a release fraction of one-third of an SST1 release would yield an estimated person-rem of about 15 percent of that associated with an SST1 release. Consequently, for value-impact calculations, the staff estimated the range of consequences of station blackout, in terms of person-rem, to be from 0.15 to 0.5 of the estimated person-rem of an SST1 release. As noted, the original value-impact analysis was based on 0.3 times the estimated person-rem of an SST1 release.

With regard to a possible delay in the resolution of USI A-44 until "better" source terms become available, key considerations appear to be when better source terms are likely to become available and to what degree uncertainties in phenomenology as well as differences between investigators will be resolved. Although research on source terms is expected to continue well into the future, improvements in our knowledge are expected to be largely evolutionary beyond this point, in that the major phenomena appear to have been accounted for, at least in a first-order fashion, both in NRC as well as industry models. Resolution and narrowing of the remaining uncertainties would also benefit from improved experiments and analytical models that are likely to become available gradually. For these reasons, significantly better source terms than those presently available are likely to be forthcoming only after a number of years. Since the range of severe accident source terms and consequences suggested above from estimating station blackout sequences is sufficiently broad to cover likely improvements in source term knowledge, the resolution of USI A-44 should not be delayed.

#### 9. Specificity on the Extent of Required Coping Studies

*Comments*—Several letters by industry expressed concern that the studies necessary to demonstrate that a

plant can cope with a station blackout are not well defined and could potentially be unbounded. These comments focused on two main points. First, the proposed rule required plants to determine the maximum duration the plant could cope with a station blackout, yet the draft regulatory guide included specific guidance on acceptable coping durations (e.g., 4 or 8 hours). Determining the maximum duration, rather than assessing the plant's capability for a specific acceptable duration, could be an open-ended requirement. Along these lines, NUMARC stated:

Unless the required coping demonstration is specifically bounded by clearly stated definitions, assumptions, and criteria, there could conceivably be hundreds of supporting special effects analyses which licensees may have to consider as a result of the exercise of discretion by individual staff reviewers. Under the rule as proposed, licensees cannot ascertain the ultimate requirements they will be expected to meet (including the potential plant modifications they will need to make) to demonstrate compliance.

Second, industry also commented on the potential open-endedness of analyses to determine the operability of equipment in environmental conditions resulting from a station blackout (e.g., without heating, ventilation, and air conditioning). Unless these analyses were well defined, industry felt the analyses could be much more costly than estimated by the staff. However, NUMARC made the following statement relating to the need for detailed prescriptive requirements by NRC that appears to contradict their earlier statement.

The point \* \* \* is not that regulations must be prescriptive by their very nature. Prescriptive regulations, which outline in detail exactly what steps are required by licensees to satisfy a proposed regulation, are, in many instances, unnecessary and counterproductive.

*Response*—With regard to the proposed requirement that each plant determine its maximum duration for coping with station blackout, the staff agrees with the industry comments. First of all, it would be difficult to adequately define "maximum duration" in this sense. Second, if licensees determine that their plants can cope with a station blackout for a specified duration and restore ac power through an acceptable coping analysis, the additional safety benefit gained from simply the knowledge that a longer, or "maximum duration," coping duration exists is small. Third, the costs for assessing "maximum duration" will be higher since more extensive analyses will be required to analyze a transient which

would go beyond the coping analysis for a specified duration and recovery from station blackout. Therefore, the rule and regulatory guide have been revised accordingly to delete the requirement for licensees to determine a plant's maximum coping capability.

With regard to the comments on assessments to determine equipment operability during a station blackout, the staff feels strongly that such assessments are necessary to determine a plant's response to station blackout. By deleting the requirement to determine a plant's "maximum" coping capability, the assessment of equipment operability would not be as costly as assumed by industry. Guidance on acceptable coping assessments is provided in the station blackout regulatory guide. Also, guidelines to evaluate the effects of loss of ventilation under station blackout conditions are provided in Appendix E of NUMARC-8700, "Guidelines and Technical Bases for NUMARC Initiatives Addressing Station Blackout at Light Water Reactors." These efforts provide additional definitions, criteria, and standards for licensees' assessments of equipment operability without the need for "prescriptive regulations" by NRC.

In order to further evaluate industry's comments on this subject, NRC requested Sandia National Laboratories to identify specific tasks necessary to determine operability of equipment during a station blackout and to estimate the cost to perform these tasks. Results of this study were used in the revised value-impact analysis performed for this issue ("Equipment Operability During Station Blackout Event," NUREG/CR-4942).

#### 10. Acceptable Duration for Coping with a Station Blackout

*Comments*—Several comments with differing views were directed at guidance in the draft regulatory guide on acceptable station blackout coping durations in order for plants to comply with the proposed rule.

Washington Public Power Supply commented that "it should be possible for certain utilities to demonstrate [an acceptable] zero hour blackout." One individual recommended "that a 30 minute period be a margin, and that no duration under 4 hours be accepted by the staff." NucleDyne Engineering commented that "advanced reactors should require the capability to safely withstand a station blackout of at least 8 hours," and the Illinois Department of Nuclear Safety wrote that "the rule should require no less than 20 hours

decay heat removal capability instead of only 4 or 8 hours."

**Response**—Although diverse comments were received on this subject, none provided supporting analysis or information to back up the opinions expressed. However, the staff did reanalyze the estimated risk from station blackout events for different plant- and site-related characteristics and revised its guidance on acceptable coping duration accordingly based on a goal of limiting the average contribution to core damage from station blackout to about  $10^{-6}$  per reactor-year. Most plants would still need a 4- or 8-hour coping capability. Those few plants with the most redundant onsite emergency ac power system, coincident with significantly lower than average expected frequency of loss of offsite power, would need only a 2-hour capability to be acceptable. Any plant with minimum redundancy in the onsite emergency ac power system coincident with low reliability and a significantly higher than average expected frequency of loss of offsite power would need to substantially improve its ac power reliability or be able to cope with a station blackout for 16 hours.

#### 11. Credit for Alternate or Diverse AC Power Sources

**Comments**—Ten letters from the utility industry commented that more credit should be allowed for the availability of alternate power sources such as onsite gas turbines. The comments below represent the utilities' viewpoint.

The station blackout rule should be clarified to allow credit for diverse and very reliable offsite power sources or diverse and very reliable onsite electrical generation. (Public Service Company of Colorado)

The option of providing an additional alternate source of ac power is eliminated by [the proposed resolution]. The inconsistency in this approach can best be understood by considering an example at a generic nuclear power station. (Toledo Edison)

If the licensee were to provide an additional independence diesel generator capable of providing the necessary ac power to prevent station blackout, the licensee . . . would still be required to withstand at least 4 hours without ac power. They would receive no credit for the additional diesel generator in the coping analysis. If the licensee were to use that same diesel engine to power a charging pump, even though it would be of less significance to mitigation of reactor core damage than the diesel generator, the licensee could take credit for it in coping with the blackout. (Toledo Edison)

Since a diesel-powered charging pump will not provide for equipment loading flexibility, lighting, ventilation, instrumentation, etc., it is obviously of lower value than an additional source of ac power. The fixed category

approach taken in [the proposed resolution], however, will not permit taking credit for the same diesel engine when used as a generator though the actual reliability for the machine is the same. (Toledo Edison)

**Response**—The proposed regulation did not intend to ignore the alternative of adding additional power sources or taking credit for such sources if they already exist. For example, as specified in the regulatory guide, if a licensee added an emergency diesel generator to one of its plants that had minimum redundancy in the onsite emergency ac power system, the acceptable station blackout coping duration could be reduced. For some plants, however, adding a diesel generator would not result in a reduction in the acceptable coping duration, and the point made by Toledo Edison is a valid one. The rule and regulatory guide have been revised to clarify that alternate ac power sources are given credit to cope with a station blackout provided that certain criteria are met (e.g., independence, redundancy, high reliability, maintenance, and testing).

#### 12. Trends on the Reliability of AC Power Sources

**Comments**—Five letters included comments on the reliability of ac power sources. Four letters from industry felt that improved ac power reliability should be factored into the staff's technical analysis. Examples of these comments include the following:

\* \* \* the frequency of loss of offsite power activities has been decreasing \* \* \* (Washington Public Power Supply System);

\* \* \* offsite power availability in the absence of regulation has significantly improved over the past decade. (Southern California Edison Company);

[NUREG/CR-4347] \* \* \* shows an improvement in diesel generator reliability over that shown in the earlier document [NUREG/CR-2989] (General Electric); and

Typically the reliability of onsite power systems increases during the first few years following startup. (Gulf States Utilities)

The Illinois Department of Nuclear Safety, on the other hand, felt that potential vulnerabilities still exist in onsite emergency ac power systems, and licensees should demonstrate that they have taken steps to reduce the probability of loss of ac power.

**Response**—The staff and its contractors have extensively analyzed the industry experience and trends in ac power reliability as documented in NUREG-1032, NUREG/CR-2989, NUREG/CR-3992, and NUREG/CR-4347. Trends have shown that two aspects of ac power reliability have improved somewhat—the reduced frequency of losses of offsite power due

to plant-centered events, and a slight improvement in average diesel generator reliability from 1976 through 1983. These factors have been taken into account in the staff's analyses and the resolution of USI A-44. However, data also demonstrate that there are practical limits on ac power reliability, and the defense-in-depth approach of being able to cope with a station blackout is warranted.

#### 13. Sharing of Emergency Diesel Generators Between Units at Multi-Unit Sites

**Comments**—Several letters from industry stated that some plants with two units on a site have the capability to cross-tie electrical buses between units and therefore have improved flexibility in providing ac power. Since the magnitude of the electrical loads necessary to provide core cooling during a station blackout is significantly less than that required for a design basis accident, it could be possible to provide ac power to both units at the site using only a single diesel generator.

**Response**—The proposed rule and draft regulatory guide do not prohibit the approach discussed above. If licensees can demonstrate that such cross-tie capability exists, procedures are in place to accomplish the cross-tie and shed nonessential loads (if necessary), and no NRC regulations are violated (such as separation, minimum redundancy, and independence), then credit would be given for this capability as shown in Regulatory Guide 1.155 [i.e., reduced acceptable station blackout coping durations for greater diesel generator redundancy].

#### 14. Clarification of the Definitions of Station Blackout and Diesel Generator Failures

**Comments**—(A) Three commenters from the utility industry recommended that the definition of station blackout in § 50.2 should be clarified to exclude ac power from the station batteries through inverters. This source of ac power from the station batteries would be available in the event of a loss of both the offsite and onsite emergency ac power sources (i.e., diesel generators).

(B) Several from industry commented that the definition of diesel generator failure should be clarified, particularly with respect to the treatment of short-term failures that can be recovered quickly. Sargent and Lundy Engineers commented that:

A definition of failure on demand for emergency diesel generators needs to be provided. Under the context of a station blackout, a diesel generator which fails to

start automatically upon detection of an offsite power loss, but is successfully started manually from the main control room or from the local control panel, should not be considered a failure on demand.

*Response*—(A) The staff agrees with comment A and revised the definition of station blackout accordingly.

(B) Based on actual experience, failures of diesel generators to start due to failures in the auto-start system make up less than 20 percent of all diesel generator failures. Therefore, discounting these failures would not have a significant impact on overall diesel generator reliability statistics. However, the staff agrees in principle with comment B and has clarified the station blackout regulatory guide so that auto-start failures of diesel generators need not be counted in determining the failure rate if the diesel generator is capable of being started manually immediately after it does not start automatically.

#### 15. Specificity and Clarification of Requirements

*Comments*—Public comments were received regarding the specificity and clarification of the proposed rule and draft regulatory guide. These ranged from general to specific comments as the following two excerpts indicate:

We are concerned that, if the proposed rule is adopted, the staff will promulgate regulatory guidance criteria which will be unrealistic and excessive, i.e., compounding the event with other accidents, imposing passive failure criteria, applying seismic, environmental qualification and other qualifications to equipment that could otherwise be used in response to such an event, etc. (Maine Yankee Atomic Power Company)

Definitions of P1 and P2 [in Table 3 of the draft Regulatory Guide] use frequency of extremely severe weather and severe weather interchangeably, thus creating confusion in the definition. (Washington Public Supply System)

*Response*—Some of the comments on this subject relate to other subjects discussed elsewhere in this section. Some comments were quite specific while others were general in nature or expressed views that were not substantiated with backup material. The staff has taken these comments into consideration and revised and clarified the rule and regulatory guide accordingly. Additional guidance is provided in NUMARC-8700 which has been reviewed by the staff and referenced in the regulatory guide as providing a method the staff finds acceptable for meeting the rule.

#### 16. Technical Comments on NUREG-1032

*Comments*—In addition to comments on the proposed rule and draft regulatory guide, several letters contained comments on the staff's draft technical report, NUREG-1032, "Evaluation of Station Blackout Accidents at Nuclear Power Plants."

*Response*—NUREG-1032 was issued in draft form for public comment in May 1985 (50 FR 24332). The comments received were reviewed and considered by the staff and resulted in a re-evaluation of the technical analysis. Details of the specific comments and responses are not presented here. Rather, NUREG-1032 was revised extensively over the past year to address the public comments. In general, the overall conclusions on the risk from station blackout events did not change significantly as a result of the reanalysis. One of the major changes resulting from the reanalysis was a revision to the definitions of plant characteristics, especially the clustering of plants into site and weather-related groups (Appendix A in NUREG-1032). These changes are reflected in revisions to the guidance in the station blackout regulatory guide to determine plant-specific acceptable station blackout coping durations.

#### 17. Relationship of USI A-44 to Other NRC Generic Issues

*Comments*—The major public comment regarding the relationship of USI A-44 to other NRC generic safety issues was that the proposed rule may not be necessary or should be postponed because of ongoing work to resolve related generic issues. Some comments were general in nature such as the following one from Southern California Edison Company:

Promulgation of a final station blackout rulemaking at this time will unnecessarily complicate the final resolution of related generic technical issue \* \* \*. The NRC must develop and implement a program to coordinate the resolution of all power-related generic issues prior to finalizing any individual proposed rule.

AIF suggested that the implementation of any requirements for station blackout be deferred until the requirements from USI A-45, Shutdown Decay Heat Removal Requirements, are known and until the effect of source term changes can be evaluated.

NUMARC mentioned specific proposed and existing regulatory requirements that should be considered because they could reduce the need for a station blackout rule (e.g., B-56, Diesel Generator Reliability, and GI 23, Reactor

Coolant Pump Seal Failures). Other related issues mentioned in the public comments were A-30, Adequacy of Safety-Related DC Power Supplies, and implementation of safe shutdown facilities to meet the fire protection requirements of Appendix R.

*Response*—The question that needs to be addressed is "should a requirement be imposed now to reduce risk, or should it be postponed until related issues are resolved sometime in the future?" Potentially, this could result in substantial delays, thereby not resolving generic safety issues in a timely manner. The staff has considered the resolution of USI A-44 in light of the related issues mentioned in the comments. Although these issues are identified as separate tasks within NRC, they are all managed in a well established program that coordinates all related issues. A brief discussion of the most relevant issues is presented below. (Additional information is provided in NUREG-1109, "Regulatory Analysis for the Resolution of Unresolved Safety Issue A-44, Station Blackout.")

Resolution of USI A-45 will occur at some time following issuance of the station blackout rule (§ 50.63) and after plant-specific station blackout coping evaluations have been performed by licensees per NUMARC/NUGSBO Initiative 5, utilizing guidelines provided in NUMARC-8700. Further, the resolution of USI A-45 is expected to be highly plant-specific and focused on loss of decay heat removal considerations from other causes beyond station blackout. Utilization will be made of A-44 evaluations (as applicable) and any plant equipment modification needs identified from A-45 will be carefully evaluated to maximize effective use of previously identified A-44 equipment needs.

Maintaining emergency diesel generator reliability, the purpose of B-56, is an integral part of the resolution of USI A-44. However, the Commission believes that additional defense-in-depth will achieve a substantial increase in protection to public health and safety.

The resolution of GI 23 (reactor coolant pump seal leakage) deals with loss of reactor coolant system inventory and associated degraded core conditions. USI A-44 deals with station blackout induced effects, which result in loss of ac power, thereby impacting a broader spectrum of plant equipment and safety-related functions. Although the resolution of GI 23 will contribute to establishing a higher level of assurance that seal leakage will be minimized (thereby minimizing the need for power

to replace water inventory losses over the station blackout duration and recovery phase), resolution of GI 23 by itself will not address the broader scope of USI A-44 safety concerns.

Some licensees have implemented dedicated shutdown systems that are independent of normal and emergency ac power to meet Appendix R requirements. If applicable, these features would be credited in the resolution of USI A-44 by providing the capability to cope with a station blackout.

Thus, the resolution of USI A-44 is coordinated with related generic issues, and implementation of a final resolution should not be delayed further. (Response to comments on the effect of source term changes is included in subject number 8.)

#### 18. An Alternative of Plant-Specific Probabilistic Assessments

**Comments**—Several utilities suggested that, in lieu of the requirements in the rule, licensees should be permitted to submit plant-specific evaluations to demonstrate that the frequency of core damage from station blackout events is  $10^{-5}$  per reactor-year or less. In a similar vein, the suggestion was made that NRC should specify a target level of reliability for ac power systems in order to satisfy NRC's criteria for core damage frequency. A few licensees submitted limited probabilistic assessments to show that for some plants station blackout could have a very small probability of severe consequences.

**Response**—The Commission does not preclude licensees from submitting plant-specific probabilistic assessments to support a determination that station blackout would have a very small probability for causing core damage. However, the requirements of the rule must be met. The Commission would observe that the use of probabilistic assessments was important as input to the regulatory decisionmaking that culminated in the station blackout rule and related guidance. As expressed in the Commission's Safety Goal Policy statement of August 1986 (51 FR 28044), the Commission has acquired a reasonable degree of confidence about the usefulness and value of probabilistic assessments in assisting regulatory decisionmaking on complex safety issues. In short, such assessments are of value in complementing and focusing the more traditional and deterministic defense-in-depth approaches. On the other hand, any licensee must decide whether or not its plant-specific ac power configuration and other related equipment are sufficiently unique to

merit the conduct and submittal of a probabilistic assessment as part of achieving compliance of § 50.63. The Commission's experience also indicates that probabilistic assessments are resource intensive and can be of marginal utility if their only end result is to delay rule compliance.

#### 19. Procedures and Operator Actions During Station Blackout

**Comments**—(A) Several letters from industry commented that, in response to Generic Letter 81-04, "Emergency Procedures and Training for Station Blackout Events," dated February 21, 1981, utilities already have procedures in place to prepare plant operations for station blackout events. Owners' groups have established generic guidance for station blackout operating procedures for licensees to use in developing plant-specific procedures. A representative of the Professional Reactor Operator Society commented that:

Generic procedures are used by most operating facilities. These procedures are not carried into adequate depth of specific power plant operations. The industry has relied too heavily on generic procedures and has not given a real look at what specific steps must be taken. Extrapolation of these procedures must be required. Specific maintenance procedures must be established and followed.

(B) Other comments on procedures related to the timeliness of operator actions, both inside and outside the control room. Houston Lighting and Power suggested that:

In Section 3.1 (Part 6) [of the regulatory guide], the first sentence should be revised to read, "Consideration should be given to timely operator actions both inside and outside of the control room that \* \* \* so that credit can be taken for existing equipment that may not have actuation and control from the control room."

Illinois Power Company recommended that:

\* \* \* Section C.3.3, Item 3.a. of the proposed regulatory guide should be modified to read:

a. The system should be capable of being actuated and controlled from the control room, or if other means of control are required (e.g., manual jumping of control logics or manual operation of valves), it should be demonstrated that these steps can be carried out in a timely fashion.

**Response**—(A) Licensees may take credit for station blackout procedures already in place to comply with the station blackout rule. However, for the most part, these procedures were developed without having the benefit of a plant-specific assessment to determine whether a plant could withstand a station blackout for a specific duration. Therefore, these procedures may need to

be modified after licensees have determined an acceptable station blackout coping duration and evaluated their plant's response to a station blackout of this duration.

(B) The staff agrees with the comments related to operator actions outside the control room, and the regulatory guide was revised accordingly.

#### 20. Schedule Provisions in Proposed § 50.63

**Comments**—Two letters contained comments on the proposed schedule in § 50.63. OCRE felt the scheduling provisions in the proposed rule were far too generous. One individual recommended that the schedule be modified to require licensees to submit, within 9 months of the date of the amendment, a list of modifications along with a proposed schedule to implement those modifications. (According to the proposed rule, licensees would not have to submit a schedule for implementing equipment modifications until after the staff received and reviewed licensees' submittals on their plant's acceptable station blackout duration.)

**Response**—The staff agreed in part with these comments, and the schedule was revised accordingly. Section 50.63(c)(1)(iii) now requires that licensees submit within 9 months after the rule is issued a list of equipment modifications and a proposed schedule for implementing them. A final schedule would be developed after NRC has reviewed the licensees' submittal of their plant's acceptable station blackout duration.

#### 21. Industry Initiatives

**Comments**—In addition to comments on the proposed rule, NUMARC endorsed the following five initiatives<sup>5</sup> to address the more important contributions to station blackout:

1. Each utility will review their site(s) against the criteria specified in NUREG-1109, and if the site(s) fall into the category of an eight-hour site after utilizing all power sources available, the utility will take actions to reduce the site(s) contribution to the overall risk of station blackout. Non-hardware changes will be made within one year. Hardware changes will be made within a reasonable time thereafter.

<sup>5</sup> NUMARC initially proposed a set of four initiatives. The fifth initiative regarding the performance of a coping assessment was provided in NUMARC-8700, which was submitted by letter from J. Opeka (NUMARC) to T. Speis (RES) dated November 23, 1987. A copy is available for public inspection and copying for a fee at the NRC Public Document Room at 1717 H Street, NW., Washington, DC.

2. Each utility will implement procedures at each of its site(s) for:

- Coping with a station blackout event,
- Restoration of ac power following a station blackout event, and
- Preparing the plant for severe weather conditions (e.g., hurricanes and tornadoes) to reduce the likelihood and consequences of a loss of offsite power and to reduce the overall risk of a station blackout event.

3. Each utility will, if applicable, reduce or eliminate cold fast-starts of emergency diesel generators for testing through changes to technical specifications or other appropriate means.

4. Each utility will monitor emergency ac power unavailability utilizing data utilities provide to INPO on a regular basis.

5. Each utility will assess the ability of its plant(s) to cope with a station blackout. Plants utilizing alternate ac power for station blackout response which can be shown by test to be available to power the shutdown busses within 10 minutes of the onset of station blackout do not need to perform any coping assessment. Remaining alternate ac plants will assess their ability to cope for 1 hour. Plants not utilizing an alternate ac source will assess their ability to cope for 4 hours. Factors identified which prevent demonstrating the capability to cope for the appropriate duration will be addressed through hardware and/or procedural changes so that successful demonstration is possible.

NUMARC previously opposed generic rulemaking and felt that the first four initiatives would resolve the station blackout issue.

**Response**—These five initiatives now include many of the elements that are included in the NRC resolution of USI A-44. The staff has followed up on the NUMARC initiatives through a series of meetings in 1986 through 1987. The result has been the development of NUMARC-8700 which provides guidelines and criteria acceptable to the staff. The procedures in NUMARC-8700 have been referenced in Regulatory Guide 1.155 as providing guidance acceptable to the staff for meeting the requirements of the rule. Table 1 in Regulatory Guide 1.155 provides a cross-reference to NUMARC-8700 and notes where the regulatory guide takes precedence. NUMARC's previous concerns have been addressed in the development of Regulatory Guide 1.155 and NUMARC-8700.

#### Finding of No Significant Environmental Impact: Availability

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's rules in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment, and therefore, an environmental impact statement is not required. There are not any adverse environmental impacts as a result of the rule because there is no

additional radiological exposure to the general public or plant employees, and plant shutdown is not required so there are no additional environmental impacts as a result of the need for replacement power. The environmental assessment and finding of no significant impact on which this determination is based are available for inspection and copying for a fee at the NRC Public Document Room, 1717 H Street NW., Washington, DC. Single copies of the environmental assessment and the finding of no significant impact are available from Mr. Warren Minners, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492-7827.

#### Paperwork Reduction Act Statement

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). These requirements were approved by the Office of Management and Budget approval number 3150-0011.

#### Regulatory Analysis

The Commission has prepared a regulatory analysis on this final regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. A copy of the regulatory analysis, NUREG-1109, "Regulatory/Backfit Analysis for the Resolution of Unresolved Safety Issue A-44, Station Blackout," is available for inspection and copying for a fee at the NRC Public Document Room, 1717 H Street NW., Washington, DC 20555.

#### Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule requires that nuclear power plants be able to withstand a total loss of ac power for a specified time duration and maintain reactor core cooling during that period. These facilities are licensed under the provisions of §§ 50.21(b) and 50.22 of 10 CFR Part 50. The companies that own these facilities do not fall within the scope of "small entities" as set forth in the Regulatory Flexibility Act or the small business size standards set forth in regulations issued by the Small Business Administration in 13 CFR Part 121.

#### List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire prevention, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty,

Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Part 50.

### PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 938, as amended (42 U.S.C. 2138). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 50.10 (a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10 (b) and (c), and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.9, 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 50.2, definitions of "alternate ac source", "safe shutdown" and "station blackout" are added in the alphabetical sequence to read as follows:

#### § 50.2 Definitions.

"Alternate ac source" means an alternating current (ac) power source that is available to and located at or nearby a nuclear power plant and meets the following requirements:

- Is connectable to but not normally connected to the offsite or onsite emergency ac power systems;

(2) Has minimum potential for common mode failure with offsite power or the onsite emergency ac power sources;

(3) Is available in a timely manner after the onset of station blackout; and

(4) Has sufficient capacity and reliability for operation of all systems required for coping with station blackout and for the time required to bring and maintain the plant in safe shutdown (non-design basis accident).

"Safe shutdown (non-design basis accident (non-DBA))" for station blackout means bringing the plant to those shutdown conditions specified in plant technical specifications as Hot Standby or Hot Shutdown, as appropriate (plants have the option of maintaining the RCS at normal operating temperatures or at reduced temperatures).

"Station blackout" means the complete loss of alternating current (ac) electric power to the essential and nonessential switchgear buses in a nuclear power plant (i.e., loss of offsite electric power system concurrent with turbine trip and unavailability of the onsite emergency ac power system). Station blackout does not include the loss of available ac power to buses fed by station batteries through inverters or by alternate ac sources as defined in this section, nor does it assume a concurrent single failure or design basis accident. At single unit sites, any emergency ac power source(s) in excess of the number required to meet minimum redundancy requirements (i.e., single failure) for safe shutdown (non-DBA) is assumed to be available and may be designated as an alternate power source(s) provided the applicable requirements are met. At multi-unit sites, where the combination of emergency ac power sources exceeds the minimum redundancy requirements for safe shutdown (non-DBA) of all units, the remaining emergency ac power sources may be used as alternate ac power sources provided they meet the applicable requirements. If these criteria are not met, station blackout must be assumed on all the units.

#### § 50.8 [Amended]

3. In § 50.8, paragraph (b), insert the section number 50.63 in numerical order in the list of section numbers.

4. A new § 50.63 is added to read as follows:

#### § 50.63 Loss of all alternating current power.

(a) *Requirements.* (1) Each light-water-cooled nuclear power plant licensed to operate must be able to withstand for a specified duration and

recover from a station blackout as defined in § 50.2. The specified station blackout duration shall be based on the following factors:

(i) The redundancy of the onsite emergency ac power sources;

(ii) The reliability of the onsite emergency ac power sources;

(iii) The expected frequency of loss of offsite power; and

(iv) The probable time needed to restore offsite power.

(2) The reactor core and associated coolant, control, and protection systems, including station batteries and any other necessary support systems, must provide sufficient capacity and capability to ensure that the core is cooled and appropriate containment integrity is maintained in the event of a station blackout for the specified duration. The capability for coping with a station blackout of specified duration shall be determined by an appropriate coping analysis. Utilities are expected to have the baseline assumptions, analyses, and related information used in their coping evaluations available for NRC review.

(b) *Limitation of scope.* Paragraph (c) of this section does not apply to those plants licensed to operate prior to July 21, 1988, if the capability to withstand station blackout was specifically addressed in the operating license proceeding and was explicitly approved by the NRC.

(c) *Implementation.*—(1) *Information Submittal.* For each light-water-cooled nuclear power plant licensed to operate on or before July 21, 1988, the licensee shall submit the information defined below to the Director of the Office of Nuclear Reactor Regulation by April 17, 1989. For each light-water-cooled nuclear power plant licensed to operate after the effective date of this amendment, the licensee shall submit the information defined below to the Director by 270 days after the date of license issuance.

(i) A proposed station blackout duration to be used in determining compliance with paragraph (a) of this section, including a justification for the selection based on the four factors identified in paragraph (a) of this section;

(ii) A description of the procedures that will be implemented for station blackout events for the duration determined in paragraph (c)(1)(i) of this section and for recovery therefrom; and

(iii) A list of modifications to equipment and associated procedures, if any, necessary to meet the requirements of paragraph (a) of this section, for the specified station blackout duration determined in paragraph (c)(1)(i) of this

section, and a proposed schedule for implementing the stated modifications.

(2) *Alternate ac source.* The alternate ac power source(s), as defined in § 50.2, will constitute acceptable capability to withstand station blackout provided an analysis is performed which demonstrates that the plant has this capability from onset of the station blackout until the alternate ac source(s) and required shutdown equipment are started and lined up to operate. The time required for startup and alignment of the alternate ac power source(s) and this equipment shall be demonstrated by test. Alternate ac source(s) serving a multiple unit site where onsite emergency ac sources are not shared between units must have, as a minimum, the capacity and capability for coping with a station blackout in any of the units. At sites where onsite emergency ac sources are shared between units, the alternate ac source(s) must have the capacity and capability as required to ensure that all units can be brought to and maintained in safe shutdown (non-DBA) as defined in § 50.2. If the alternate ac source(s) meets the above requirements and can be demonstrated by test to be available to power the shutdown buses within 10 minutes of the onset of station blackout, then no coping analysis is required.

(3) *Regulatory Assessment.* After consideration of the information submitted in accordance with paragraph (c)(1) of this section, the Director, Office of Nuclear Reactor Regulation, will notify the licensee of the Director's conclusions regarding the adequacy of the proposed specified station blackout duration, the proposed equipment modifications and procedures, and the proposed schedule for implementing the procedures and modifications for compliance with paragraph (a) this section.

(4) *Implementation Schedule.* For each light-water-cooled nuclear power plant licensed to operate on or before June 21, 1988, the licensee shall, within 30 days of the notification provided in accordance with paragraph (c)(3) of this section, submit to the Director of the Office of Nuclear Reactor Regulation a schedule commitment for implementing any equipment and associated procedure modifications necessary to meet the requirements of paragraph (a) of this section. This submittal must include an explanation of the schedule and a justification if the schedule does not provide for completion of the modifications within two years of the notification provided in accordance with paragraph (c)(3) of this section. A final schedule for implementing modifications

necessary to comply with the requirements of paragraph (a) of this section will be established by the NRC staff in consultation and coordination with the affected licensee.

Dated at Rockville, Maryland, this 13th day of June 1988.

For the Nuclear Regulatory Commission,  
Samuel J. Chilk,  
Secretary of the Commission.

### Backfit Analysis

#### *Analysis and Determination That the Rulemaking To Amend 10 CFR Part 50 Concerning Station Blackout Complies With the Backfit Rule 10 CFR 50.109*

The Commission's existing regulations establish requirements for the design and testing of onsite and offsite electrical power systems (10 CFR Part 50, Appendix A, General Design Criteria 17 and 18). However, as operating experience has accumulated, the concern has arisen regarding the reliability of both the offsite and onsite emergency ac power systems. These systems provide power for various safety systems, including reactor core decay heat removal and containment heat removal, which are essential for preserving the integrity of the reactor core and the containment building, respectively. In numerous instances emergency diesel generators have failed to start and run during tests conducted at operating plants. In addition, a number of operating plants have experienced a total loss of offsite electric power, and more such occurrences are expected. Existing regulations do not require explicitly that nuclear power plants be designed to withstand the loss of all ac power for any specified period.

This issue has been studied by the staff as part of Unresolved Safety Issue (USI) A-44, "Station Blackout." Both deterministic and probabilistic analyses were performed to determine the timing and consequences of various accident sequences and to identify the dominant factors affecting the likelihood of core melt accidents from station blackout. Although operational experience shows that the risk to public health and safety is not undue, these studies, which have evaluated plant design features and site-dependent factors in detail, show that blackout can be a significant contributor to the overall residual risk. Consequently, the Commission is amending its regulations to require that plants be capable of withstanding a total loss of ac power for a specified duration and to maintain reactor core cooling during that period.

An analysis of the benefits and costs of implementing the station blackout

rule is presented in NUREG-1109, "Regulatory/Backfit Analysis for the Resolution of Unresolved Safety Issue A-44, Station Blackout. The estimated benefit from implementing the station blackout rule is a reduction in the frequency of core damage per reactor-year due to station blackout and the associated risk of offsite radioactive releases. The risk reduction for 100 operating reactors is estimated to be 145,000 person-rem and supports the Commission's conclusion that § 50.63 provides a substantial improvement in the level of public health and safety protection.

The cost for licensees to comply with the rule would vary depending on the existing capability of each plant to cope with a station blackout, as well as the specified station blackout duration for that plant. The costs would be primarily for licensees (1) to assess the plant's capability to cope with a station blackout, (2) to develop procedures, (3) to improve diesel generator reliability if the reliability falls below certain levels, and (4) to retrofit plants with additional components or systems, as necessary, to meet the requirements.

The estimated total cost for 100 operating reactors to comply with the resolution of USI A-44 is about \$60 million. The average cost per reactor would be around \$600,000, ranging from \$350,000, if only a station blackout assessment and procedures and training are necessary, to a maximum of about \$4 million if substantial modifications are needed, including requalification of a diesel generator.

The overall value-impact ratio, not including accident avoidance costs, is about 2,400 person-rem averted per million dollars. If the net cost, which includes the cost savings from accident avoidance (i.e., cleanup and repair of onsite damages and replacement power following an accident), were used, the overall value-impact ratio would improve significantly to about 6,100 person-rem averted per million dollars. These values, which exceed the \$1,000/person-rem interim guidance provided by the Commission, support proceeding with the implementation of § 50.63.

The preceding quantitative value-impact analysis was one of the factors considered in evaluating the rule, but other factors also played a part in the decision-making process. Probabilistic risk assessment (PRA) studies performed for this USI, as well as some plant-specific PRAs, have shown that station blackout can be a significant contributor to core melt frequency, and, with consideration of containment failure, station blackout events can represent an important contributor to

reactor risk. In general, active systems required for containment heat removal are unavailable during station blackout. Therefore, the offsite risk is higher from a core melt resulting from a station blackout than it is from many other accident scenarios.

Although there are licensing requirements and guidance directed at providing reliable offsite and onsite ac power, experience has shown that there are practical limitations in ensuring the reliability of offsite and onsite emergency ac power systems. Potential vulnerabilities to common cause failures associated with design, operational, and environmental factors can affect ac power system reliability. For example, if potential common cause failures of emergency diesel generators exist (e.g., in service-water or dc power support systems), then the estimated core damage frequency from station blackout events can increase significantly. Also, even though recent data indicate that the average emergency diesel generator reliability has improved slightly since 1976, these data also show that diesel generator failure rates during unplanned demand (e.g., following a loss of offsite power) were higher than that during surveillance tests.

The estimated frequency of core damage from station blackout events is directly proportional to the frequency of the initiating event. Estimates of station blackout frequencies for this USI were based on actual operational experience with credit given for trends showing a reduction in the frequency of losses of offsite power resulting from plant-centered events. This is assumed to be a realistic indicator of future performance. An argument can be made that the future performance will be better than the past. For example, when problems with the offsite power grid arise, they are fixed and, therefore, grid reliability should improve. On the other hand, grid power failures may become more frequent because fewer plants are being built, and more power is being transmitted among regions, thus placing greater stress on transmission lines.

The factors discussed above support the determination that additional defense-in-depth provided by the ability of plant to cope with station blackout for a specific duration would provide a substantial increase in the overall protection of the public health and safety, and the direct and indirect costs of implementation are justified in view of this increased protection. The Commission has considered how this backfit should be prioritized and scheduled in light of other regulatory activities ongoing at operating nuclear

power plants. Station blackout warrants a high priority ranking based on both its status as an "unresolved safety issue" and the results and conclusions reached in resolving this issue. As noted in the implementation section of the rule (§ 50.63(c)(4)), the schedule for equipment modification (if needed to meet the requirements of the rule) shall be established by the NRC staff in consultation and coordination with the licensee. Modifications that cannot be scheduled for completion within two years after NRC accepts the licensee's specified station blackout duration must be justified by the licensee. The NRC retains the authority to determine the schedules for modifications.

In addition, some foreign countries, including France, Britain, Sweden, Germany and Belgium, have taken steps to reduce the risk from station blackout events. These steps include adding design features to enhance the capability of the plant to cope with a station blackout for a substantial period of time and/or adding redundant and diverse emergency ac power sources.

#### Analysis of § 50.109(c) Factors

1. Statement of the specific objectives that the backfit is designed to achieve.

The NRC staff has completed a review and evaluation of information developed since 1980 on Unresolved Safety Issue (USI) A-44, Station Blackout. As a result of these efforts, the NRC is amending 10 CFR Part 50 by adding a new § 50.63, "Station Blackout."

The objective of the station blackout rule is to reduce the risk of severe accidents associated with station blackout. Specifically, the rule requires all light-water-cooled nuclear power plants to be able to cope with a station blackout for a specified duration and to have procedures and training for such an event. A regulatory guide, to be issued along with the rule, provides an acceptable method to determine the station blackout duration for each plant. The duration is to be determined for each plant based on a comparison of the individual plant design with factors that have been identified as the main contributors to risk of core melt resulting from station blackout. These factors are (1) the redundancy of onsite emergency ac power sources, (2) the reliability of onsite emergency ac power sources, (3) the frequency of loss of offsite power, and (4) the probable time needed to restore offsite power.

2. General description of the activity

required by the licensee or applicant in order to complete the backfit.

In order to comply with the resolution of USI A-44, licensees will be required to—

- Maintain the reliability of onsite emergency ac power sources at or above specified acceptable reliability levels.

- Develop procedures and training to restore ac power using nearby power sources if the emergency ac power system and the normal offsite power sources are unavailable.

- Determine the duration that the plant should be able to withstand a station blackout based on the factors specified in § 50.63, "Station Blackout," and Regulatory Guide 1.155, "Station Blackout."

- If available, an alternate ac power source that meets specific criteria for independence and capacity can be used to cope with a station blackout.

- Evaluate the plant's actual capability to withstand and recover from a station blackout. This evaluation includes:

- Verifying the adequacy of station battery power, condensate storage tank capacity, and plant/instrument air for the station blackout duration.
- Verifying the operability of equipment needed to operate during a station blackout and the recovery from the blackout for environmental conditions associated with total loss of ac power (i.e., loss of heating, ventilation, and air conditioning).

- Depending on the plant's existing capability to cope with a station blackout, licensees may or may not need to backfit hardware modifications (e.g., adding battery capacity) to comply with the rule. (See item 8 of this analysis for additional discussion.) Licensees will be required to have procedures and training to cope with and recover from a station blackout.

3. Potential change in the risk to the public from the accidental offsite release of radioactive material.

Implementation of the station blackout rule will result in an estimated total risk reduction to the public ranging from 65,000 to 215,000 person-rem with a best estimate of about 145,000 person-rem.

4. Potential impact on radiological exposure of facility employees.

For 100 operating reactors, the estimated total reduction in occupational exposure resulting from reduced core damage frequencies and associated postaccident cleanup and repair activities is 1,500 person-rem. No

significant increase in occupational exposure is expected from operation and maintenance activities associated with the rule. Equipment additions and modifications contemplated do not require work in and around the reactor coolant system and therefore are not expected to result in significant radiation exposure.

5. Installation and continuing costs associated with the backfit, including the cost of facility downtime or the cost of construction delay.

For 100 operating reactors, the total estimated cost associated with the station blackout rule ranges from \$42 to \$94 million with a best estimate of \$60 million. This estimate breaks down as follows:

Activity	Estimated number of reactors	Estimated total cost (million dollars)		
		Best	High	Low
Assess plant's capability to cope with station blackout .....	100	25	40	20
Develop procedures and training .....	100	10	15	5
Improve diesel generator reliability .....	10	2.5	4	1.5
Requalify diesel generator .....	2	5.5	11	2.5
Install hardware to increase plant capability to cope with station blackout .....	27	17	24	13
Totals .....		60	94	42

6. The potential safety impact of changes in plant or operational complexity, including the relationship to proposed and existing regulatory requirements.

The rule requiring plants to be able to cope with a station blackout should not add to plant or operational complexity. The station blackout rule is closely related to several NRC generic programs and proposed and existing regulatory requirements as the following discussion indicates.

#### Generic Issue B-56, Diesel Generator Reliability

The resolution of USI A-44 includes a regulatory guide on station blackout that specifies the following guidance on diesel generator reliability (Regulatory Guide 1.155, Sections C1.1. and C.1.2):

The minimum emergency diesel generator (EDG) reliability should be targeted at 0.95 per demand for each EDG for plants in emergency ac Groups A, B, and C and at

0.975 per demand for each EDG for plants in emergency ac Group D (see Table 2). These reliability levels will be considered minimum target reliabilities and each plant should have an EDG reliability program containing the principal elements, or their equivalent, outlined in Regulatory Position 1.2. Plants that select a target EDG reliability of 0.975 will use the higher level as the target in their EDG reliability programs.

The reliable operation of onsite emergency ac power sources should be ensured by a reliability program designed to maintain and monitor the reliability level of each power source over time for assurance that the selected reliability levels are being achieved. An EDG reliability program would typically be composed of the following elements or activities (for their equivalent):

1. Individual EDG reliability target levels consistent with the plant category and coping duration selected from Table 2.

2. Surveillance testing and reliability monitoring programs designed to track EDG performance and to support maintenance activities.

3. A maintenance program that ensures that the target EDG reliability is being achieved and that provides a capability for failure analysis and root-cause investigations.

4. An information and data collection system that services the elements of the reliability program and that monitors achieved EDG reliability levels against target values.

5. Identified responsibilities for the major program elements and a management oversight program for reviewing reliability levels being achieved and ensuring that the program is functioning properly.

The resolution of B-56 will provide specific guidance for use by the staff or industry to review the adequacy of diesel generator reliability programs consistent with the resolution of USI A-44.

#### *Generic Issue 23, Reactor Coolant Pump Seal Failures*

Reactor coolant pump (RCP) seal integrity is necessary for maintaining primary system inventory during station blackout conditions. The estimates of core damage frequency for station blackout events for USI A-44 assumed that RCP seals would leak at a rate of 20 gallons per minute. Results of analyses performed for GI 23 will provide the information necessary to estimate RCP seal behavior during a station blackout. The industry coping analysis guidelines (NUMARC-8700) recognize the possibility of leakages exceeding an assumed 25 gpm per pump and incorporate the need to reevaluate the plant-specific coping analysis if the resolution of GI 23 identifies higher levels.

#### *USI A-45, Shutdown Decay Heat Removal Requirements*

The overall objective of USI A-45 is to evaluate the adequacy of current licensing design requirements to ensure that the nuclear power plants do not pose an unacceptable risk as a result of failure to remove shutdown decay heat. The study includes an assessment of alternative means of shutdown decay heat removal and of diverse "dedicated" systems for this purpose. Results will include proposed recommendations regarding the desirability of, and possible design requirements for, improvements in existing systems or an alternative dedicated decay heat removal method.

The USI A-44 concern for maintaining adequate core cooling under station blackout conditions can be considered a subset of the overall A-45 issue.

However, there are significant differences in scope between these two issues. USI A-44 deals with the probability of loss of ac power, the capability to remove decay heat using systems that do not require ac power, and the ability to restore ac power in a timely manner. USI A-45 deals with the overall reliability of the decay heat removal function in terms of response to transients, small-break loss-of-coolant accidents, and special emergencies such as fires, floods, seismic events, and sabotage.

Although the recommendations that might result from the resolution of USI A-45 are not yet final, some could affect the station blackout capability, while others would not. Recommendations that involve a new or improved decay heat removal system that is ac power dependent but that does not include its own dedicated ac power supply would have no effect on USI A-44.

Recommendations that involve an additional ac-independent decay heat removal system would have a very modest effect on USI A-44.

Recommendations that involve an additional decay heat removal system with its own ac power supply would have a significant effect on USI A-44. Such a new additional system would receive the appropriate credit within the USI A-44 resolution by either changing the emergency ac power configuration group or providing the ability to cope with a station blackout for an extended period of time. Well before plant modifications, if any, will be implemented to comply with the station blackout rule, it is anticipated that the proposed technical resolution of USI A-45 will be published for public comment. Those plants needing hardware modifications for station blackout could

be reevaluated before any actual modifications are made so that any contemplated design changes resulting from the resolution of USI A-45 can be considered at the same time.

#### *Generic Issue A-30, Adequacy of Safety-Related DC Power Supply*

The analysis performed for USI A-44 assumed that a high level of dc power system reliability would be maintained so that (1) dc power system failures would not be a significant contributor to losses of all ac power and (2) should a station blackout occur, the probability of immediate dc power system failure would be low. Whereas Generic Issue A-30 focuses on enhancing battery reliability, the resolution of USI A-44 is aimed at ensuring adequate station battery capacity in the event of a station blackout of a specified duration. Therefore, these two issues are consistent and compatible.

#### *Fire Protection Program*

Section 50.48 of 10 CFR Part 50 states that each operating nuclear power plant must have a fire protection plan that satisfies GDC 3. The fire protection features required to satisfy GDC 3 are specified in Appendix R to 10 CFR Part 50. They include certain provisions regarding alternative and dedicated shutdown capability. To meet these provisions, some licensees have added, or plan to add, improved capability to restore power from offsite sources or onsite diesels for the shutdown system. A few plants have installed a safe shutdown facility for fire protection that includes a charging pump powered by its own independent ac power source. In the event of a station blackout, this system can provide makeup capability to the primary coolant system as well as reactor coolant pump seal cooling. This could be a significant benefit in terms of enhancing the ability of a plant to cope with a station blackout. Plants that have added equipment to achieve alternate safe shutdown in order to meet Appendix R requirements could take credit for that equipment, if available, for coping with a station blackout event.

7. The estimated resource burden on the NRC associated with the backfit and the availability of such resources.

The estimated total cost for NRC review of industry submittals required by the station blackout rule is \$1.5 million based on submittals for 100 reactors and an estimated average of 175 person-hours per reactor.

8. The potential impact of differences in facility type, design, or age on the relevancy and practicality of the backfit.

The station blackout rule applies to all pressurized water reactors and boiling water reactors. However, in determining an acceptable station blackout coping capability for each plant, differences in plant characteristics relating to ac power reliability (e.g., number of emergency diesel generators, the reliability of the offsite and onsite emergency ac power systems) could result in different acceptable coping capabilities. For example, plants with an already low risk from station blackout because of multiple, highly reliable ac power sources are required to withstand a station blackout for a relatively short period of time; and few, if any, hardware backfits would be required as a result of the rule. Plants with currently higher risk from station blackout are required to withstand somewhat longer duration blackouts; and, depending on their existing capability, may need some modifications to achieve the longer station blackout capability.

9. Whether the backfit is interim or final and, if interim, the justification for imposing the backfit on an interim basis.

The station blackout rule is the final resolution of USI A-44; it is not an interim measure.

[FR Doc. 88-13651 Filed 6-20-88; 8:45 am]

BILLING CODE 7590-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 80-CE-04-AD; Amdt. 39-5961]

#### Airworthiness Directives; Cessna Models T210M, T210N and P210N Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, rescission.

**SUMMARY:** This amendment rescinds Airworthiness Directive (AD) 80-04-09, Amendment 39-3697, applicable to Cessna Models T210M, T210N and P210N airplanes. Subsequent to the issuance of AD 80-04-09 the FAA completed a detailed review and analysis of the service history of these airplanes and has determined that the actions required by that AD do not provide an increase in protection against fuel vapor problems. This action will delete the necessity of installing an insulated fuel hose on these airplanes,

and eliminate an unnecessary burden on the public.

**EFFECTIVE DATE:** June 30, 1988.

**ADDRESSES:** Information pertaining to this action may be examined at the Rules Docket, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul O. Pendleton, Aerospace Engineer, Wichita Aircraft Certification Office, ACE-140W, FAA, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946-4427.

#### SUPPLEMENTARY INFORMATION:

Airworthiness Directive AD 80-04-09 (Amendment 39-3697) (45 FR 8950; February 11, 1980), effective February 16, 1980, requires installation of an insulated fuel hose in accordance with Cessna Single Engine Customer Care Service Information Letter SE79-60 on certain Cessna Models T210M, T210N and P210N airplanes.

The FAA has now determined that installation of the insulated fuel hose in accordance with AD 80-04-09 does not provide an increase in protection against fuel vapor problems associated with these airplanes. AD 79-15-01, which required a placard dealing with fuel flow fluctuations, has been determined to be most effective in addressing the fuel vapor problem which has not been reported with any regularity over the past several years. Therefore, the FAA is rescinding AD 80-04-09.

This action permits those airplanes previously modified in accordance with AD 80-04-09 to either operate with the insulated fuel hose or return to the original configuration. This action also permits those airplanes affected by AD 80-04-09 but not currently in compliance with this AD to remain in the original configuration.

This rescission will not result in any increase in cost to the private sector and will remove an unnecessary burden on the public. Therefore, it is found that notice and public procedure hereon are impractical and contrary to the public interest, and good cause exists for making this amendment effective in less than 30 days.

The regulations set forth in this amendment are promulgated pursuant to authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt State law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulation does not have federalism implications warranting the

preparation of a Federalism Assessment.

The FAA has determined that this regulation is not major under section 8 of Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to relieve an unnecessary burden on the public. If this action is subsequently determined to involve a significant regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required). A copy of it, when filed, may be obtained by contacting the Rules Docket under the caption "ADDRESSES" at the location identified.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the FAR as follows:

#### PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

2. By rescinding AD 80-04-09; Amendment 39-3697.

This amendment becomes effective on June 30, 1988.

Issued in Kansas City, Missouri, on June 15, 1988.

Paul K. Bohr,

Director, Central Region.

[FR Doc. 88-13969 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 71

[Airspace Docket No. 88-ASO-3]

#### Amendment to Control Zone; Jacksonville, NC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This amendment changes the published hours during which the control zone is effective. This action extends the effective hours to include periods of increased instrument flight activity at the MCAS New River (McCutcheon) Airport.

**EFFECTIVE DATE:** 0901 u.t.c., August 25, 1988.

**FOR FURTHER INFORMATION CONTACT:** James G. Walters, Airspace Section, Airspace and Procedures Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone: (404) 763-7646.

**SUPPLEMENTARY INFORMATION:**

**History**

On March 28, 1988, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to amend the Jacksonville, NC, control zone (53 FR 9948). This action will extend the current effective hours for the control zone to accommodate increased flight activity at the MCAS New River (McCUTCHEON) Airport. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Section 71.171 of Part 71 of the Federal Aviation Regulations was republished in FAA Handbook 7400.6D dated January 4, 1988.

**The Rule**

This amendment to Part 71 of the Federal Aviation Regulations extends the effective hours of the Jacksonville, NC, to include periods of increased flight activity at the MCAS New River (McCUTCHEON) Airport.

The FAA has determined that this 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 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, Control zone.

**Adoption of the Amendment**

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

**PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS**

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

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

**§ 71.171 [Amended]**

2. § 71.171 is amended as follows:

**Jacksonville, NC [Amended]**

By deleting the last sentence which begins with the words, "This control zone is effective from 0700 hours. \* \* \*" and by adding the following sentence to the end of the description: "This control zone is effective from 0700-2300 hours, local time, Monday through Friday; 0900-1500 hours, local time, Saturday; 1500-1900 hours, local time, Sunday, and closed on holidays."

Issued in East Point, Georgia, on June 8, 1988.

**William D. Wood,**

*Acting Manager, Air Traffic Division, Southern Region.*

[FR Doc. 88-13857 Filed 6-20-88; 8:45 am]

**BILLING CODE 4910-13-M**

**14 CFR Part 71**

[Airspace Docket No. 88-ACE-05]

**Alteration of Transition Area; Milford, IA**

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

**ACTION:** Final rule.

**SUMMARY:** The nature of this federal action is to alter the 700-foot transition area at Milford, Iowa, to provide additional controlled airspace for aircraft executing a new approach procedure to the Fuller Municipal Airport utilizing the Spencer VOR/DME as a navigational aid. The intended effect of this action is to ensure segregation of aircraft using the new approach procedure under Instrument Flight Rules (IFR) and other aircraft operating under Visual Flight Rules (VFR).

**EFFECTIVE DATE:** 0901 u.t.c., October 20, 1988.

**FOR FURTHER INFORMATION CONTACT:** Lewis G. Earp, Airspace Specialist, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, FAA, Central Region, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426-3408.

**SUPPLEMENTARY INFORMATION:** To enhance airport usage, an additional instrument approach procedure is being developed for the Fuller Municipal

Airport, Milford, Iowa, utilizing the Spencer VOR/DME as a navigational aid. The establishment of this instrument approach procedure, based on this navigational aid, entails alteration of the transition area at Milford, Iowa, at or above 700 feet above the ground within which aircraft are provided air traffic control service. The intended effect of this action is to ensure segregation of aircraft using the new approach procedure under Instrument Flight Rules (IFR) and other aircraft operating under Visual Rules (VFR).

Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D, dated January 4, 1988.

**Discussion of Comments**

On page 12947 of the Federal Register, dated April 20, 1988 (53 FR 12947), the FAA published a Notice of Proposed Rulemaking which would amend § 71.181 of Part 71 of the Federal Aviation Regulations so as to alter the transition area at Milford, Iowa. Interested persons were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No objections were received as a result of the Notice of Proposed Rulemaking.

The FAA has determined that this 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 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.

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me, Part 71 of the FAR (14 CFR Part 71) is amended as follows:

**PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS**Fuller Municipal Airport, Milford, Iowa  
[Amended]

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

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

**§ 71.181 [Amended]**

2. By amending § 71.181 as follows:

Milford, Iowa [Revised]

That airspace extending upward from 700 ft. above the surface within a five (5) mile radius of the Fuller Municipal Airport (Lat. 43°19'17" W., Long. 95°09'29" W.) and within 1.75 miles each side of the 190° bearing from the Fuller Municipal Airport extending from the five (5) mile radius to 5.5 miles south of the airport.

This amendment becomes effective at 0901 u.t.c., October 20, 1988.

Issued in Kansas City, Missouri, on June 9, 1988.

Clarence E. Newbern,

Manager, Air Traffic Division.

[FR Doc. 88-13862 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

**14 CFR Parts 71 and 73**

Airspace Docket No. 87-ASW-65]

**Establishment of Restricted Area R-5115; Deming, NM**

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This action establishes Restricted Area R-5115 located near Deming, NM. The new restricted area provides airspace for the United States Customs Service to deploy a tethered balloon carrying a radar surveillance system. This action is required to enable surveillance of flight activity near the southern border of the United States. Part 71 is amended to include R-5115 in the continental control area.

**EFFECTIVE DATE:** 0901 u.t.c., August 25, 1988.

**FOR FURTHER INFORMATION CONTACT:** Paul Gallant, Airspace Branch (ATO-440), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9253.

**SUPPLEMENTARY INFORMATION:****History**

On March 8, 1988, the FAA proposed to amend Parts 71 and 73 of the Federal Aviation Regulations (14 CFR Part 71 and 73) to establish Restricted Area R-5115 near Deming, NM, in order to provide airspace to contain an aerostat balloon for the Customs Service (53 FR 7377). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. The Aircraft Owners and Pilots Association (AOPA) responded in support of the proposal, but recommended that the balloon not be raised until R-5115 is depicted on appropriate aeronautical charts and the balloon tether is outfitted with strobe lights. R-5115 will be depicted on the 41st edition of the El Paso Sectional Aeronautical Chart. The area will be shown on the overlapping Albuquerque Sectional Aeronautical Chart starting with the November 17, 1988, edition. During the interim period between August 25 and November 17, 1988, R-5115 will also be advertised through a graphic notice in Section 2 of the Class II Notices to Airmen. Regarding lighting of the balloon tether, operators, under § 101.11 of the Federal Aviation Regulations, are not required to mark or light mooring lines when the balloon is operated within a restricted area. FAA has, however, forwarded AOPA's concerns to the Customs Service for consideration. Except for editorial changes, these amendments are the same as those proposed in the notice. Sections 71-151 and 73.51 of Parts 71 and 73 of the Federal Aviation Regulations were republished in Handbook 7400.6D dated January 4, 1988.

**The Rule**

These amendments to Parts 71 and 73 of the Federal Aviation Regulations establish Restricted Area R-5115, near Deming, NM to contain a U.S. Customs Service operated aerostat balloon system; and amend the Continental Control Area to include R-5115.

The FAA has determined that this 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 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 Parts 71 and 73**

Aviation safety, Restricted areas, Continental control area.

**Adoption of the Amendments**

Accordingly, pursuant to the authority delegated to me, Parts 71 and 73 of the Federal Aviation Regulations (14 CFR Parts 71 and 73) are amended, as follows:

**PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS**

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

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

**§ 71.151 [Amended]**

2. § 71.151 is amended as follows:

R-5115, Deming, NM [New]

**PART 73—SPECIAL USE AIRSPACE**

3. The authority citation for Part 73 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510, 1522; E.O. 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

**§ 73.51 [Amended]**

4. § 73.51 is amended as follows:

R-5115, Deming, NM [New]

*Boundaries.* A 2-mile radius centered at lat. 32°01'07"N., long. 107°51'52"W.

*Designated altitudes.* Surface to 15,000 feet MSL.

*Time of designation.* Continuous.

*Controlling agency.* FAA, Albuquerque ARTCC.

*Using agency.* United States Customs Service.

Issued in Washington, DC, on June 13, 1988.

Temple H. Johnson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 88-13859 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

**14 CFR Part 73**

[Airspace Docket No. 87-ANM-18]

**Change Time of Designation for Restricted Areas R-5701 and R-5706; Boardman, OR****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final rule.

**SUMMARY:** This action reduces the time of designation for Restricted Areas R-5701 and R-5706, Boardman, OR, from "continuous" to more specific times. A review of annual utilization reports for these areas indicated that a continuous designation was no longer warranted.

**EFFECTIVE DATE:** 0901 u.t.c., August 25, 1988.

**FOR FURTHER INFORMATION CONTACT:** Paul Gallant, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-9253.

**The Rule**

This amendment to Part 73 of the Federal Aviation Regulations reduces the time of designation for Restricted Areas R-5701 and R-5706, Boardman, OR, to specific hours which more accurately represent actual area usage. A review of the use of these areas determined that the continuous use designation was not warranted based on current and near-term projected utilization. Although retention of the continuous use designation is not justified at the present time, the U.S. Navy indicated that future increased requirements for R-5701 and R-5706 are certain and that a return to continuous use will eventually be necessary to support emerging requirements. When user needs again warrant continuous use, such action will be requested through the regulatory process. I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary because this action is a minor technical amendment in which the public would not be particularly interested. Section 73.57 of Part 73 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

The FAA has determined that this 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 73**

Aviation safety, Restricted areas.

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me, Part 73 of the Federal Aviation Regulations (14 CFR Part 73) is amended, as follows:

**PART 73—SPECIAL USE AIRSPACE**

1. The authority citation for Part 73 continues to read as follows:

**Authority:** 49 U.S.C. 1348(a), 1354(a), 1510, 1522; E.O. 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

**§ 73.57 [Amended]**

2. Section 73.57 is amended as follows:

**R-5701, Boardman, OR [Amended]**

By removing the current time of designation and substituting the following:

*Time of designation.* 0700-0200 Monday-Friday; 0800-1800 Saturday and Sunday; other times by NOTAM 6 hours in advance.

**R-5706, Boardman, OR [Amended]**

By removing the current time of designation and substituting the following:

*Time of designation.* 0700-0200 Monday-Friday; 0800-1800 Saturday and Sunday; other times by NOTAM 6 hours in advance.

Issued in Washington, DC, on June 13, 1988.

**Temple H. Johnson,**

*Manager, Airspace-Rules and Aeronautical Information Division.*

[FR Doc. 88-13860 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

**14 CFR Part 95**

[Docket No. 25633; Amdt. No. 344]

**IFR Altitudes; Miscellaneous Amendments****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final rule.

**SUMMARY:** This amendment adopts miscellaneous amendments to the revised IFR (instrument flight rule)

altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. These regulatory actions are needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

**EFFECTIVE DATE:** June 30, 1988.

**FOR FURTHER INFORMATION CONTACT:** Donald K. Funai, Flight Procedures Standards Branch (AFS-230), Air Transportation Division, Office of Flight Standards, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-8277.

**SUPPLEMENTARY INFORMATION:** This amendment to Part 95 of the Federal Aviation Regulations (14 CFR Part 95) prescribes new, amended, suspended, or revoked IFR altitudes governing the operation of all aircraft in IFR flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in Part 95. The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference.

The reasons and circumstances which create the need for this amendment involve matters of flight safety, operational efficiency in the National Airspace System, and are related to published aeronautical charts that are essential to the user and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment is unnecessary, impracticable, and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

The FAA has determined that this 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. For the same reason, the FAA certifies that this amendment 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 95

Aircraft, Airspace.

Issued in Washington, DC, on June 10, 1988.

Robert L. Goodrich,

Director of Flight Standards.

#### Adoption of the Amendment

Accordingly and pursuant to the authority delegated to me by the Administrator, Part 95 of the Federal Aviation Regulations (14 CFR Part 95) is

amended as follows effective at 0901 g.m.t.:

#### PART 95—[AMENDED]

1. The authority citation for Part 95 continues to read as follows:

Authority: 49 U.S.C. 1348, 1354 and 1510; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.49(b)(2).

2. Part 95 is amended to read as follows:

BILLING CODE 4910-13-M

## REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES &amp; CHANGEOVER POINTS

## AMENDMENT 344 EFFECTIVE DATE, JUNE 30, 1988

FROM	TO	MEA	FROM	TO	MEA
<b>§95.1001 DIRECT ROUTES-U.S.</b> IS ADDED TO READ			<b>§95.6014 VOR FEDERAL AIRWAY 14—Continued</b>		
BUFFALO, NY VORTAC *1800 - MOCA	U.S. CANADIAN BORDER	*2600	FORISTELL, MO VORTAC *2100 - MOCA	ST LOUIS, MO VORTAC	*2600
			ST LOUIS, MO VORTAC *2000 - MOCA	VANDALIA, IL VORTAC	*2500
<b>§95.1001 DIRECT ROUTES-U.S.</b>			<b>§95.6015 VOR FEDERAL AIRWAY 15</b> IS AMENDED TO READ IN PART		
<b>BAHAMA ROUTES</b>			WACO, TX VORTAC *2000 - MOCA	SCURRY, TX VORTAC	*2500
20 LIMA			<b>§95.6016 VOR FEDERAL AIRWAY 16</b> IS AMENDED TO READ IN PART		
SATELLITE, FL NDB *1500 - MOCA	AXXEL, BF FIX	*2000	SCURRY, TX VORTAC *2000 - MOCA	QUITMAN, TX VORTAC	*2600
AXXEL, BF FIX *1500 - MOCA	WEST END, BF NDB	*2000	<b>§95.6020 VOR FEDERAL AIRWAY 20</b> IS AMENDED TO READ IN PART		
WEST END, BF NDB *1500 - MOCA	FREPORT, BF NDB	*2000	MELIA, VA FIX	RICHMOND, VA VORTAC	2000
IS AMENDED TO DELETE			<b>§95.6033 VOR FEDERAL AIRWAY 33</b> IS AMENDED TO READ IN PART		
FREPORT, BF NDB *1500 - MOCA	SATELLITE, FL NDB	*2000	HARCUM, VA VORTAC FAGED, VA FIX	FAGED, VA FIX COLIN, VA FIX	4000 7000
57V	IS AMENDED TO READ IN PART		<b>§95.6038 VOR FEDERAL AIRWAY 38</b> IS AMENDED TO READ IN PART		
FORT LAUDERDALE, FL VOR/DME *1400 - MOCA	DEKAL, FL FIX	*2000	RICHMOND, VA VORTAC	HARCUM, VA VORTAC	2000
DEKAL, FL FIX	BIMINI, BF VORTAC	2000	<b>§95.6054 VOR FEDERAL AIRWAY 54</b> IS AMENDED TO READ IN PART		
<b>§95.6010 VOR FEDERAL AIRWAY 10</b> IS AMENDED TO READ IN PART			WACO, TX VORTAC *2000 - MOCA	SCURRY, TX VORTAC	*2500
STAFF, KS FIX	HUTCHINSON, KS VORTAC	3100	SCURRY, TX VORTAC *2000 - MOCA	QUITMAN, TX VORTAC	*2600
FLOSS, KS FIX	EMPORIA, KS VORTAC	3300	TEXARKANA, AR VORTAC *4000 - MRA **1700 - MOCA	*WASHO, AR FIX	**2500
<b>§95.6011 VOR FEDERAL AIRWAY 11</b> IS AMENDED TO READ IN PART			<b>§95.6066 VOR FEDERAL AIRWAY 66</b> IS AMENDED TO READ IN PART		
RAKIN, MS FIX	JACKSON, MS VORTAC	2400	MIDLAND, TX VORTAC *4400 - MOCA	BYPAS, TX FIX	*5000
<b>§95.6014 VOR FEDERAL AIRWAY 14</b> IS AMENDED TO READ IN PART					
HOBART, OK VORTAC *3500 - MRA **2800 - MOCA	*CARFF, OK FIX	**3500			
WILL ROGERS, OK VORTAC *3000 - MOCA	TOTES, OK FIX	*3700			
TOTES, OK FIX *2500 - MOCA	TULSA, OK VORTAC	*3000			
VICHY, MO VORTAC *2200 - MOCA	FORISTELL, MO VORTAC	*2900			

FROM	TO	MEA	FROM	TO	MEA
<b>§95.6066 VOR FEDERAL AIRWAY 66—Continued</b>			<b>§95.6130 VOR FEDERAL AIRWAY 130</b>		
			IS AMENDED TO READ IN PART		
BYPAS, TX FIX *4300 - MOCA	HYMAN, TX FIX	*6000	BRADLEY, CT VORTAC	NORWICH, CT VORTAC	5000
HYMAN, TX FIX *4300 - MOCA	ABILENE, TX VORTAC	*7000			
<b>§95.6076 VOR FEDERAL AIRWAY 76</b>			<b>§95.6198 VOR FEDERAL AIRWAY 198</b>		
IS AMENDED TO READ IN PART			IS AMENDED TO READ IN PART		
BIG SPRING, TX VORTAC *7000 - MRA	*WATOR, TX FIX	4500	EL PASO, TX VORTAC	HUDSPETH, TX VORTAC	7500
WATOR, TX FIX	SAN ANGELO, TX VORTAC	4500	<b>§95.6219 VOR FEDERAL AIRWAY 219</b>		
<b>§95.6094 VOR FEDERAL AIRWAY 94</b>			IS AMENDED TO READ IN PART		
IS AMENDED TO READ IN PART			SIOUX CITY, IA VORTAC *6800 - MRA **3200 - MOCA	*GRUVE, IA FIX	**4500
SAN SIMON, AZ VORTAC *8100 - MOCA	DEMING, NM VORTAC	*9000	<b>§95.6234 VOR FEDERAL AIRWAY 234</b>		
MIDLAND, TX VORTAC *4400 - MOCA	BYPAS, TX FIX	*5000	IS AMENDED TO READ IN PART		
BYPAS, TX FIX *4300 - MOCA	HYMAN, TX FIX	*6000	FLOSS, KS FIX	EMPORIA, KS VORTAC	3300
HYMAN, TX FIX *4100 - MOCA	TUSCOLA, TX VOR/DME	*6000	<b>§95.6502 VOR FEDERAL AIRWAY 502</b>		
CATOO, TX FIX	GREGG COUNTY, TX VORTAC	2100	IS AMENDED TO READ IN PART		
			FLOSS, KS FIX	EMPORIA, KS VORTAC	3300

FROM	TO	MEA	MAA
<b>§95.7025 JET ROUTE NO. 25</b>			
IS AMENDED BY ADDING			
GOPHER, MN VORTAC	BRAINERD, MN VORTAC	18000	45000
BRAINERD, MN VORTAC	U.S. CANADIAN BORDER	18000	45000
<b>§95.7051 JET ROUTE NO. 51</b>			
IS AMENDED TO READ IN PART			
DUPONT, DE VORTAC	YARDLEY, PA VORTAC	18000	29000
<b>§95.7101 JET ROUTE NO. 101</b>			
IS AMENDED TO READ IN PART			
SHREVEPORT, LA VORTAC	LITTLE ROCK, AR VORTAC	18000	45000
<b>§95.7211 JET ROUTE NO. 211</b>			
IS AMENDED TO READ IN PART			
YOUNGSTOWN, OH VORTAC	JOHNSTOWN, PA VORTAC	18000	45000

## §95.8003 VOR FEDERAL AIRWAYS CHANGEOVER POINTS

AIRWAY SEGMENT		CHANGEOVER POINTS	
FROM	TO	DISTANCE	FROM
<b>V-66</b>			
IS AMENDED BY ADDING			
MIDLAND, TX VORTAC	ABILENE, TX VORTAC	51	MIDLAND
<b>V-68</b>			
IS AMENDED BY ADDING			
INDUSTRY TX VORTAC	HOBBY TX VOR/DME	33	INDUSTRY
<b>V-76</b>			
IS AMENDED BY ADDING			
LUBBOCK, TX VORTAC INDUSTRY TX VORTAC	BIG SPRING, TX VORTAC HOBBY, TX VOR/DME	71 33	LUBBOCK INDUSTRY
<b>V-81</b>			
IS AMENDED BY ADDING			
LUBBOCK, TX VORTAC	MIDLAND, TX VORTAC	71	LUBBOCK
<b>V-94</b>			
IS AMENDED BY ADDING			
MIDLAND, TX VORTAC	TUSCOLA, TX VOR/DME	51	MIDLAND
<b>V-130</b>			
IS AMENDED TO DELETE			
BRADLEY CT VORTAC	NORWICH, CT VORTAC	10	BRADLEY
<b>V-205</b>			
IS AMENDED TO DELETE			
BRADLEY CT VORTAC	PUTNAM, CT VOR/DME	10	BRADLEY
<b>V-405</b>			
IS AMENDED TO DELETE			
BRADLEY CT VORTAC	PROVIDENCE, RI VORTAC	10	BRADLEY

## §95.8005 JET ROUTES CHANGEOVER POINTS

AIRWAY SEGMENT		CHANGEOVER POINTS	
FROM	TO	DISTANCE	FROM
<b>J-82</b>			
IS AMENDED BY ADDING			
JAMESTOWN, NY VOR/DME	ALBANY NY VORTAC	145	JAMESTOWN

[FR Doc. 88-13858 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-C

## 14 CFR Part 97

Docket No. 25635; Amdt. No. 1376]

## Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** *Effective:* An effective date of each SIAP is specified in the amendatory provisions.

*Incorporation by reference:*— Approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

**ADDRESSES:** Availability of matters incorporated by reference in the amendment is as follows:

*For Examination—*

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located; or

3. The Flight Inspection Field Office which originated the SIAP.

*For Purchase—*

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APAC-800), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

*By Subscription—*

Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

**FOR FURTHER INFORMATION CONTACT:** Donald K. Funai, Flight Procedures

Standards Branch (AFS-230), Air Transportation Division, Office of Flight Standards, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8277.

**SUPPLEMENTARY INFORMATION:** This amendment to Part 97 of the Federal Aviation Regulations (14 CFR Part 97) prescribes new, amended, suspended, or revoked Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR Part 51, and § 97.20 of the Federal Aviation Regulations (FARs). The applicable FAA Forms are identified as FAA Forms 8260-3, 8260-4, and 8260-5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the *Federal Register* expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form document is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

This amendment to Part 97 is effective on the date of publication and contains separate SIAPs which have compliance dates stated at effective dates based on related changes in the National Airspace System or the application of new or revised criteria. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach

Procedures (TERPs). In developing these SIAPs, the TERPs criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs is unnecessary, impracticable, and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this 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. For the same reason, the FAA certifies that this amendment 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 97**

Approaches, Standard instrument, Incorporation by reference.

Issued in Washington, DC on June 10, 1988.

Robert L. Goodrich,

Director of Flight Standards.

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me, Part 97 of the Federal Aviation Regulations (14 CFR Part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 G.M.T. on the dates specified, as follows:

**PART 97—[AMENDED]**

1. The authority citation for Part 97 continues to read as follows:

Authority: 49 U.S.C. 1348, 1354(a), 1421, and 1510; 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983; and 14 CFR 11.49(b)(2)).

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33 and 97.35 [Amended]

By amending: Section 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME,

MLS/RNAV; § 97.31 RADAR SIAPs;  
§ 97.33 RNAV SIAPs; and § 97.35  
COPTER SIAPs, identified as follows:

\* \* \* Effective August 25, 1988

Marianna, FL—Marianna Muni. VOR/DME—  
B, Amdt. 2

Marianna, FL—Marianna Muni, NDB—C,  
Amdt. 1

West Union, IA—George L. Scott Muni,  
VOR/DME—A, Amdt. 2

West Union, IA—George L. Scott Muni, NDB  
RWY 35, Amdt. 2

Elko, NV—Elko Muni—J.C. Harris Field,  
LDA/DME RWY 23, Amdt. 3

Graford, TX—Possum Kingdom, NDB—A,  
Orig.

Terrell, TX—Terrell Muni, NDB RWY 17,  
Orig.

Cheyenne, WY—Cheyenne, VOR or TACAN—  
A, Amdt. 8

\* \* \* Effective July 28, 1988

Bay Minette, AL—Bay Minette Muni, VOR  
RWY 8, Amdt. 5

New Haven, CT—Tweed-New Haven, VOR  
RWY 20, Amdt. 4, Cancelled

Brookhaven, MS—Brookhaven-Lincoln  
County, VOR/DME—A, Amdt. 8

Olive Branch, MS—Olive Branch, NDB RWY  
36, Amdt. 3

Smithfield, NC—Johnston County, NDB RWY  
21, Amdt. 5

Wenatchee, WA—Pangborn Field, VOR/  
DME—C, Amdt. 2

\* \* \* Effective June 30, 1988

Minneapolis, MN—Minneapolis-St. Paul Intl/  
Wold-Chamberlain, LOC BC Rwy 11L,  
Amdt. 7, Cancelled

Minneapolis, MN—Minneapolis-St. Paul Intl/  
Wold-Chamberlain, ILS Rwy 11L, Orig.

Minneapolis, MN—Minneapolis-St. Paul Intl/  
Wold-Chamberlain, RADAR-1, Amdt. 30

Aberdeen, SD—Aberdeen Regional, VOR  
Rwy 31, Amdt. 19

Aberdeen, SD—Aberdeen Regional, VOR/  
DME Rwy 13, Amdt. 11

Aberdeen, SD—Aberdeen Regional, LOC/  
DME BC Rwy 13, Amdt. 9

Aberdeen, SD—Aberdeen Regional, NDB  
Rwy 31, Amdt. 9

Aberdeen, SD—Aberdeen Regional, ILS Rwy  
31, Amdt. 12

Milwaukee, WI—Lawrence J. Timmerman,  
VOR Rwy 4L, Amdt. 6

Milwaukee, WI—Lawrence J. Timmerman,  
VOR Rwy 15L, Amdt. 11

Milwaukee, WI—Lawrence J. Timmerman,  
LOC Rwy 15L, Amdt. 2

\* \* \* Effective June 9, 1988

St. Paul, MN—St. Paul Downtown Holman  
Fld, ILS Rwy 32, Amdt. 1

\* \* \* Effective May 26, 1988

Livermore, CA—Livermore Muni, ILS Rwy  
25R, Amdt. 6

[FR Doc. 88-13861 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

## DEPARTMENT OF COMMERCE

### International Trade Administration

#### 15 CFR Parts 370 and 386

[Docket No. 80350-8050]

#### Export of Commodities on Board Country Group Q, W, Y, or Z Vessels and Aircraft

**AGENCY:** Bureau of Export  
Administration, Commerce.

**ACTION:** Proposed rule with request for  
comments.

**SUMMARY:** As authorized by section 15(b) of the Export Administration Act of 1979, as amended, the Bureau of Export Administration proposes to amend the Export Administration Regulations to control the shipment of U.S.-origin commodities and technical data controlled for reasons of national security aboard vessels and aircraft registered in, owned or controlled by, or under charter or lease to a country in Country Group Q, W, Y, or Z, or a national of any such country (Country Groups are listed in Supplement No. 1 to Part 370 of the Regulations). Such shipments are prohibited unless the exporter obtains a validated license or the commodities are authorized for export to Q, W, Y or Z countries under General License G-DEST or the technical data are authorized for export to Q, W, Y or Z countries under General License GTDA or GTDR. This requirement is intended to prevent diversion of commodities and data that are controlled to Country Group Q, W, Y or Z.

In response to this proposed rule, the Bureau of Export Administration specifically requests that commenters address the following questions: What problems are inherent in determining whether an aircraft or vessel is "registered in, owned or controlled by, or under charter or lease to a country in Country Group Q, W, Y or Z, or a national of such country"? What problems could arise by placing such a prohibition on parties outside the United States? Should the prohibition contain a "knowledge or reason to know" standard?

**DATE:** Comments should be received by August 22, 1988.

**ADDRESS:** Written comments (six copies) should be sent to: Joan Maguire, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20044

**FOR FURTHER INFORMATION CONTACT:**  
David Schlechty, Country Policy, Bureau

of Export Administration, Department of  
Commerce, Washington, DC 20230,  
Telephone: (202) 377-4252.

#### SUPPLEMENTARY INFORMATION:

#### Rulemaking Requirements and Invitation to Comment

1. Because this rule concerns a foreign and military affairs function of the United States, it is not a rule or regulation within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the requirements of the Order. Accordingly, no preliminary or final regulatory impact analysis has to be or will be prepared.

2. This rule contains collections of information subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). These collections have been approved by the Office of Management and Budget under control numbers 0625-0001 and 0625-0003.

3. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553), or by any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final regulatory flexibility analysis has to be or will be prepared.

4. Section 13(a) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. app. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. This rule is also exempt from these APA requirements because it involves a foreign and military affairs function of the United States. Because this rule is being issued in proposed form, this rule complies with section 13(b) of the Export Administration Act. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

However, because of the importance of the issues raised by these regulations, this rule is issued in proposed form and comments will be considered in the development of final regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close August 22, 1988. The Department will consider all

comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form. Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 4086, Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Margaret Cornejo, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 377-2593.

5. This proposed rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

#### List of Subjects

##### 15 CFR Part 370

Administrative practice and procedure, Exports.

##### 15 CFR Part 386

Exports, Reporting and recordkeeping requirements.

Accordingly, Parts 370 and 386 of the Export Administration Regulations (15

CFR Parts 368-399) are proposed to be amended as follows:

1. The authority citation for 15 CFR Part 370 continues to read as follows:

Authority: Pub. L. 96-72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97-145 of December 29, 1981 and by Pub. L. 99-64 of July 12, 1985; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985)

2. The authority citation for 15 CFR Part 386 continues to read as follows:

Authority: Pub. L. 96-72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97-145 of December 29, 1981 and by Pub. L. 99-64 of July 12, 1985; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); Pub. L. 95-223 of December 28, 1977 (50 U.S.C. 701 *et seq.*); E.O. 12532 of September 9, 1985 (50 FR 36861, September 10, 1985) as affected by notice of September 4, 1986 (51 FR 31925, September 8, 1986); Pub. L. 99-440 of October 2, 1986 (22 U.S.C. 5001 *et seq.*); and E.O. 12571 of October 27, 1986 (51 FR 39505, October 29, 1986).

#### PART 370—[AMENDED]

3. A new § 370.8 is added, reading as follows:

##### § 370.8 Shipments on Country Group Q, W, Y, or Z vessels or aircraft.

(a) No U.S.-origin commodity or technical data controlled for national security reasons may be placed as cargo on board an aircraft or vessel registered in, owned or controlled by, or under charter or lease to a country in Country Group Q, W, Y or Z, or a national of any such country, whether in the United States or in a foreign port, unless:

(1) The commodity or technical data may be exported under General License G-DEST, GTDA or GTDR to the country where the aircraft or vessel is registered or to the country, or country national, that owns, controls, charters or leases the aircraft or vessel; or

(2) A validated license (Form ITA-622P) or amendment (Form ITA-635P) authorizes export of the commodity or technical data to the QWYZ Country, except that:

(i) Commodities or technical data may be placed on a USSR vessel or aircraft *only if* they are licensed for export to the USSR;

(ii) Commodities or technical data may be placed on a Country Group Z vessel or aircraft *only if* they are licensed for export to a destination in Country Group Z.

(b) An exporter who seeks authorization to export commodities or technical data aboard Country Group Q, W, Y, or Z vessels or aircraft shall insert "Bloc Carrier" in item 4 ("Special Purpose") of Form ITA-622P.

(c) Holders of a Distribution License, Project License, or Service Supply

License must apply for separate validated license authorization to export commodities or technical data aboard Country Group Q, W, Y or Z vessels or aircraft.

#### PART 386—[AMENDED]

4. Section 386.5 is amended by adding paragraph (c) as follows:

##### § 386.5 General destination control requirements.

(c) *Shipment on Certain Carriers.* An exporter must be aware not only of the restrictions on exports to certain destinations, but also of the restrictions on exports of certain commodities and technical data on carriers registered in, owned or controlled by, or under charter or lease to a country in Country Group Q, W, Y or Z, or a national of any such country, as described in § 370.8.

##### § 386.8 [Amended]

5. Section 386.8 is amended by adding a sentence at the end of paragraph (b)(4) reading as follows: "(Section 370.8 contains special provisions regarding shipments on a Country Group Q, W, Y or Z exporting carrier)."

Dated: June 16, 1988.

Vincent F. DeCain,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 88-13946 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-DT-M

#### 15 CFR Part 372

[Docket No. 80344-8044]

#### Temporary Exports Under the Individual Validated License Procedure

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Final rule.

SUMMARY: Section 372.8(c) of the Export Administration Regulations governs temporary exports of commodities that may not be exported under any general license. The Bureau of Export Administration is revising § 372.8(c) to create a limit on the amount of time that temporary exports may remain abroad. Temporary exports that are made pursuant to § 372.8(c) may remain abroad only for the period of time specified in the applicant's certification and authorized by the Office of Export Licensing. Authorization will generally not be granted for a period of time exceeding one year from the date on which the commodities were exported. Exceptions to this time limit will be

considered when the applicant submits a special request and provides specific justification.

**EFFECTIVE DATE:** This rule is effective June 21, 1988.

**FOR FURTHER INFORMATION CONTACT:** Willard Fisher, Regulations Branch, Bureau of Export Administration, Telephone: (202) 377-3856.

**SUPPLEMENTARY INFORMATION:**

**Rulemaking Requirements**

1. Because this rule concerns a foreign and military affairs function of the United States, it is not a rule or regulation within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the requirements of that Order. Accordingly, no preliminary or final Regulatory Impact Analysis has to be or will be prepared.

2. This rule involves a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This collection has been approved by the Office of Management and Budget under control number 0625-0001.

3. Section 13(a) of the Export Administration Act of 1979, as amended (EAA) (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. This rule is also exempt from these APA requirements because it involves a foreign and military affairs function of the United States. Section 13(b) of the EAA does not require that this rule be published in proposed form because this rule does not impose a new control. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

4. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553), or by any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final Regulatory Flexibility Analysis has to be or will be prepared.

5. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Therefore, this regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be

submitted to Willard Fisher, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20044.

**List of Subjects in 15 CFR Part 372**

Exports, Reporting and recordkeeping requirements.

Accordingly, Part 372 of the Export Administration Regulations (15 CFR Parts 368-399) is amended as follows:

**PART 372—[AMENDED]**

1. The authority citation for 15 CFR Part 372 continues to read as follows:

**Authority:** Pub. L. 96-72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97-145 of December 29, 1981 and by Pub. L. 99-64 of July 12, 1985; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); Pub. L. 95-223 of December 28, 1977 (50 U.S.C. 1701 *et seq.*); E.O. 12532 of September 9, 1985 (50 FR 36661, September 10, 1985) as affected by notice of September 4, 1986 (51 FR 31925, September 8, 1986); Pub. L. 99-440 of October 2, 1986 (22 U.S.C. 5001 *et seq.*); and E.O. 12571 of October 27, 1986 (51 FR 39505, October 29, 1986).

2. In § 372.8, the text of paragraph (c)(1), except for the first three sentences, is revised to read as follows:

**§ 372.8 Special types of individual license applications.**

(c) *Temporary Exports—(1) Applications.* \* \* \* Instead, the application shall include the following certification in the space entitled "Additional Information" or on an attachment thereto:

The commodities described on this application are to be temporarily exported for (state purpose of export, e.g., demonstration, testing, exhibition, etc.), used solely for the purpose authorized, and returned to the United States within (specify period of time) of the date of export, unless other disposition has been specifically requested and authorized in writing by the Office of Export Licensing.

The applicant's certification must identify a specific number of days/months during which the commodities will remain abroad. The period of time identified in the certification should be no more than the maximum necessary to accomplish the stated purpose, but may not, in any event, exceed one year. Special requests for exceptions to the one year time limit will be considered if the applicant clearly makes such a request on the application form and provides specific justification for it.

Since the applicant retains title to the commodities, he shall be shown on the application as the ultimate consignee, in

care of the person who will have custody of the commodities abroad.

Dated: June 14, 1988.

Vincent F. DeCain,  
Deputy Assistant Secretary for Export Administration.

[FR Doc. 88-13945 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-DT-M

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Social Security Administration**

**20 CFR Part 416**

[Regulation No. 16]

**Supplemental Security Income for the Aged, Blind, and Disabled; Definition of Resources**

**AGENCY:** Social Security Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** We are amending our regulations to exclude from the definition of resources in the Supplemental Security Income (SSI) Program, for 1 calendar month following their receipt, certain cash payments for medical or social services. Such cash payments intended specifically to enable people to pay for medical or social services are not income for SSI purposes because they are assumed not to be available for support and maintenance. However, if the recipient does not use the cash for payment of medical or social services in the month of receipt, the cash is a countable resource as of the first moment of the month following receipt. This change will make our resources policies more consistent with our income policies.

**EFFECTIVE DATE:** These rules are effective June 21, 1988.

**FOR FURTHER INFORMATION CONTACT:** Henry D. Lerner, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone (301) 594-7463.

**SUPPLEMENTARY INFORMATION:** This regulation was published as a Notice of Proposed Rulemaking in the *Federal Register* on October 8, 1987 (52 FR 37625). Only one comment was received. That comment from a social service department was in support of the regulation.

Certain cash payments intended specifically to enable people to pay for medical or social services (20 CFR 416.1103 (a) and (b)) are not income for

SSI purposes because they are assumed not to be available for support and maintenance. However, the recipient is not always able to use the cash for payment of medical or social services in the month of receipt. Lacking a regulatory resource provision for medical or social services comparable to that for income, the cash is a countable resource as of the first moment of the month following receipt and may cause ineligibility for SSI benefits.

Resources are defined in regulations (20 CFR 416.1201(a)) as including cash or other liquid assets that an individual owns and can use for support and maintenance. Thus, even though intended for the purchase of medical or social services, cash meets the definition of a resource unless its use is legally restricted.

We are amending 20 CFR 416.1201(a) so that, for 1 calendar month following its receipt, cash which is not income under 20 CFR 416.1103 (a) or (b) because it is payment for medical or social services is not a resource. If the cash is still being held at the beginning of the second calendar month following its receipt, it will be a resource. This rule does not extend to cash received as reimbursement for medical or social services bills the individual has already paid. Even though such reimbursement is not income by operation of 20 CFR 416.1103 (a) or (b), it serves only to replace the individual's previously countable resources that have been used to pay for medical or social services prior to receipt of the reimbursement. Since the individual has already paid for the medical or social services, there is no reason for extending to the reimbursement the 1 month disbursement period during which cash received for medical or social services is not a resource. Thus, if retained, the cash is included in countable resources beginning with the first month following receipt.

This final rule recognizes that it is not reasonable to expect an individual to use certain funds for support and maintenance. To use these funds for support and maintenance tends to thwart the purpose of the payor program and could result in individuals having to do without needed services that the payor program intended to provide. The rule allows a reasonable period for individuals to make disbursement, but if they do not do so, the money becomes a resource.

#### Regulatory Procedures

##### Executive Order 12291

The Secretary has determined that this is not a major rule under Executive

Order 12291 since the program and administrative costs of this final regulation will be insignificant and the threshold criteria for a major rule are not otherwise met. Therefore, a regulatory impact analysis is not required.

#### Paperwork Reduction Act

This final regulation imposes no additional reporting and recordkeeping requirement requiring Office of Management and Budget clearance.

#### Regulatory Flexibility Act

We certify that this final regulation will not have a significant economic impact on a substantial number of small entities because this rule affects only individuals and States. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96-354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Program No. 13.807, Supplementary Security Income Program)

#### List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income.

Dated: April 11, 1988.

Dorcas R. Hardy,  
Commissioner of Social Security.

Approved: May 10, 1988.

Otis R. Bowen,  
Secretary of Health and Human Services.

Subpart L of Part 416 of Chapter III of Title 20 of the Code of Federal Regulations is amended as follows:

#### PART 416—[AMENDED]

1. The authority citation for Subpart L of Part 416 continues to read as follows:

Authority: Secs. 1102, 1602, 1611, 1612, 1613, 1614(f), 1621 and 1631 of the Social Security Act; 42 U.S.C. 1302, 1381a, 1382, 1382a, 1382b, 1382c(f), 1382j and 1383; sec. 211 of Pub. L. 93-86, 87 Stat. 154.

2. Section 416.1201 is amended by revising paragraph (a) to read as follows:

#### § 416.1201 Resources; general.

(a) *Resources; defined.* For purposes of this Subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a

property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

(2) Support and maintenance assistance not counted as income under § 416.1157(c) will not be considered a resource.

(3) Except for cash reimbursement of medical or social services expenses already paid for by the individual, cash received for medical or social services that is not income under § 416.1103 (a) or (b) is not a resource for the calendar month following the month of its receipt. However, cash retained until the first moment of the second calendar month following its receipt is a resource at that time.

\* \* \* \* \*

[FR Doc. 13806 Filed 6-20-88; 8:45 am]

BILLING CODE 4190-11-M

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[T.D. 8208]

#### Income Taxes; Definition of Functional Currency

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Corrections to temporary regulations.

**SUMMARY:** This document contains corrections to temporary regulations that were published in the *Federal Register* for Friday, June 3, 1988 (53 FR 20308) as Treasury Decision 8208. The rules relate to the definition of a taxpayer's functional currency.

**FOR FURTHER INFORMATION CONTACT:** David Rosenberg of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, 202-634-5406 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

The temporary regulations that are the subject of these corrections relate to income tax regulations under section 985 of the Internal Revenue Code of 1986. Section 985 introduces a new statutory concept that requires all Federal income tax determinations to be made in a taxpayer's functional currency.

##### Need for Corrections

As published, Treasury Decision 8208 contains several errors that might cause confusion to taxpayers and practitioners.

## Corrections of Publication

## PART 1—[CORRECTED]

Accordingly, the publication of Treasury Decision 8208, which was the subject of FR Doc. 88-12562, is corrected as follows:

## § 1.985-1T [Corrected]

Paragraph 1. On page 20312, second column, in § 1.985-1T(c)(6), in line 7 from the top of the column, the language

"under this section (c) unless the" is removed and the language "under this paragraph (c) unless the" is added in its place.

Par. 2. On page 20313, third column, in § 1.985-1T(f), Example (11), in line 29 from the bottom of the column, the language "services income, and 5 percent, or 5 LCs, is" is removed and the language "services income, and 10 percent, or 5 LCs, is" is added in its place.

## § 1.985-3T [Corrected]

Par. 3. On page 20316, third column, in § 1.985-3T(c)(8), Example (1), in line 14 of the example, the language "the account receivable would be a third" is removed and the language "the account receivable would be a third country" is added in its place.

Par. 4. On page 20317, the tables as shown are incorrectly assembled and should be as follows:

Sales	Hyperinflationary currency	Exchange rate	United States dollars
(Jan-Feb).....	10,000,000h	<sup>1</sup> 20:1	500,000
(Mar-Apr).....	20,000,000	<sup>1</sup> 21:1	952,381
(May-Jun).....	50,000,000	<sup>1</sup> 22:1	2,272,727
(July).....	50,000,000	23:1	2,173,913
(August).....	20,000,000	26:1	769,231
(Sept.).....	20,000,000	28:1	714,286
(Oct.).....	20,000,000	29:1	689,655
(Nov.).....	20,000,000	30:1	666,667
(Dec.).....	30,000,000	31:1	967,742
Total.....	240,000,000h		9,706,602
Cost of Goods Sold:			
Opening Inventory.....	0		0
Purchases:			
(Jan-Feb).....	15,000,000h	<sup>1</sup> 20:1	750,000
(Mar-Apr).....	10,000,000	<sup>1</sup> 21:1	476,190
(May-Jun).....	30,000,000	<sup>1</sup> 22:1	1,363,636
(July).....	20,000,000	23:1	869,565
(August).....	10,000,000	26:1	384,615
(Sept.).....	5,000,000	28:1	178,571
(Oct.).....	5,000,000	29:1	172,414
(Nov.).....	2,500,000	30:1	83,333
(Dec.).....	2,500,000	31:1	80,645
Less Closing Inventory.....	(23,000,000)	(*)	(822,655)
Non-Capitalized Exp.			
(Jan-Feb).....	4,000,000h	<sup>1</sup> 20:1	200,000
(Mar-Apr).....	2,500,000	<sup>1</sup> 21:1	119,048
(May-Jun).....	2,500,000	<sup>1</sup> 22:1	113,636
(July).....	2,000,000	23:1	86,957
(August).....	3,000,000	26:1	115,385
(Sept.).....	3,000,000	28:1	107,143
(Oct.).....	2,000,000	29:1	68,966
(Nov.).....	3,000,000	30:1	100,000
(Dec.).....	4,000,000	31:1	129,032
Total.....	26,000,000h		1,040,167
Deprec.			
Total Cost & Exp.....	4,000,000h	20:1	200,000
Operating Profit.....	107,000,000h		4,776,481
	133,000,000h		4,930,121

<sup>1</sup> The average exchange rate for each month is the same.

<sup>2</sup> Since S uses the first-in, first-out inventory method, the closing inventory is assumed in normal circumstances to consist of purchases made during the most recent translation period as follows:

Sales	Hyperinflationary currency	Exchange rate	United States dollars
December.....	2,500,000h	31:1	80,645
November.....	2,500,000	30:1	83,333
October.....	5,000,000	29:1	172,414
September.....	5,000,000	28:1	178,571
August.....	8,000,000	26:1	307,692
Total.....	23,000,000h		822,655

Par. 5. On page 20317, column 2, in § 1.985-3T(d)(2), in line 4 from the bottom of the column, the language

"attributable to a third currency" is removed and the language "attributable

to a third country currency" is added in its place.

Par. 6. On page 20318, column 3, in § 1.985-3T(d)(6), in the first line of the heading, the language "(6) Dollar and third currency" is removed and the language "(6) Dollar and third country currency" is added in its place.

Dale D. Goode,

Chief, Technical Section, Legislation and Regulations Division.

[FR Doc. 88-13932 Filed 6-20-88; 8:45 am]

BILLING CODE 4830-01-M

## DEPARTMENT OF LABOR

### Office of Labor-Management Standards

#### 29 CFR Part 452

#### Candidacy Age Requirements in Union Officer Elections; Correction

**AGENCY:** Office of Labor-Management Standards, Labor.

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects a final regulation concerning restrictions on candidacy for union office which was published in the *Federal Register* on March 17, 1988 (53 FR 8750; FR Doc. 88-5901).

**FOR FURTHER INFORMATION CONTACT:**

Kay Oshel, Chief, Division of Interpretations and Standards, Office of Labor-Management Standards, Department of Labor, Washington, DC 20210; telephone (202) 523-7373 (this is not a toll free number).

**SUPPLEMENTARY INFORMATION:** The following corrections are made to the final regulation published in the *Federal Register* on March 17, 1988, in order to reinsert a footnote in the text of 29 CFR 452.46. The footnote had been included in the pre-amended § 452.46 and was inadvertently omitted in publishing the amendment on March 17, 1988.

**§ 452.46 [Corrected]**

1. The fourth sentence of the amended 29 CFR 452.46 should read, "Thus, it ordinarily may not limit eligibility for office to persons of a particular race, color, religion, sex, or national origin since this would be inconsistent with the Civil Rights Act of 1964."<sup>28</sup>

2. The text of footnote 28 should read as follows: "<sup>28</sup> *Shultz v. Local 1291, International Longshoremen's Association*, 338 F. Supp. 1204 (E.D. Pa.), *aff'd*, 461 F.2d 1262 (C.A. 3 1972)."

Signed at Washington, DC, this 14th day of June, 1988.

Salvatore R. Martoche,

Assistant Secretary for Labor-Management Standards.

[FR Doc. 88-13873 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-86-M

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Part 100

[CGD11 88-02]

#### Regatta; Sacramento Water Festival

**AGENCY:** Coast Guard, DOT.

**ACTION:** Final rule.

**SUMMARY:** The regulation will amend § 100.1202 of Title 33, Code of Federal Regulations. The purpose is to extend the period of time the Sacramento River is closed during the Sacramento Water Festival.

**EFFECTIVE DATE:** June 2, 1988.

Consequently, for 1988, these regulations are effective from 0900 to 1800 on July 2, July 3, and July 4.

**FOR FURTHER INFORMATION CONTACT:**

Lt. K. S. Gregory, Eleventh Coast Guard District Boating Affairs Office, 400 Ocean Gate Boulevard, Long Beach, California 90822-5399, Tel: (213) 499-5318.

**SUPPLEMENTARY INFORMATION:** On 14 April, 1988, the Coast Guard published a notice of proposed rulemaking in the *Federal Register* for these regulations (53 FR 12434). Interested persons were requested to submit comments and one comment was received.

#### Drafting Information

The drafters of these regulations are Lt. K. S. Gregory, project officer, Eleventh Coast Guard Boating Affairs Office, and Lt. G. R. Wheatley, project attorney, Eleventh Coast Guard District Legal Office.

#### Discussion of Comments

The one commentor mentioned the impact of diminished public access through the Water Festival area. The Sacramento Water Festival draws a number of visitors to the local area and boosts the local economy. Due to the type of events scheduled, closure of the Water Festival area is necessary to insure the safety of participants as well as spectators. Closure of the Water Festival area is in the best interest of the community. Passage through the Water Festival area will be restricted during

the following periods: Saturday, July 2, 1988—0900 to 1145, 1215 to 1515, and 1545 to 1800; Sunday, July 3, 1988—0900 to 1145, 1215 to 1515, and 1545 to 1730; Monday, July 4, 1988—1000 to 1145, 1215 to 1515, and 1545 to 1700.

#### Economic Assessment and Certification

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is deemed unnecessary. It involves negligible cost and will not have a significant effect on recreational vessels, commercial vessels or other marine interests.

Since the impact of this proposal is expected to be minimal, the Coast Guard certifies that they will not have significant economic impact on a substantial number of small entities.

#### List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

#### Final Regulations

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations, is amended as follows:

#### PART 100--[AMENDED]

1. The authority citation for Part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35.

2. Section 100.1202(a) is revised to read as follows:

#### § 100.1202 Sacramento Water Festival.

(a) *Effective Dates.* This section is effective from 0900 to 1800 PDT the first Friday, Saturday, and Sunday in July, except for those years when July 4th falls on Monday. In those years, the effective date of these regulations will be the first Saturday, Sunday and Monday in July, as published in the LOCAL NOTICE TO MARINERS.

Dated: June 13, 1988.

J.W. Kime,

Rear Admiral, U.S. Coast Guard, Commander, Eleventh Coast Guard District.

[FR Doc. 88-13856 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-14-M

## VETERANS ADMINISTRATION

## 38 CFR Part 3

## Improvements in Veterans' Benefits

AGENCY: Veterans Administration.

ACTION: Final regulations.

**SUMMARY:** The Veterans Administration (VA) has amended its adjudication regulations to improve and extend eligibility for certain veterans' benefits. The amendments are necessary because recent legislation has changed the eligibility and entitlement criteria for those benefits. The effect of these amendments will be the addition of new presumptively service-connected disabilities for former prisoners of war, improvement in compensation payable for certain multiple disabilities, exclusion of certain income in computing pension entitlement, extension of eligibility for special home adaptation grants and a change in the effective date of reduction for certain hospitalized incompetent veterans. Additional amendments also implement opinions of the VA General Counsel and a settlement agreement.

**EFFECTIVE DATES:** These amendments are effective October 28, 1986, with the exception of the amendments to 38 CFR 3.309(c) which are effective October 1, 1986, as provided by law, and the amendments to 38 CFR 3.22, 3.23, 3.271, 3.272(h) and (m), and 3.557(c) and 3.800 which are effective July 21, 1988.

**FOR FURTHER INFORMATION CONTACT:** Robert M. White, Chief, Regulations Staff, Compensation and Pension Service, Department of Veterans Benefits, Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233-3005.

**SUPPLEMENTARY INFORMATION:** On pages 37170-75 of the Federal Register of October 5, 1987, the VA published proposed rules for improvements in veterans' benefits. Interested persons were invited to submit comments, suggestions or objections to these proposals by November 4, 1987. Five comments were received.

One commenter was totally supportive of the proposed changes while another suggested an additional income exclusion for pension purposes which was not a subject on which comments were sought. As will be noted later, exclusions from income under the improved pension program are set forth in Title 38 United States Code.

The other three commenters all focused on the proposed definition of hardship for purposes of excluding a child's income when computing pension entitlement and on the method of

computing the amount of that exclusion. One commenter suggested that the proposed definition and computation method would be a burden on regional office personnel and offered an alternative definition. The commenter suggested that hardship should be held to exist whenever a child's income exceeds the additional amount added to a veteran's or surviving spouse's maximum annual pension rate by virtue of including that child as a member of the family unit. The amount of the exclusion would be the amount of the excess.

This suggestion cannot be accepted for a number of reasons. First, it defines hardship differently for different children. Under this suggestion when a single veteran adds one dependent child to his or her award, hardship would exist when the child's income exceeded \$1926. Similarly, when the first child is added to a surviving spouse's award, hardship would exist when the child's income exceeded \$1291. When other children are subsequently added to a veteran's or surviving spouse's award, hardship for them would exist when their income exceeded \$1055. Such unequal treatment is not appropriate.

Secondly, pension is a need-based program with those in greater financial need receiving more benefits. In determining need the income of all family members is considered. Under the suggested definition and exclusion methodology a child with income under \$1000 could not claim a hardship exclusion but a child with income of \$10,000 could. This is contrary to the basic purpose of the pension program.

In addition, hardship cannot be defined in terms of a particular dollar amount. The level of income that may create a hardship in New York City may not create a hardship in a more rural community. We believe that the hardship definition and methodology proposed will result in more equitable treatment of claimants on a case-by-case basis and is consistent with the basic purpose of the pension program.

The remaining two commenters who addressed the definition of hardship recommended that the definition of low income used by the Department of Housing and Urban Development (HUD) be considered as the income level below which hardship would be presumed and a child's income would be excluded. That definition was said to be 80 percent of the median income for the region. After review of HUD's October 1, 1986, median family income figures we determined that the suggested definition of hardship could not be used. In most cases the median family income figures were so high that people with incomes

near 80 percent of those figures would exceed the maximum annual pension rate and would not be entitled to pension. The effect of the suggestion, in other words, would be, if an individual's income were low enough to permit pension entitlement, the VA would be precluded from considering the income of any child in the family unit. This would constitute a blanket exclusion of children's income which Title 38 United States Code would not permit.

It was also suggested that a baseline for earned income of children be established. We believe this would be inappropriate for the same reason as establishing a set monetary amount as constituting hardship.

These commenters also suggested that the proposed determinations would be burdensome on the VA and would tend to favor those who kept accurate records and could best articulate their expenditures for reasonable family maintenance. We do not believe this proposed adjudicative determination would be a burden on VA employees as they already make similar determinations when deciding whether a veteran's parents qualify as dependents. We also do not believe that these proposed rules will favor some beneficiaries over others. In any event, there are numerous veterans' service organizations and the VA's own benefit counselors who are ready to assist any claimant who has difficulty.

Finally these two commenters suggest that the VA cannot consider a child's social security benefits in determining the pension entitlement of a veteran or surviving spouse. Court decisions and the laws and regulations governing social security benefits are cited in support of this position. We cannot agree. The statutory authority for including a child's social security benefits when computing a veteran's or surviving spouse's pension entitlement is contained in 38 U.S.C. 503, 521 and 541. Until such authority is repealed, the VA must continue to implement both the letter and the spirit of those statutes.

These amendments are adopted as proposed. We appreciate the interest expressed by each commenter.

In accordance with Executive Order 12291, Federal Regulation, we have determined that these final regulations are nonmajor for the following reasons:

- (1) They will not have an annual effect on the economy of \$100 million or more.
- (2) They will not cause a major increase in costs or prices.
- (3) They will not have 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.

The Administrator hereby certifies that these final regulations will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. The reason for this certification is that these regulations would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these regulations are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance program numbers are 64.100 through 64.110.

#### List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved: June 1, 1988.

Thomas K. Turnage,  
Administrator.

38 CFR Part 3, Adjudication, is amended as follows:

#### PART 3—[AMENDED]

1. In § 3.22 paragraph (b) is amended by adding a sentence and an authority citation at the end to read as follows:

§ 3.22 Benefits at DIC rates in certain cases when death is not service-connected.

(b) \* \* \* The provisions of this paragraph do not apply, however, to any portion of such benefits payable for any period preceding the end of the month in which such money or property of value is received.

Authority: 38 U.S.C. 210(c)

2. In § 3.23, new paragraph (d)(6) is added to read as follows:

§ 3.23 Improved pension rates-veterans and surviving spouses.

(d) \* \* \*  
(6) Reasonable availability and hardship. For the purposes of paragraphs (d)(4) and (d)(5) of this section, a child's income shall be considered "reasonably available" when it can be readily applied to meet the veteran's or surviving spouse's expenses necessary for reasonable family maintenance, and "hardship" shall be held to exist when annual expenses necessary for reasonable family maintenance exceed the sum of

countable annual income plus VA pension entitlement. "Expenses necessary for reasonable family maintenance" include expenses for basic necessities (such as food, clothing, shelter, etc.) and other expenses, determined on a case-by-case basis, which are necessary to support a reasonable quality of life.

(Authority: 38 U.S.C. 210(c))

3. In § 3.271, paragraphs (a), (e) and (f) are revised to read as follows:

#### § 3.271 Computation of income.

(a) *General.* Payments of any kind from any source shall be counted as income during the 12-month annualization period in which received unless specifically excluded under § 3.272.

(Authority: 38 U.S.C. 210(c))

(e) *Installments.*—Income shall be determined by the total amount received or anticipated during a 12-month annualization period.

(Authority: 38 U.S.C. 210(c))

(f) *Deferred determinations.* When an individual is unable to predict with certainty the amount of countable annual income, the annual rate of improved pension shall be reduced by the greatest amount of anticipated countable income until the end of the 12-month annualization period, when total income received during that period will be determined and adjustments in pension payable made accordingly.

(Authority: 38 U.S.C. 210(c))

4. In § 3.272, the introductory text, paragraphs (g) introductory text, (g)(1)(iii), (g)(2)(iii), (g)(3), (h) introductory text, and (h)(1)(i) are revised, and paragraphs (l) and (m) are added to read as follows:

#### § 3.272 Exclusions from income.

The following shall be excluded from countable income for the purpose of determining entitlement to improved pension. Unless otherwise provided, expenses deductible under this section are deductible only during the 12-month annualization period in which they were paid.

(Authority: 38 U.S.C. 210(c))

(g) *Medical expenses.* Within the provisions of the following paragraphs, there will be excluded from the amount of an individual's annual income any unreimbursed amounts which have been paid within the 12-month annualization period for medical expenses regardless of when the indebtedness was incurred. An estimate based on a clear and reasonable expectation that unusual

medical expenditure will be realized may be accepted for the purpose of authorizing prospective payments of benefits subject to necessary adjustment in the award upon receipt of an amended estimate, or after the end of the 12-month annualization period upon receipt of an eligibility verification report.

(Authority: 38 U.S.C. 210(c))

(1) \* \* \*

(iii) They were or will be in excess of 5 percent of the applicable maximum annual pension rate or rates for the veteran (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound) as in effect during the 12-month annualization period in which the medical expenses were paid.

(2) \* \* \*

(iii) They were or will be in excess of the applicable maximum annual pension rate or rates for the spouse (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound) as in effect during the 12-month annualization period in which the medical expenses were paid.

(Authority: 38 U.S.C. 210(c))

(3) *Children's income.* Unreimbursed amounts paid by a child for medical expenses of self, parent, brothers and sisters, to the extent that such amounts exceed 5 percent of the maximum annual pension rate or rates payable to the child during the 12-month annualization period in which the medical expenses were paid.

(Authority: 38 U.S.C. 210(c))

(h) *Expenses of last illnesses, burials, and just debts.* Expenses specified in paragraphs (h)(1) and (h)(2) of this section which are paid during the calendar year following that in which death occurred may be deducted from annual income for the 12-month annualization period in which they were paid or from annual income for any 12-month annualization period which begins during the calendar year of death, whichever is to the claimant's advantage. Otherwise, such expenses are deductible only for the 12-month annualization period in which they were paid. Any such expenses paid subsequent to death but prior to date of entitlement are not deductible.

(Authority: 38 U.S.C. 210(c))

(1) \* \* \*

(i) Amounts paid by a spouse before a veteran's death for expenses of the

veteran's last illness will be deducted from the income of the surviving spouse.

(Authority: 38 U.S.C. 503(a)(3))

(l) *Distributions of funds under 38 U.S.C. 618.* Distributions from the Veterans Administration Special Therapeutic and Rehabilitation Activities Fund as a result of participation in a therapeutic or rehabilitation activity under 38 U.S.C. 618 shall be considered donations from a public or private relief or welfare organization and shall not be countable as income for pension purposes.

(Authority: 38 U.S.C. 618(f))

(m) *Hardship exclusion of child's available income.* When hardship is established under the provisions of § 3.32(d)(6) of this part, there shall be excluded from the available income of any child or children an amount equal to the amount by which annual expenses necessary for reasonable family maintenance exceed the sum of countable annual income plus VA pension entitlement computed without consideration of this exclusion. The amount of this exclusion shall not exceed the available income of any child or children, and annual expenses necessary for reasonable family maintenance shall not include any expenses which were considered in determining the available income of the child or children or the countable annual income of the veteran or surviving spouse.

(Authority: 38 U.S.C. 521(h), 541(g))

5. In § 3.309, the list in paragraph (c) and the authority citation for the section are revised to read as follows:

**§ 3.309 Disease subject to presumptive service connection.**

(c) *Diseases specific as to former prisoners of war.*

Avitaminosis.  
Beriberi (including beriberi heart disease).  
Chronic dysentery.  
Helminthiasis.  
Malnutrition (including optic atrophy associated with malnutrition).  
Pellagra.  
Any other nutritional deficiency.  
Psychosis.  
Any of the anxiety states.  
Dysthmic disorder (or depressive neurosis).  
Organic residuals of frostbite, if it is determined that the veteran was interned in climatic conditions consistent with the occurrence of frostbite.  
Post-traumatic osteoarthritis.

(Authority: 38 U.S.C. 210(c))

6. In § 3.342, paragraph (b)(4)(ii) is revised to read as follows:

**§ 3.342 Permanent and total disability ratings for pension purposes.**

(b) \* \* \*

(4) \* \* \*

(ii) Participation in, or the receipt of a distribution of funds as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 618.

(Authority: 38 U.S.C. 618(f))

7. In § 3.343, the last sentence in paragraph (c)(1) is revised and an authority citation is added to paragraph (c) to read as follows:

**§ 3.343 Continuance of total disability ratings.**

(c) *Individual unemployability.* (1) \* \* \* Neither participation in, nor the receipt of a distribution of funds as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 618 shall be considered evidence of employability.

(Authority: 38 U.S.C. 618(f))

8. Section 3.383 is revised to read as follows:

**§ 3.383 Special consideration for paired organs and extremities.**

(a) *Entitlement criteria.* Compensation is payable for the combinations of service-connected and nonservice-connected disabilities specified in paragraphs (a)(1) through (a)(5) of this section as if both disabilities were service-connected, provided the nonservice-connected disability is not the result of the veteran's own willful misconduct.

(1) Blindness in one eye as a result of service-connected disability and blindness in the other eye as a result of nonservice-connected disability.

(2) Loss or loss of use of one kidney as a result of service-connected disability and involvement of the other kidney as a result of nonservice-connected disability.

(3) Total deafness in one ear as a result of service-connected disability and total deafness in the other ear as a result of nonservice-connected disability.

(4) Loss or loss of use of one hand or one foot as a result of service-connected disability and loss or loss of use of the other hand or foot as a result of nonservice-connected disability.

(5) Permanent service-connected disability of one lung, rated 50 percent or more disabling, in combination with a

nonservice-connected disability of the other lung.

(b) *Effect of judgment or settlement.*  
(1) If a veteran receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the nonservice-connected disability which established entitlement under this section, the increased compensation payable by reason of this section shall not be paid for any month following the month in which any such money or property is received until such time as the total amount of such increased compensation that would otherwise have been payable equals the total of the amount of any such money received and the fair market value of any such property received. The provisions of this paragraph do not apply, however, to any portion of such increased compensation payable for any period preceding the end of the month in which such money or property of value was received.

(2) With respect to the disability combinations specified in paragraphs (a)(1), (a)(2), (a)(3) and (a)(5) of this section, the provisions of this paragraph apply only to awards of increased compensation made on or after October 28, 1986.

(c) *Social security and workers' compensation.* Benefits received under social security or workers' compensation are not subject to recoupment under paragraph (b) of this section even though such benefits may have been awarded pursuant to a judicial proceeding.

(d) *Veteran's duty to report.* Any person entitled to increased compensation under this section shall promptly report to the VA the receipt of any money or property received pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the nonservice-connected loss or loss of use of the impaired extremity upon which entitlement under this section is based. The amount to be reported is the total of the amount of money received and the fair market value of property received. Expenses incident to recovery, such as attorneys' fees, may not be deducted from the amount to be reported.

(Authority: 38 U.S.C. 360)

**§ 3.384 [Removed and reserved]**

9. Section 3.384 is removed and reserved.

10. In § 3.501, paragraph (i)(3) is revised to read as follows:

**§ 3.501 Veterans.**

(Authority: 38 U.S.C. 210(c))

(i) \* \* \*

(3) *Section 3.557. Incompetent veteran, admitted for hospital, institutional or domiciliary care, without dependents, whose estate equals or exceeds \$1,500: Last day of the month of admission or the last day of the month in which the veteran's estate equal or exceeds \$1,500, whichever is later. If the veteran was hospitalized for observation and examination, the date treatment began will be considered the date of admission.*

(Authority: 38 U.S.C. 3012(c))

11. In § 3.502, the introductory text and paragraph (c) are revised to read as follows:

**§ 3.502 Surviving spouses.**

The effective date of discontinuance of pension, compensation, or dependency and indemnity compensation to or for a surviving spouse will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.

(Authority: 38 U.S.C. 210(c))

(c) *Legal surviving spouse entitled. Date of last payment on award to another person as surviving spouse. See § 3.657.*

(Authority: 38 U.S.C. 210(c))

12. In § 3.503, the introductory text and paragraphs (b) and (i) are revised as follows:

**§ 3.503 Children.**

The effective date of discontinuance of pension, compensation, or dependency and indemnity compensation to or for a child, or to or for a veteran or surviving spouse on behalf of such child, will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.

(Authority: 38 U.S.C. 210(c))

(b) *Enters service. Date of last payment of apportioned disability benefits for child not in custody of estranged spouse. Full rate payable to veteran. No change where payments are being made for the child to the veteran, his (her) estranged spouse, his (her) surviving spouse, or to the fiduciary of a child not in the surviving spouse's custody.*

(i) *Surviving spouse becomes entitled. Date of last payment. See § 3.657.*

(Authority: 38 U.S.C. 210(c))

13. In § 3.557, the first sentence of paragraph (b)(4) and paragraph (d), and all of paragraph (c) are revised and an authority citation is added to paragraph (d) to read as follows:

**§ 3.557 Incompetents; estate over \$1,500 and institutionalized.**

(b) \* \* \*

(4) Has an estate, derived from any source, which equals or exceeds \$1,500, further payments of pension, compensation or emergency officer's retirement pay will not be made, except as provided in paragraph (d) of this section, until the estate is reduced to \$500.

(c) For veterans subject to paragraph (b) of this section, the value of the veteran's estate shall be computed under the provisions of § 13.109 of this title.

(Authority: 38 U.S.C. 210(c))

(d) Payment of pension, compensation or emergency officers' retirement pay to a veteran subject to the provisions of paragraph (b) of this section will be discontinued the last day of the month of admission or the last day of the month in which the veteran's estate equals or exceeds \$1,500, whichever is later. \* \* \*

(Authority: 38 U.S.C. 3203)

14. In § 3.800, paragraph (a)(2) is amended by adding a sentence at the end and revising the authority citation to read as follows:

**§ 3.800 Disability or death due to hospitalization, etc.**

(a) \* \* \*

(2) \* \* \* The provisions of this paragraph do not apply, however, to any portion of such compensation or dependency and indemnity compensation payable for any period preceding the end of the month in which such judgment, settlement or compromise becomes final.

(Authority: 38 U.S.C. 210(c))

15. In § 3.809a, the introductory text is revised to read as follows:

**§ 3.809a Special home adaptation grants under 38 U.S.C. 801(b).**

A certificate of eligibility for assistance in acquiring necessary special home adaptations, or, on or after

October 28, 1986, for assistance in acquiring a residence already adapted with necessary special features, under 38 U.S.C. 801(b) may be issued to a veteran who served after April 20, 1986, if the following requirements are met:

(Authority: 38 U.S.C. 801(b))

[FR Doc. 88-13919 Filed 6-20-88; 8:45 am]

BILLING CODE 8320-01-M

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[FRL-3399-2; KY-043]

**Approval and Promulgation of Implementation Plans; Kentucky Permit Fees and Renewal****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** EPA today approves amendments to Jefferson County Regulation 2.08, Permit Fees and Renewal, submitted to EPA on March 20, 1987. These amendments entail a complete realignment of permit fees and renewal frequencies. After completing a study of the average costs involved in establishing a permit, the Jefferson County Air Pollution Control District determined that these revisions to Regulation 2.08 being approved today are necessary to cover the costs of reviewing and processing permit applications, as well as the costs of implementing and enforcing such permit conditions. Section 110(a)(2)(K) of the Clean Air Act provides the authority for the establishment of permit fees. The amendments to Regulation 2.08 being approved in this notice were proposed on November 19, 1987 (52 FR 44448). No comments were received in response to that proposal.

**EFFECTIVE DATE:** This rule will become effective on July 21, 1988.**ADDRESSES:** Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations:

U.S. Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street, NE., Atlanta, Georgia 30365.

Kentucky Natural Resources and Environmental Protection Cabinet, Department of Environmental Protection, Frankfort Office Park, 18 Reilly Road, Frankfort, Kentucky 40601.

Jefferson County, Kentucky, Physical and Environmental Services, Air Pollution Control District, 914 East Broadway, Louisville, Kentucky 40204. Public Information Reference Unit, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:**

Pamela E. Adams of the EPA Air Programs Branch at the above address, telephone (404) 347-2864 or FTS 257-2804.

**SUPPLEMENTARY INFORMATION:**

On March 20, 1987, the Kentucky Division of Air Pollution Control submitted to EPA revisions to Jefferson County Regulation 2.08, Permit Fees and Renewal. This regulation is a part of the Kentucky State Implementation Plan (SIP) approved under section 110 of the Clean Air Act. Submittal of these amendments by the Jefferson County Air Pollution Control District occurred on March 2, 1987. Opportunity for public participation and input relevant to these amendments was provided through a public hearing conducted on December 17, 1986, at the Air Pollution Control District of Jefferson County. The revisions to Regulation 2.08, Permit Fees and Renewal, incorporate a complete realignment of permit fees and renewal frequencies. Section 110(a)(2)(K) of the Clean Air Act provides the authority for the establishment of permit fees. Section 110(a)(2)(K) of the Clean Air Act provides that a SIP can be approved by EPA if it "requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this Act a fee sufficient to cover: (i) The reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, whether before or after the date of enactment of this subparagraph, the reasonable costs (incurred after such date of enactment) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action)." After conducting a study of the average permitting costs associated with meeting the requirements of section 110(a)(2)(K) of the Clean Air Act, the Jefferson County Air Pollution Control District determined that revisions to Regulation 2.08 discussed in this notice are necessary to compensate for increased permitting costs.

Section 1 of Regulation 2.08 was revised to increase and redistribute permit fees. A fee was also established for demolition/renovation of asbestos containing structures. Section 1(a) was

revised to increase the operating permit fee from \$15 to \$50 per process. The stipulation was added to section 1(a) that these permits are for major and minor sources. An amendment to section 1(b) of Regulation 2.08 increased the fee for construction permits from \$15 to \$450. Furthermore, section 1(b) was amended to state that the \$450 fee is "for all affected facilities which singly or collectively have the potential to be emitters of 100 tons per year or more of any pollutant." A new subsection, section 1(c), was added to Regulation 2.08 to state that the construction permit fee for sources not covered by section 1(b) will be \$200. Section 1(d) of Regulation 2.08, labelled as section 1(c) prior to the amendments discussed in this notice, was amended to increase the fee for banking permits from \$15 to \$50. The section labelled 1(d) prior to the amendments discussed in this notice was deleted. Prior to this deletion, this section stated that there would be a "\$2000/year maximum operating permit fee per source." A new subsection, section 1(e), was added to Regulation 2.08 to establish a \$100 fee for the "demolition/renovation of asbestos containing structures." As a result of this new subsection, sections previously labelled section 1(e) and section 1(f) were labelled as section 1(f) and section 1(g), respectively.

Section 2 of Regulation 2.08 was revised to change renewal conditions for permits. Section 2(a) was amended to state that "major sources shall renew operating permits every two years." Prior to this revision, major sources were required to renew operating permits every year. A similar amendment to section 2(b) requires minor sources to renew operating permits every four years rather than every three years. A new subsection, section 2(c), states that "the District, at its discretion, may adjust individual permit time periods to conform with its inspection schedules of sources." Section 2(d) of Regulation 2.08, previously labelled as section 2(c), was amended to state that "permits issued under this regulation are not transferable." This revision was adopted for clarification purposes as the previous version read "this section" rather than "this regulation." Section 2(e) was added to state that "banking permits are not subject to periodic renewal."

The amendments to Regulation 2.08 being approved in this notice were proposed in a *Federal Register* notice dated November 19, 1987 (52 FR 44448). The proposal notice discusses comments received at the December 17, 1986, public hearing conducted to review the

amendments to Regulation 2.08. No comments were submitted to EPA in response to the proposal notice (52 FR 44448). EPA anticipates no adverse environmental impacts resulting from implementation of the amendments to Regulation 2.08 being approved today.

**Final Action**

EPA is today approving regulatory changes to Jefferson County Regulation 2.08, Permit Fees and Renewal. These changes increase several permit fees and decrease renewal frequencies. The Jefferson County Air Pollution Control District determined that these revisions are necessary to cover the costs of reviewing and processing permit applications, as well as the costs of implementing and enforcing such permit conditions.

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 22, 1988. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Air pollution control.  
Intergovernmental relations.

**Note:** Incorporation by reference of the State Implementation Plan for the State of Kentucky was approved by the Director of the Federal Register on July 1, 1982.

Dated: June 9, 1988.

Lee M. Thomas,  
Administrator.

Part 52 of Chapter I, Title 40, of the Code of Federal Regulations is amended as follows:

**PART 52—[AMENDED]**

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

**Subpart S—Kentucky**

2. Section 52.920 is amended by adding paragraph (c)(55) to read as follows:

**§ 52.920 Identification of plan.**

(c) \* \* \*

(55) Revisions to Jefferson County, Kentucky Regulation 2.08, Permit Fees and Renewal, submitted on March 20, 1987, by the Kentucky Natural

Resources and Environmental Protection Cabinet.

(i) Incorporation by reference.

(A) Revisions to Jefferson County, Kentucky Regulation 2.08, Permit Fees and Renewal, which became State-effective on December 17, 1986.

(B) Letter of March 20, 1987, from the Kentucky Natural Resources and Environmental Protection Cabinet.

(ii) Other material—none.

[FR Doc. 88-13620 Filed 6-20-88; 8:45 am]

BILLING CODE 6560-50-M

## HARRY S. TRUMAN SCHOLARSHIP FOUNDATION

### 45 CFR Part 1801

#### Harry S. Truman Scholarship Program Regulations; Final Provisions

**AGENCY:** Harry S. Truman Scholarship Foundation.

**ACTION:** Final rule.

**SUMMARY:** The following are the regulations governing the annual competition for Harry S. Truman Scholarships, as amended. Amendments are being made to expand the nomination requirements to permit each institution of higher education annually to nominate up to three students for Truman Scholarships. The nominated students may have legal residence in the same State/District or they may be residents of different States/Districts (§ 1801.11). The amendments also reflect an increase to \$7,000 of the maximum annual Scholarship stipend (§ 1801.41). In addition a number of clarifying changes are being made to the last complete edition of these regulations published in the *Federal Register* on December 9, 1980 (45 FR 81047).

**EFFECTIVE DATE:** June 21, 1988.

**ADDRESS:** Harry S. Truman Scholarship Foundation, 712 Jackson Place, NW., Washington, DC 20006.

**FOR FURTHER INFORMATION CONTACT:** Malcolm C. McCormack, (202) 395-4831.

Dated: June 14, 1988.

Malcolm C. McCormack,  
Executive Secretary.

Approved: June 14, 1988.

Elmer B. Staats,  
Chairman, Board of Trustees.

Title 45 of the Code of Federal Regulations is amended by revising Part 1801, to read as follows:

## PART 1801—HARRY S. TRUMAN SCHOLARSHIP PROGRAM

### Subpart A—General

Sec.

- 1801.1 Annual Truman Scholarship competition.
- 1801.2 Truman Scholars are selected from each State.
- 1801.3 Students eligible for nomination.
- 1801.4 Definitions.

### Subpart B—Nominations

- 1801.10 Nomination by institution of higher education.
- 1801.11 Annual nomination.
- 1801.12 Institutions with more than one campus.
- 1801.13 Two-year institutions.
- 1801.14 Submission of application to the Foundation.
- 1801.15 Faculty representative.
- 1801.16 Closing date for receipt of nominations.
- 1801.17 Contents of application.

### Subpart C—The Competition

- 1801.20 Selection of semifinalists.
- 1801.21 Evaluation criteria.
- 1801.22 Interview of student with regional review panel.
- 1801.23 Recommendation by panel.
- 1801.24 Further recommendations or nominations.
- 1801.25 Selection of Truman Scholars by the Foundation.

### Subpart D—Graduate Study and the Work Experience Program

- 1801.30 Continuation into graduate study.
- 1801.31 Approval of graduate programs by the Foundation.
- 1801.32 Eligible colleges and degree programs.
- 1801.33 The work experience program.

### Subpart E—Amount of Payments to Students

- 1801.40 Travel expenses of semifinalists.
- 1801.41 Scholarship awards.
- 1801.42 Definition of "fee".
- 1801.43 Allowance for books.
- 1801.44 Allowance for room and board.
- 1801.45 Deduction for benefits from other sources.

### Subpart F—Payment Conditions and Procedures

- 1801.50 Acceptance of the scholarship.
- 1801.51 Report at the beginning of each term.
- 1801.52 Definition of "term".
- 1801.53 Payment schedule.
- 1801.54 Postponement of payment.

### Subpart G—Duration of Scholarship

- 1801.60 Renewal of scholarship.
- 1801.61 Termination of scholarship.
- 1801.62 Recovery of scholarship funds.

**Authority:** Pub. L. 93-642, 88 Stat. 2276 (20 U.S.C. 2001-2012).

### Subpart A—General

#### § 1801.1 Annual Truman Scholarship competition.

Each year, the Harry S. Truman Scholarship Foundation carries out a nationwide competition to select students to be Truman Scholars.

#### § 1801.2 Truman Scholars are selected from each State.

(a) At least one Truman Scholar is selected each year from each State in which there is a resident applicant who meets the eligibility criteria in § 1801.3. In addition, the Board of Trustees may select additional Scholars-at-Large.

(b) As used in this part, "State" means each of the States, the District of Columbia, the Commonwealth of Puerto Rico, and considered as a single entity: Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

#### § 1801.3 Students eligible for nomination.

A student is eligible to be nominated as a Truman Scholar if he or she:

(a) Is a matriculated student pursuing a degree at an institution of higher education during the year in which nominated;

(b) Will be a junior pursuing a bachelor's degree as a full-time student at an institution of higher education the following academic year;

(c) Has an undergraduate field of study that permits admission to a graduate program leading to a career in public service;

(d) Has an undergraduate average of at least "B" or its equivalent and ranks in the upper fourth of his or her class; and

(e) Is a U.S. citizen, a U.S. national, or a permanent resident of the Commonwealth of the Northern Mariana Islands.

#### § 1801.4 Definitions.

As used in this part:

"Academic year" means the period of time, typically 8 or 9 months in which a full-time student would normally complete two semesters, two trimesters, three quarters, or the equivalent.

"Foundation" means the Harry S. Truman Scholarship Foundation.

"Full-time student" means a student who is carrying a sufficient number of credit hours or their equivalent to secure the degree or certificate toward which he or she is working, in no more than the length of time normally taken at the institution of higher education.

"Graduate study" means the courses of study beyond the baccalaureate level which may lead to an advanced degree.

"Institution of higher education" has the meaning given in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)).

"Junior" means a student who has received credit for more than one-half of the coursework required to complete the second year of college, but not more than one-half of the coursework required to complete the third year of college.

"President" means the principal official responsible for the overall direction of the operations of an institution of higher education.

"Public service" means a career at any level or in any function of government, including, for example, government service activities in the health, engineering or military fields, as well as other fields of governmental activity.

"Resident" means a person who has legal residence in the State, recognized under State law. If a question arises concerning the State of residence, the Foundation determines, for the purposes of this program of which State the person is a resident, taking into account parent's place of residence, eligibility for "in-State" tuition rates at public institutions of higher education, and place of registration to vote.

"Senior" means the academic level recognized by the institution of higher education as having fourth year standing.

"Sophomore" means the academic level recognized by the institution of higher education as having second year standing.

"Work-experience program" means employment approved by the Foundation that involves an intensive period of practical work in Federal, State, or local government office.

#### Subpart B—Nominations

##### § 1801.10 Nomination of institution of higher education.

To be considered in the competition a student must be nominated by the institution of higher education that he or she attends.

##### § 1801.11 Annual nomination.

(a) Except as provided in §§ 1801.12 and 1801.13, each institution of higher education may nominate up to three students annually. If an institution chooses to nominate three students, the three may have legal residence in the same State, or in different States.

(b) All nominations must be made by the President of the institution or the designated Faculty Representative, after the President asks for and

considers recommendations by the faculty.

##### § 1801.12 Institutions with more than one campus.

If an institution of higher education has more than one component separately listed in the current edition of the publication Education Directory: Colleges and Universities (Published by the U.S. Department of Education), each component of the institution may nominate up to three students. However, a component that is organized solely for administrative purposes and has no students enrolled may not nominate a student.

##### § 1801.13 Two-year institutions.

If an institution of higher education does not offer education beyond the sophomore level, the institution may nominate only students who will be a junior the following year at another institution of higher education.

##### § 1801.14 Submission of application to the Foundation.

To nominate a student for the competition, the institution of higher education must send the student's application to the Foundation.

##### § 1801.15 Faculty representative.

(a) Each institution which nominates a student or which has a Truman Scholar in attendance must give the Foundation the name, business address, and business telephone number of a member of the faculty who will serve as liaison between the institution and the Foundation.

(b) It is the role of this Faculty Representative to publicize the Truman Scholarship Program on campus, solicit recommendations of potential nominees from members of the faculty, and insure that the institution's nomination with all required supporting documents, is forwarded to the Foundation by the required deadline.

##### § 1801.16 Closing date for receipt of nominations.

The Foundation publishes an annual notice in the *Federal Register* of the date, usually December 1, by which institutions of higher education must submit their nominations and all supporting documents in order to be guaranteed consideration by the Foundation.

##### § 1801.17 Contents of application.

(a) The Foundation provides a form that must be used as the application.

(b) Each application must include the following:

(1) A statement that the student is an applicant for a Truman Scholarship;

(2) A statement that the student plans to pursue a career in public service;

(3) A list of the student's public service activities, such as those associated with government agencies, community groups, political campaigns, and charities;

(4) A list of leadership positions the student has held during high school and during the first two years of undergraduate school;

(5) A statement that the student is willing to participate in an internship or seminar sponsored by the Foundation;

(6) A statement of interest in a career in government, written by the student, that shows in some detail how the student's academic program and overall education plans will prepare him or her for that chosen career.

(c) In support of each nomination the following documents must also be submitted:

(1) An essay of 600 words or less written by the student that analyzes a particular public policy issue of interest to the student;

(2) Transcripts of the student's high school and undergraduate scholastic record; and

(3) Three letters of recommendation. One of these letters must be written by a faculty member in the student's field of study, and one must be written by another person who can speak to the student's potential for a career in public service.

#### Subpart C—The Competition

##### § 1801.20 Selection of semifinalists.

The Foundation selects semifinalists from the students who are nominated.

##### § 1801.21 Evaluation criteria.

(a) The Foundation selects semifinalists from the students nominated on the basis of the following criteria:

(1) The extent to which the student has shown an outstanding potential for leadership in the public service; and

(2) The student's academic performance.

(b) The Foundation evaluates each student solely on the basis of the information required under § 1801.17.

##### § 1801.22 Interview of student with regional review panel.

The Foundation invites each semifinalist to an interview with a regional review panel.

##### § 1801.23 Recommendation by panel.

(a) Each regional review panel recommends two finalists from each State to the Foundation. In addition, the Board of Trustees may authorize each

regional review panel to recommend additional "Scholars-at-Large" from the States in its region.

(b) The finalists must be recommended by the panel in the order of their qualification to be a Truman Scholar.

(c) The recommendations are based on the material required under § 1801.17 and, as determined in the interview, the panel's assessment of each semifinalist's potential for leadership in government.

#### § 1801.24 Further recommendations or nominations.

(a) The Foundation may ask a regional review panel to submit the names of additional finalists for consideration, or may ask institutions of higher education to submit additional nominations.

(b) If additional nominations are made under paragraph (a) of this section, the applications must meet the requirements of Subpart B of this part, and are considered under the procedures of this subpart.

#### § 1801.25 Selection of Truman Scholars by the Foundation.

(a) The Foundation names Truman Scholars after receiving recommendations from the regional review panels.

(b) The Foundation may name an alternate for each Truman Scholar. The alternate receives the scholarship if:

(1) The person named as Truman Scholar is not able to begin studies at the start of the following academic year, and

(2) Payments are not postponed under § 1801.54.

#### Subpart D—Graduate Study and the Work Experience Program

##### § 1801.30 Continuation into graduate study.

(a) The Foundation will not conduct a new and separate competition for graduate scholarships, nor will it add new Truman Scholars at the graduate level.

(b) Only Truman Scholars who satisfactorily complete their undergraduate education and who comply with § 1801.31 shall be eligible for continued Foundation support for an approved program of graduate study.

##### § 1801.31 Approval of graduate programs by the Foundation.

(a) Early in their senior year, Truman Scholars desiring Foundation support for graduate study must submit a proposed program of graduate study to the Foundation for approval. The proposed program may subsequently be changed with the approval of the Foundation.

(b) Foundation approval of the Scholar's proposal is required before financial support is granted for graduate work.

(c) Scholars must include in their submission to the Foundation a statement of interest in a career in government that specifies in some detail how their graduate program and their overall educational plans will prepare them for their chosen career goal.

(d) Scholars may offer relevant and appropriate fields of study that will help prepare them for a career in government.

##### § 1801.32 Eligible colleges and degree programs.

(a) Truman Scholars at the graduate level may study at any accredited college or university that offers graduate study.

(b) They may enroll in any relevant graduate program, including masters of arts, masters of public administration, masters of business administration, law, medicine, engineering or doctoral study.

(c) Foundation support for graduate study is restricted to two full-time years of study.

##### § 1801.33 The work experience program.

(a) The Foundation encourages all Truman Scholars without substantial previous government experience to participate in a voluntary program of work experience in the public service. This would typically occur after the completion of the baccalaureate degree.

(b) These apprenticeships are intensive periods of practical work ranging up to a year in length in a Federal, State, or local government office arranged with the approval of the Foundation.

(c) Although the Foundation is not authorized to provide financial support during this period, it will attempt to assist Scholars to make appropriate work experience arrangements.

#### Subpart E—Amount of Payments to Students

##### § 1801.40 Travel expenses of semi-finalists.

(a) Each semi-finalist may receive reimbursement for the actual and necessary expenses of round trip transportation to the location of the regional review panel.

(b) The Foundation uses the Federal Travel Regulations (referenced in 41 CFR 101-7.003) as a guide to determine the amount of the reimbursement.

(c) The Foundation informs semi-finalists of the procedures for obtaining this reimbursement.

##### § 1801.41 Scholarship awards.

Each Truman Scholar receives annually \$7,000 or the cost of tuition fees, books, and room and board, whichever is less.

##### § 1801.42 Definition of "fee".

As used in this part, "fee" means a typical and usual non-refundable charge by the institution of higher education for a service, a privilege, or the use of property which is required for Scholars' enrollment and registration.

##### § 1801.43 Allowance for books.

The cost allowance for a student's books is \$180 per year.

##### § 1801.44 Allowance for room and board.

The cost allowed for a student's room and board is the amount the institution of higher education reports to the Foundation as the average cost of room and board for the student's institution, given the type of housing the student occupies.

##### § 1801.45 Deduction for benefits from other sources.

The cost allowed for a student's tuition, fees, books, and room and board must be reduced to the extent that the cost is paid for by another organization.

#### Subpart F—Payment Conditions and Procedures

##### § 1801.50 Acceptance of the scholarship.

To receive any payment, a Truman Scholar must sign an acceptance of the scholarship and submit it to the Foundation.

##### § 1801.51 Report at the beginning of each term.

The Truman Scholar must submit the following material to the Foundation at the beginning of each term:

(a) A statement of the student's costs for tuition, fees, books, and room and board.

(b) A certification by an authorized official of the institution that the statement of those costs is accurate.

(c) A certification of the amounts of those costs that are paid for by another organization.

(d) A certification by an authorized official of the institution that the Truman Scholar:

(1) Is a full-time student and is taking a course of study, training, or other educational activities to prepare for a career in public service; and

(2) Is not engaged in gainful employment that interferes with the Scholar's studies.

(e) A certification by an authorized official of the institution of whether the Truman Scholar is in academic good standing.

**§ 1801.52 Definition of "term".**

As used in this part, "term" means the period which the institution of higher education uses to divide its academic year: Semester, trimester, or quarter.

**§ 1801.53 Payment schedule.**

The Foundation will pay the Truman Scholar a portion of the award after each report submitted under § 1801.51.

**§ 1801.54 Postponement of payment.**

(a) A Truman Scholar may request the Foundation to postpone one or more payments because of sickness or other circumstances.

(b) If the Foundation grants a

postponement, it may impose such conditions as it decides are necessary.

**Subpart G—Duration of Scholarship**

**§ 1801.60 Renewal of scholarship.**

It is the intent of the Foundation to renew scholarship awards for a period not to exceed a total of four academic years (consisting of the junior year, the senior year and up to two academic years of graduate study), only in accordance with the regulations established by its Board of Trustees, and subject to an annual review for compliance with the requirements of this part.

**§ 1801.61 Termination of scholarship.**

(a) The Foundation may terminate a scholarship under the following specific conditions:

(1) If the Truman Scholar does not meet the criteria in § 1801.51(e) for two consecutive terms, or

(2) If the Truman Scholar does not meet the criteria in § 1801.31, § 1801.51(d) or § 1801.3(e).

(b) Before it terminates a scholarship under these conditions the Foundation gives the student notice and an opportunity to be heard with respect to the grounds for termination.

**§ 1801.62 Recovery of scholarship funds.**

If a scholarship is terminated or if the student resigns a scholarship, all scholarship funds which have not been spent or which the student may recover must be returned to the Foundation.

[FR Doc. 88-13889 Filed 6-20-88; 8:45 am]

BILLING CODE 9500-01-M

## Proposed Rules

Federal Register

Vol. 53, No. 119

Tuesday, June 21, 1988

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 Parts 916, 917, and 919

#### Expenses and Assessment Rates for Specified Marketing Orders

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would authorize expenditures and establish assessment rates under Marketing Order Nos. 916 and 917 (California nectarines, plums, and peaches) and 919 (Colorado peaches) for the 1988-89 fiscal year established for each order. 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 U.S. Department of Agriculture (USDA) for approval. The members of the committees are handlers and producers of the regulated commodities. They are familiar with the committees' needs and with the costs for goods, services, and personnel in their local areas and are thus in a position to formulate appropriate budgets. Funds to administer these programs are derived from assessments on handlers. The assessment rate recommended by each committee is derived by dividing anticipated expenses by expected shipments of the commodity. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committees' expected expenses.

**DATE:** Comments must be received by July 1, 1988.

**ADDRESS:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, F&V, AMS, USDA, P.O. Box 96456, Room 2085-S, Washington, DC 20090-6456.

Comments should reference the date and page number of this issue of the Federal Register and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:**

Jerry N. Brown, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456; telephone: (202) 475-5464.

**SUPPLEMENTARY INFORMATION:** This rule is proposed under Marketing Order Nos. 916 [7 CFR Part 916] regulating the handling of nectarines grown in California; 917 [7 CFR Part 917] regulating the handling of fresh pears, plums, and peaches grown in California; and 919 [7 CFR Part 919] regulating the handling of peaches grown in Mesa County, Colorado. These orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act.

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 considered the economic impact of this proposed rule on 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 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 are approximately 650 handlers of California plums, peaches, and nectarines subject to regulation under marketing orders [7 CFR Parts 916 and 917], and there are approximately 2,030 producers of these commodities in the regulated area. There are approximately 28 handlers of Colorado peaches subject to regulation under marketing order [7 CFR Part 919], and there are approximately 245 producers of peaches in the regulated area. Small agricultural producers have been defined by the

Small Business Administration [13 CFR 121.2] as those having average gross annual revenues for the last three years of less than \$500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. The majority of these handlers and producers 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 U.S. Department of Agriculture for approval. The members of the committees are primarily handlers and producers of the regulated commodities. They are familiar with the committees' needs and with the costs for goods, services, and personnel in their local areas and are thus in a position to formulate appropriate budgets. 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 derived by dividing anticipated expenses by expected shipments of the commodity. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committees' expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committees shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited so that the committees will have funds to pay their expenses.

The Nectarine Administrative Committee met on May 5, 1988, and unanimously recommended 1988-89 marketing order expenditures of \$3,123,908 and an assessment rate of \$0.18 per No. 22D standard lug box (package) of fresh nectarines. For comparison, 1987-88 fiscal year budgeted expenditures were \$2,844,417 and the assessment rate was \$0.16 per package. Major expenditure categories in the 1988-89 budget are \$1,801,886 for market development and \$867,000 for inspection, with most of the remainder for program administration. Total income for 1988-89 would amount to \$3,173,900, including assessment income

of \$3,132,900 based on shipments of 17,405,000 packages of fresh nectarines, \$20,000 from the California Department of Food and Agriculture, and \$21,000 from other sources such as interest earned on the reserve fund. Committee reserves are within limits authorized under the program.

The Plum Commodity Committee met on May 4, 1988, and unanimously recommended 1988-89 marketing order expenditures of \$3,510,878 and an assessment rate of \$0.19 per No. 22D standard lug box (package) of fresh plums. For comparison, 1987-88 fiscal year budgeted expenditures were \$3,125,626 and the assessment rate was \$0.19 per package. Major expenditure categories in the 1988-89 budget are \$1,971,459 for market development and \$1,085,960 for inspection, with most of the remainder for program administration. Total income for 1988-89 would amount to \$3,508,030, including assessment income of \$3,465,030 based on shipments of 18,237,000 packages of fresh plums, \$20,000 from the California Department of Food and Agriculture, and \$23,000 from other sources such as interest earned on the reserve fund. Additional estimated income includes \$100,000 from the USDA's Foreign Agricultural Service for export matching funds. Reserves are within the maximum amounts authorized under the program.

The Peach Commodity Committee met on May 5, 1988, and recommended, by a 12-1 vote, 1988-89 marketing order expenditures of \$2,562,089 and an assessment rate of \$0.18 per No. 22D standard lug box (package) of fresh peaches. For comparison, 1987-88 fiscal year budgeted expenditures were \$2,409,180 and the assessment rate was \$0.16 per package. Major expenditure categories in the 1988-89 budget are \$1,280,435 for market development and \$896,000 for inspection, with most of the remainder for program administration. Total income for 1988-89 would amount to \$2,590,980, including assessment income of \$2,553,480 based on shipments of 14,186,000 packages of fresh peaches, \$20,000 from the California Department of Food and Agriculture, and \$17,500 from other sources such as interest earned on the reserve fund. Additional estimated income includes \$20,000 from the USDA's Foreign Agricultural Service for export matching funds. Reserves are within the maximum amounts authorized under the program.

The Colorado Peach Administrative Committee met on May 23, 1988, and unanimously recommended 1988-89 marketing order expenditures of \$1,830 and an assessment rate of \$0.01 per bushel of fresh peaches. The Federal

marketing order program is operated in conjunction with a State program. For comparison, 1987-88 fiscal year budgeted expenditures were \$683. There was no assessment rate for the 1987-88 season because the committee wanted to reduce the Federal portion of the reserve account. The reserve was reduced to \$30. Federal assessment income for 1988-89 would amount to \$1,800 based on shipments of 180,000 bushels of fresh peaches. Operating reserves are well within the amounts authorized under the program. The Federal program budget expenditures of \$1,830 would be used to help pay the manager's salary.

While this proposed action would impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be significantly offset by the benefits derived from the operation of the marketing orders. Therefore, the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

It is found and determined that a comment period of less than 30 days is appropriate because the budgets and assessment rate approval for these programs need to be expedited. The committees need to have sufficient funds to pay their expenses, which are incurred on a continuous basis.

#### List of Subjects in 7 CFR Parts 916, 917, and 919

Marketing agreements and orders, Nectarines, Pears, Plums, Peaches (California), Peaches (Colorado).

For the reasons set forth in the preamble, it is proposed that new §§ 916.227, 917.250, 917.251, and 919.227 be added as follows:

1. The authority citation for 7 CFR Parts 916, 917, and 919 continues to read as follows:

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

2. New §§ 916.227, 917.250, 917.251, and 919.227 are added to read as follows:

#### PART 916—NECTARINES GROWN IN CALIFORNIA

##### § 916.227 Expenses and assessment rate.

Expenses of \$3,123,908 by the Nectarine Administrative Committee are authorized, and an assessment of \$0.18 per No. 22D standard lug box of assessable nectarines is established for the fiscal period ending February 28,

1989. Unexpended funds may be carried over as a reserve.

#### PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

##### § 917.250 Expenses and assessment rate.

Expenses of \$3,510,878 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.19 per No. 22D standard lug box of assessable plums is established for the fiscal period ending February 28, 1989. Unexpended funds may be carried over as a reserve.

##### § 917.251 Expenses and assessment rate.

Expenses of \$2,562,089 by the Peach Commodity Committee are authorized and an assessment rate of \$0.18 per No. 22D standard lug box of assessable peaches is established for the fiscal period ending February 28, 1989. Unexpended funds may be carried over as a reserve.

#### PART 919—PEACHES GROWN IN MESA COUNTY, COLORADO

##### § 919.227 Expenses and assessment rate.

Expenses of \$1,830 by the Administrative Committee are authorized, and an assessment rate of \$0.01 per bushel of assessable peaches is established for the fiscal period ending June 30, 1988. Unexpended funds may be carried over as a reserve.

Dated: June 16, 1988.

William J. Doyle,

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

[FR Doc. 88-13958 Filed 6-20-88; 8:45 am]

BILLING CODE 3410-02-M

#### FEDERAL HOME LOAN BANK BOARD

##### 12 CFR Parts 563c and 571

[No. 88-460]

##### Investment Portfolio Policy and Accounting Guidelines

Date: June 9, 1988.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule; proposed statement of policy.

SUMMARY: The Federal Home Loan Bank Board ("Bank Board" or "Board") is proposing to amend its regulations governing institutions insured ("insured institution") by the Federal Savings and Loan Insurance Corporation ("Corporation") by adopting a statement of policy and by amending its rules to clarify that insured institutions must account for securities held for

investment, sale and/or trading in accordance with generally accepted accounting principles ("GAAP"). The proposed policy statement requires an insured institution's board of directors to document and monitor its investment policy and strategies; discusses the appropriate documentation of investment decisions; summarizes GAAP applicable to securities held for investment, sale and/or trading; and offers guidance on the application of GAAP by insured institutions in determining when securities should be accounted for as a security held for an investment, as a security held for sale, or as a security held for trading. The intent of the proposed statement of policy is not to demarcate safe and sound investment policies and strategies. Such determinations are necessarily dependent upon a case-by-case assessment of individual institutions in the context of applicable regulations, policy statements and supervisory guidelines.

**DATE:** Comments must be received by August 22, 1988.

**ADDRESS:** Send comments to Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552. Comments will be available for public inspection at Information Services, Federal Home Loan Bank Board, 801 17th Street NW., Washington, DC 20552.

**FOR FURTHER INFORMATION CONTACT:**

Julie A. Gerschick, Professional Accounting Fellow, (202) 778-2537, or W. Barefoot Bankhead, Professional Accounting Fellow, (202) 778-2538, Office of Regulatory Policy, Oversight and Supervision ("ORPOS"), Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006; or Gary Jeffers, Staff Attorney, (202) 377-6457, or Julie L. Williams, Deputy General Counsel, (202) 377-6459, Corporate and Securities Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** With the increased investment powers of savings institutions and the increased proliferation of types of securities<sup>1</sup>, some insured institutions have expanded their investment activity into a variety of securities as an alternative to traditional lending activities. The extent, volume and nature of the activity of purchasing, originating and selling

securities has led to questions regarding the inconsistent accounting for and financial statement presentation of such securities by insured institutions. In proposing this statement of policy, the Board provides guidance and clarification to insured institutions on the accounting for and classification<sup>2</sup> of investments in securities within the confines of existing accounting literature. The Board further notes that section 402 of the Competitive Equality Banking Act of 1987 requires the Board to prescribe uniformly applicable accounting standards to be used by all insured institutions for the purpose of determining compliance with any rule or regulation issued by the Corporation or the Board to the same degree that generally accepted accounting principles are used to determine compliance with the rules and regulation of the Federal banking agencies ("Bank RAP"). An exception to this requirement is provided for certain institutions and transactions where, *inter alia*, the transaction was consistent with GAAP when such transaction was completed. See 12 U.S.C. 1730h. Accordingly, it is appropriate for the Board to take notice of the accounting treatment for investments in securities (specifically, accounting for securities held for investment or trading) by the banking industry as set forth in the American Institute of Certified Public Accountants ("AICPA") Industry Audit Guide, Audits of Banks ("Bank Audit Guide").

The Board envisions that an insured institution, with the assistance of management and other qualified consultants, that invests or intends to invest in securities shall adopt a written investment policy to set forth the broad direction that the institution's board of directors believes to be an appropriate investment course for the institution given the present financial position of the institution, the institution's business plan for growth, the current economic environment in which the institution operates and a range of reasonable economic conditions (e.g., interest rate changes), the types of securities, amounts of investments in those types of securities, and the safety and soundness considerations pertaining to the institution. In this regard, significant changes in the investment policy and/or investment strategies of the institution

that may be dictated by changing market conditions or a change in perception by the institution's board of directors of the institution's investment goals must be incorporated into the overall investment policy and investment strategies of the institution.

It is also expected that the institution's board of directors shall develop investment strategies that set out, in a more detailed basis, the manner in which the investment policy shall be implemented. The investment strategies shall address, *inter alia*, the type, nature, dollar amount and anticipated maturity of each group of instruments to be invested in and the acceptable range of interest rate risk. The investment strategies must be in sufficient detail to permit management and its consultants, if any, to determine the direction of periodic (daily, weekly, monthly, etc.) investment activity envisioned by the board of directors.

It is management's responsibility to invest the institution's assets in accordance with the investment strategies. To the extent an independent consultant is utilized by the insured institution, management has the responsibility to oversee the activities of the consultant to ensure that the consultant's actions are consistent with the investment policy and investment strategies of the insured institution. The ultimate responsibility for the oversight of investment consultants lies with the institution's board of directors. See the ORPOS R-Memorandum No. 70, Use of Investment Consultants, dated March 16, 1988.

The investment activity shall be reviewed periodically, but no less than quarterly, by the institution's board of directors to determine conformity with the institution's investment policy and strategies. Such review must be documented in the minutes of any meetings of the board of directors during which the review is conducted. Such review is intended to fulfill the board of directors' fiduciary duty to supervise adequately the actions of management regarding investment activities and to safeguard and account properly for the assets of the insured institution.

While changing market conditions may necessitate deviations from the institution's investment policy and strategies, management shall sufficiently document, in writing (and during the period the deviations occur), the reasons for significant deviations and the basis for the alternative investments purchased or originated, including the amount, nature, type, maturity, interest rate risk, etc., of the alternative investment as contrasted with the

<sup>2</sup> "Classification", as used throughout this preamble, refers to the balance sheet classification of securities and does not refer to classification of assets under 12 CFR 561.15c. "Classification of Certain Assets". Furthermore, "classification" as used throughout this statement of policy, does not refer to a classification of assets that falls within the arbitration process mandated by The Competitive Equality Banking Act of 1987.

<sup>1</sup> "Securities", as used throughout this preamble, refers generically to investment securities, loans, mortgage-backed securities and derivative securities.

original investment. Such significant deviations, and the related documentation thereof, must be reviewed by the institution's board of directors and formally approved in writing on a timely basis, *i.e.*, during the regular periodic review of the investment activity.

Management has the responsibility to maintain an accurate and complete record of the transactions engaged in by the institution. See 12 CFR 563.17-1(c). Such records, both on a detailed basis and in reports to the institution's board of directors and other persons, shall be maintained in sufficiently concise and coherent detail to permit comprehensible review by the institution's board of directors and other persons that have legitimate access to the insured institution's records, *e.g.*, Federal Home Loan Bank System examiners, independent accountants, etc. Concomitant with management's responsibility to maintain adequate documentation is management's responsibility to properly account for and classify the transactions entered into and to properly account for and classify the securities held at any financial reporting date. To that end, the Bank Board is proposing this policy statement and amendment to its rules. The proposed statement of policy summarizes GAAP and provides guidance to address the proper accounting for and classification of securities held for investment, sale or trading.<sup>3</sup>

Accordingly, this proposed statement of policy and the proposed amendment to the Board's regulations constitute "specific principles or procedures on particular accounting or reporting matters as the Corporation may require by regulation or otherwise". See 12 CFR 563.23-3(a) (1987). To clarify further, the Board believes that the proposed statement of policy sets an enforceable standard of accounting for and classification of securities held for investment, sale and/or trading by insured institutions.

The Board's proposed policy statement summarizes the accounting treatment as discussed in the accounting literature cited in the proposed policy statement and focuses on two significant factors in determining the

appropriate accounting for and classification of securities held for investment, sale and/or trading. These factors are (1) the intent of the institution to hold the securities for the foreseeable future, or, conversely, to sell or to trade the particular securities, and (2) the institution's ability to hold the securities for the foreseeable future. The AICPA Audit and Accounting Guide for Savings and Loan Associations ("S&L Audit Guide") refers to these factors in the context of determining whether an estimated allowance for loss in value of securities held must be recorded, *i.e.*, whether there is an impairment of a security.<sup>4</sup> The Bank Audit Guide refers to these factors in the same context<sup>5</sup> and in the context of the proper accounting for and classification of securities.<sup>6</sup> In neither the S&L Audit Guide nor the Bank Audit Guide are the terms "intent" and "ability" substantially discussed. The Board's proposed policy statement intends to offer guidance on the application of these terms in determining the appropriate accounting for and classification of securities held by an insured institution for investment, sale and/or trading. The proposed policy statement also recognizes that a presumption of trading will be found under certain circumstances. The Board believes that its use of the terms "intent" and "ability" in the proposed policy statement is consistent with the use of those terms in the S&L Audit Guide and the Bank Audit Guide.

In analyzing "intent", the proposed policy statement addresses the consistency of an institution's activity with its investment policy and strategies and the nature of certain securities activities. In analyzing "ability", the proposed policy statement addresses not only an institution's financial ability but also its regulatory ability to hold securities in compliance with applicable regulations, *e.g.*, loans-to-one borrower limitations, growth limitations. In this regard, the insured institution must continually assess the appropriateness of its investment policy and investment strategies in light of current and anticipated economic (market) conditions and its current and anticipated financial conditions, *e.g.*, liquidity, its business plan, and the safety and soundness of the institution. Such review may demonstrate that a

revision of the strategies underlying the policy may be necessary or the policy itself needs revision in light of current financial conditions. Such revisions must be fully explained and documented and adopted by the institution's board of directors. These documentation requirements do not relieve the institution's board of directors from their responsibility to ensure that securities activities are recorded in accordance with GAAP.

The Bank Board solicits comments on all aspects of the proposed amendments to its rules and the proposed statement of policy. While the Board wishes to resolve the inconsistencies in the application of GAAP, the Board is aware of and concerned about the overall effect to insured institutions of the application of GAAP, which has not kept pace with the development of certain securities and securities strategies, and therefore does not necessarily reflect the economics of specific transactions or series of transactions. Thus, the Board specifically requests comment on suggested modifications to the proposed amendments to the Board's rules and the proposed statement of policy, which would address the overall impact to insured institutions and the inconsistencies between the accounting for and economics of securities transactions and strategies.

For example, GAAP may require use of the lower of cost or market to account for certain securities that are duration and/or maturity matched. GAAP may misrepresent the economic condition of an institution to the extent GAAP does not give comparable treatment to related liabilities. In this respect, the Board solicits comments on the appropriateness of and on the extent of the Board's legal authority to attempt to remedy such problems.

While the issuance of this proposed rule and proposed policy statement indicates the Board's concern regarding inadequate documentation and inconsistent accounting for and classification of securities transactions, the Board does not recommend that institutions alter current practices that their independent accountants have found to be in compliance with GAAP until these proposed guidelines have been finalized.

In addition, the Board requests comments regarding the appropriateness of accounting for securities held for trading at market or the lower of amortized cost or market. The Board also requests comments regarding the need for specific definitions of the terms "intent" and "ability".

<sup>3</sup> The Board recognizes that new financial instruments are constantly being developed and it may be difficult to apply present GAAP, or evolving GAAP, to the new instruments. However, in the context of this proposed policy statement, the institution's board of directors and management have the responsibility to determine how such instruments fit within the institution's investment policy and investment strategies and account for the security in accordance with (existing) GAAP.

<sup>4</sup> AICPA Audit and Accounting Guide for Savings and Loan Associations (1979), Chapter 3, "Accounting Principles and Auditing Procedures", page 21.

<sup>5</sup> AICPA Industry Audit Guide, Audits of Banks (1983), Chapter 5, "Investment Securities, Accounting", page 30.

<sup>6</sup> *Id.* at p. 32.

Finally, the Board believes that adoption of the documentation requirements of this proposed statement of policy will require time. In recognition of this fact and the fact that adoption of the proposed statement of policy and amendments to its rules may have significant impact on insured institutions, the Board is soliciting comments on the appropriate effective dates for the standards set forth in the proposed statement of policy.

The Board notes that the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(A), exempts general policy statements and interpretative rules from notice and comment requirements. Nevertheless, the Board believes that because the amendments to the rules and the proposed policy statement are closely related, the public interest will be best served by considering comment on both. Therefore, the Board believes it is in the public interest to offer this proposed policy statement for comment so that the proposed regulatory package can be considered as a whole. Any comments should refer to Board Resolution No. 88-460.

The Board will provide the 30 day period after publication of a final rule in the *Federal Register* before making the final rule effective, unless good cause justifies a shorter time period as permitted under the Administrative Procedure Act, 12 U.S.C. 553(d)(3).

#### Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following initial regulatory flexibility analysis:

#### 1. Reasons, Objectives, and Legal Basis Underlying the Proposed Rule

These elements are incorporated above in

#### SUPPLEMENTARY INFORMATION.

#### 2. Small Institutions to Which the Proposed Rule Applies

The Small Business Administration defines a small financial institution as "a commercial bank or savings and loan association, the assets of which, for the preceding fiscal year, do not exceed \$100 million." 13 CFR 121.13(a) (1987). Therefore, small entities to which the proposed rule applies are the 1,651 insured institutions that had assets totalling \$100 million or less as of December 31, 1987.

#### 3. Impact of the Proposed Rule on Small Institutions

All institutions, including small institutions, should benefit from the proposed. The proposal amendments to

the Board's rules and the proposed policy statement treat all institutions identically regardless of their size for the reasons discussed herein. Further, inasmuch as the intent of the proposed amendments to the Board's rules and proposed policy statement is to require all institutions to adopt, maintain and document sound investment policies and strategies, there is no disproportionate or adverse impact on small institutions. The Board, therefore, believes that the proposed amendments to the rules and the proposed statement of policy will not have a significant, disproportionate economic impact on small institutions.

#### 4. Overlapping or Conflicting Federal Rules

There are no known federal rules that duplicate, overlap, or conflict with this proposed rule.

#### 5. Alternatives to the Proposed Rule.

There are no alternatives that would be less burdensome than the proposed rule in addressing the concerns expressed in the **SUPPLEMENTARY INFORMATION** set forth above.

#### List of Subjects in 12 CFR Parts 563c and 571

Accounting, Bank deposit insurance, Reporting and recordkeeping requirements, Savings and loan associations, Securities.

#### SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

Accordingly, the Board hereby proposes to amend Parts 563c and 571, Subchapter D, Chapter V, Title 12, *Code of Federal Regulations*, as set forth below.

#### PART 563c—ACCOUNTING REQUIREMENTS

1. The authority citation for Part 563c continues to read as follows:

Authority: Sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402-403, 407, 48 Stat. 1256-1257, 1260, as amended (12 U.S.C. 1725-1726, 1730); secs. 3(b), 12-14, 23, 48 Stat. 882, 892, 894-895, 901, as amended (15 U.S.C. 78c(b), m, n, w); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071.

2. Amend § 563c.102 by revising paragraph I.4.; by revising the first sentence of paragraph I.6.(a); by redesignating paragraphs I.7. through 25 as the new paragraphs I.8. through 26; and by adding a new paragraph I.7. to read as follows:

#### § 563c.102 Financial statement presentation.

#### I. Balance Sheet

4. *Trading account assets.* Include securities or any other investments that are considered to be held for trading purposes in accordance with the policy statement at § 571.19.

6. *Investment securities.* (a) Include securities considered to be held for investment purposes in accordance with the policy statement at § 571.19

7. *Assets held for sale.* Investments in assets considered to be held for sale purposes, e.g., mortgage-backed, pass-through certificates, in accordance with the policy statement at § 571.19 should be reported separately in the statement of financial condition.

#### PART 571—STATEMENTS OF POLICY

3. The authority citation for Part 571 continues to read as follows:

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); secs. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); secs. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402, 403, 406, 407, 48 Stat. 1256, 1257, 1259, 1260, as amended (12 U.S.C. 1725, 1726, 1729, 1730); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071.

4. Amend Part 571 by adding a new § 571.19 to read as follows:

#### § 571.19 Investment portfolio policy and accounting guidelines.

(a) This Statement of Policy sets forth the Board's position on the need for institutions to document prudent investment portfolio policies and strategies. It places with the institution's board of directors the responsibility for the establishment of and ongoing monitoring of compliance with the institution's investment policy and strategies. Finally, it sets forth guidance with respect to the determination of the appropriate accounting for and classification<sup>1</sup> of certain securities.<sup>2</sup> The intent of the — statement of policy is not to demarcate safe and sound investment policies and strategies. Such determinations are necessarily dependent upon a case-by-case

<sup>1</sup> "Classification", as used throughout this Statement of Policy, refers to the balance sheet classification of securities and does not refer to classification of assets for purposes of loss allowance analysis under 12 CFR 561.16c. "Classification of Certain Assets". Furthermore, "classification" as used throughout this statement of policy, does not refer to a classification of assets that falls within the arbitration process mandated by the Competitive Equality Banking Act of 1987.

<sup>2</sup> "Securities", as used throughout this Statement of Policy, refers generically to investment securities, loans, mortgage-backed securities and derivative securities.

assessment of individual institutions in the context of applicable regulations, policy statements and supervisory guidelines.

(b) *Investment policy and strategies.*—(1) *Content of policy and strategies.* An institution must document its overall investment policy for the institution as a whole and must also document its investment strategies for each different type of security portfolio. The investment policy and strategies must distinguish between those securities activities undertaken to protect the institution from interest rate risk by maintaining an interest rate spread, and those securities activities engaged in to maximize short-term gains. (For example, an institution may sell mortgage-backed securities to maintain a duration and net yield [after consideration of means of financing the mortgage-backed securities] in changing interest rate environments. This securities activity is considered to differ from the securities activities undertaken to maximize short term gains or attempting to benefit from market anomalies.) Furthermore, changes in policy and strategies (e.g., from loans held for sale to loans held for investment or vice versa) shall be documented and based upon sound rationale. The investment policy and strategies must also, at a minimum, address the following:

(i) The investment policy and strategies in both a rising interest rate and falling interest rate environment. Holding securities (assuming that the institution has the ability to hold the securities) in a rising interest rate environment and selling securities in a declining interest rate environment may be the stated investment strategy of the institution, but is not considered to qualify as an investment policy or strategy accounted for at amortized cost.);

(ii) The institution's intent to purchase and originate securities for investment, sale and/or trading;

(iii) The liquidity considerations of the institution;

(iv) The institution's desired return on investments;

(v) The institution's desired degree of interest rate risk;

(vi) The institution's desired asset/liability position;

(vii) The use of hedging techniques, if any;

(viii) The types of products to be originated and/or purchased;

(ix) The intent of the institution to build a mortgage-servicing portfolio;

(x) The institution's plan for reinvestment of proceeds from sales; and

(xi) The characteristics of the investments originated or purchased.

(2) *Board of directors' approval and review.* The investment policy must be reviewed and approved periodically (but no less than annually) by the institution's board of directors. Furthermore, the institution's investment strategies and securities activities must be reviewed and approved (but no less than quarterly) by the institution's board of directors to ensure that they are consistent with the investment policy and strategies and the securities are accounted for and classified appropriately under generally accepted accounting principles ("GAAP").

(3) *Investment decisions.* (i) An institution shall determine whether securities are intended for its investment, trading or sale accounts at the time the securities are committed to be purchased or originated. These securities shall not be recorded in a suspense account until an institution determines the category.

(ii) The rationale for each investment transaction, or series of like transactions, shall be documented at the time the transaction takes place (i.e., at the time a commitment to purchase, originate or sell is made). Alternatively, documentation of investment decisions may be by exception (e.g., "all adjustable rate mortgages are held for investment"). Then, any exceptions to this documented strategy shall require documentation.) This documentation shall include the designation of securities purchased and/or originated intended for the institution's investment, trading or sale portfolios at the time of commitment to purchase or originate and management's approval of the acquisition or origination and classification. The documentation for investment transactions shall also encompass considerations such as maturity, duration, interest rate risk, yield, reinvestment of proceeds and liquidity. In addition, the documentation must support how the transaction and its characteristics comply with the investment policy and strategies established by the institution.

(c) *Safety and soundness.* The overriding regulatory concern regarding such activities is the extent to which these activities are conducted in a safe and sound manner by competent personnel. Investment decisions and securities activity shall be carried out consistent with the investment policy and strategies that appropriately consider adequate liquidity, protection from interest rate risk, desired return, asset/liability position, capital adequacy and management capabilities of an institution. In addition to

understanding and approving the institution's investment policy and strategies, the institution's board of directors has the fiduciary duty to oversee the establishment of strong internal controls, ensure that management and their investment consultants are reputable and capable, and ensure that securities activities are consistent with the investment policy and strategies of the institution and are accounted for and classified in accordance with GAAP.

(d) *Generally Accepted Accounting Principles.* (1) Accounting guidance for securities including investment securities, loans and mortgage-backed securities and their derivatives exists in various degrees of detail in the American Institute of Certified Public Accountants' ("AICPA") Audit and Accounting Guide for Savings and Loan Associations, the AICPA's Industry Audit Guide for Audits of Banks, the Financial Accounting Board ("FASB") Statement of Financial Accounting Standards ("SFAS") No. 12, "Accounting for Certain Marketable Securities," SFAS No. 65, "Accounting for Certain Mortgage Banking Activities," SFAS No. 91, "Accounting for Nonrefundable Fees and Costs Associated with Originating or Acquiring Loans and Initial Direct Costs of Leases" and various consensus of the Emerging Issues Task Force.

(2) This table provides guidance on the issue of determining the appropriate carrying amount and classification of securities. This discussion does not address the accounting for securities that may separately qualify for hedge accounting.

Investments types	Accounting <sup>1</sup>
Debt:	
Investment.....	Amortized Cost.
Sale.....	Lower of amortized cost or market. <sup>2</sup>
Trading.....	Market. <sup>3</sup>
Marketable Equities:	
Investment or Sale.....	Lower of amortized cost or market. <sup>4,5</sup>
Trading.....	Market. <sup>3</sup>
Mortgage-Backed Securities and Loans:	
Investment.....	Amortized Cost.
Sale.....	Lower of amortized cost or market. <sup>2</sup>
Trading.....	Market. <sup>3</sup>
Transfer or Securities:	
Between Trading and Investment.....	Market. <sup>3</sup>
Between Investment and Sale.....	Lower of amortized cost or market. <sup>6</sup>

<sup>1</sup> The accounting guidance in the table does not include accounting for investments with permanent impairment which must always be considered under GAAP. Additionally, this guidance does not address the accounting for securities acquired for hedging purposes.

<sup>2</sup> Realized and unrealized losses are recognized in the statement of operations.

<sup>3</sup> Realized and unrealized gains and losses are recognized in the statement of operations.

<sup>4</sup> Temporary losses are recognized as an adjustment to equity until final disposition or recovery.

<sup>5</sup> For regulatory accounting purposes, mutual funds meeting the requirements of 12 CFR 523.10(g)(8) can be recorded and reported at cost through December 31, 1993 as prescribed in 12 CFR 563.23-3(c).

<sup>6</sup> When securities are transferred from an investment account to a trading account, gains are deferred until final disposition and losses are recognized in income.

(3) An institution's investment activities shall be accounted for and classified in accordance with GAAP as indicated in the table at paragraph (d)(2) of this section. Critical to the proper accounting for and classification of securities as investments is the intent and ability of an institution to hold the securities for the foreseeable future.

(4) The types, extent and timing of activity must be analyzed to ascertain whether an institution is properly accounting for and classifying its security transactions. If the analysis of activity indicates that an institution did not have the intent to hold securities for the foreseeable future, there is a presumption that all or part of similar securities held at the end of the period represent a portfolio held for sale or trading unless management can document otherwise. Once deemed to be held for sale or trading, transfers of securities between investment, sale or trading classifications should be unusual. Paragraphs (d)(4)(i)-(ii) of this section give guidance with respect to considerations of the intent and ability of an institution to own a security for investment, sale or trading.

(i) *Intent—(A) Sales intent.* In analyzing the investment activity in each security portfolio for intent to hold for the foreseeable future, the reasons for sales of securities shall be reviewed for consistency with the institution's investment policy and strategies, and with the specific investment decision for the original acquisition and classification of the security. If the sales activity is not consistent with the overall investment policy and strategies of the institution, or indicates frequent changes in investment policy and strategies to maximize profit-taking, then there is a presumption that intent to hold the securities does not exist and that the sales actually represent trading activity. Factors to be considered in reviewing sales activity include, but are not limited to, a review of:

(1) The number of sales transactions at gains and at losses during the reporting period;

(2) The relative volume of gross gains and gross losses on sale as percentages of net income and equity;

(3) The dollar amount of assets sold compared with outstanding balances throughout the reporting period;

(4) The rapidity of turnover, including consideration of the average number of days securities are owned prior to sale;

(5) A trend indicating that sales of securities transpire only when gains are recognized (also known as "gains trading");

(6) The strategy of an institution to sell certain types of securities (e.g., a strategy to sell all fixed-rate loans originated);

(7) The impact of sales on the yield and duration of the securities portfolio. (Sales of securities with prepayment risk for the purpose of managing duration does not automatically imply trading; however, a consistent policy of managing yield and prepayment risk only in periods of declining interest rates (where gain recognition is common) does not support an institution's intent to hold securities.);

(8) The purpose for and extent of sales of securities not owned or in production ("short sales"); and

(9) The purpose for and extent of forward commitments to sell securities, including the extent of "pair-off" activity before delivery.

(B) *Originations and purchases intent.* The types and extent of purchases shall also be consistent with the overall investment policy and strategies of an institution. Factors to be considered in reviewing origination and purchase activity for compliance with the investment strategy include, but are not limited to, a review of:

(1) The nature of the securities (type, term, duration, yield, etc.) originated and/or purchased;

(2) The means of financing the acquisition;

(3) Trends indicating that market value is consistently below cost at the time of origination and/or purchase; and

(4) The purpose for and extent of forward commitments to purchase securities, including the extent of "pair-off" activity before delivery.

(C) *Other intent.* Other securities activities that shall be considered when reviewing an institution's intent to hold securities for the foreseeable future include, but are not limited to:

(1) The period of time between sales and purchases of securities;

(2) The method by which securities are financed may assist in analyzing an institution's intent for specific securities. The consistent funding of securities via very short-term liabilities that have not been extended in duration via interest rate swaps, options, futures, etc., may

indicate that the intent to hold the securities is short-term; and

(3) The reasons for an institution's securitization of loans. There are numerous reasons to securitize loans, one being the ability to raise debt at lower cost when collateralized by mortgage-backed securities. Securitization does not automatically portend sale or trade accounting; however, the extent of securitization should be considered in light of an institution's investment policy and strategies, activity and liquidity needs.

(D) *Presumptions of intent to trade.* Finally, the following securities activities are presumed to indicate trading unless an institution has documentation that clearly supports the consistency of such activity with the intent to hold securities.

(1) *"Arbitrage" transactions.* These transactions involve the simultaneous sale and purchase of securities, which are not considered to be substantially the same (e.g., a sale of a treasury security and purchase of a different treasury security, equity security, mortgage-backed security, etc.) in order to "lock-in" short-term profits arising from apparent anomalies in the securities markets.

(2) *Frequent purchases and sales of "when-issued" securities.*<sup>3</sup> "When-issued" securities trading is the buying and selling of securities in the interim between the announcement of an offering and the issuance and payment date of these securities. A purchaser of a "when-issued" security acquires all the risks and rewards of owning a security and may sell the "when issued" security at a profit before taking delivery and paying for it.

(3) *"Pair-Off" activity.*<sup>4</sup> A "pair-off" is a security purchase transaction that is closed out or sold at, or prior to, settlement date. As an example, an investment portfolio manager will commit to purchase a security; then, prior to the predetermined settlement date, the portfolio manager will "pair-off" the purchase with a sale of the same security prior to, or on, the original settlement date. Profits or losses on the transaction are settled by one party to the transaction remitting to the counterparty the difference between the purchase and sale price. Like "when issued" trading, "pair-offs" permit speculation on securities price

<sup>3</sup> Drawn substantially from the Office of the Comptroller of the Currency, Bank Issuance BC-228 on "Selection of Securities Dealers and Unsuitable Investment Practices", April 14, 1988.

<sup>4</sup> *Id.*

movements without paying for the securities.

(4) "Corporate Settlement" on U.S. Government and Federal agency securities purchases.<sup>5</sup> "Regular-way settlement" for transactions in U.S. Government and Federal agency securities is one business day after the trade date. "Regular-way settlement" for corporate securities is five business days after the trade date. The use of a "corporate settlement" method (five business days) for U.S. Government securities purchases appears to be offered by dealers in order to facilitate speculation on the part of the purchaser.

(5) Repositioning repurchase agreements.<sup>6</sup> Dealers can encourage speculation through the use of "pair-off", "when-issued" and "corporate settlement" transactions by providing securities to an institution that cannot be sold at a profit. The buyer purchasing the security pays the dealer a small "margin" that is roughly equivalent to the actual loss in the security. The dealer then agrees to fund the purchase by buying the security back from the purchaser under a resale agreement. The purchaser thus acquires all the risks of ownership of a large amount of depreciated securities for a very small margin payment.

(6) Short sales.<sup>7</sup> A "short sale" is the sale of a security that is not owned. The purpose of a short sale generally is to speculate on the fall in the price of the security. A "short sale against the box" is the sale of a security that is owned. Consideration should be given to the purpose of such transactions and the appropriate classification of these securities when short sales against the box are combined with purchases of commitments or purchases of similar securities.

(ii) Ability. (A) In supporting an institution's ability to hold securities for the foreseeable future, and for purposes of analyzing its ability to hold, documentation shall include, but not be limited to, an analysis of the following:

- (1) The availability of funding;
- (2) The ability to meet margin calls and overcollateralization requirements; and

(3) The ability of the institution to fund commitments to purchase or originate securities in light of regulatory limitations (e.g., loans-to-one borrower limitations, equity risk limitations, growth limitations, etc.). If an institution's pair-off activity is considered to be investment activity (instead of trading activity), then

regulatory limitations shall be analyzed based upon gross commitments to purchase or originate securities adjusted for anticipated prepayments through the period of delivery.

(B) If an institution does not document its ability to fund securities or if this ability to fund securities is not supported by the above analysis, the securities shall be considered held for sale or trading for accounting and classification purposes.

(e) Effective date. The guidelines for determining intent and ability detailed in this section are to be consistently adopted by all insured institutions effective \_\_\_\_\_. The documentation requirements for investment policy and strategies, specific securities transactions and board of directors' reviews are effective \_\_\_\_\_.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,  
Assistant Secretary.

[FR Doc. 88-13854 Filed 6-20-88; 8:45 am]  
BILLING CODE 5720-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 88-NM-61-AD]

#### Airworthiness Directives; Short Brothers Model SD3-60 Series Airplanes

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

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This notice proposes to revise an existing airworthiness directive (AD), applicable to Shorts Model SD3-60 series airplanes, which currently requires inspection of interference bushings for looseness in each of four fittings on the rear fuselage used for attachment of the horizontal stabilizer. Looseness of these fittings, if not detected and corrected, could lead to failure of the horizontal stabilizer attachment fittings. This proposal would revise the existing AD to limit the applicability only to specific airplanes.

**DATE:** Comments must be received no later than August 1, 1988.

**ADDRESSES:** Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-61-AD, 17900 Pacific Highway South, C-

68966, Seattle, Washington 98168. The applicable service information may be obtained from Short Brothers PLC, 2011 Crystal Drive, Suite 713, Arlington, Virginia 22202-3702. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Ms. Armella Donnelly, Standardization Branch, ANM-113; telephone (206) 431-1967. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

##### Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-61-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

##### Discussion

On December 21, 1987, FAA issued AD 88-01-10, Amendment 39-5819 (53 FR 14; January 4, 1988), to require inspection of interference bushings for looseness in each of four horizontal stabilizer attach fittings, and replacement, if necessary, on all Shorts Model SD3-60 series airplanes. That amendment was prompted by a report of an interference fit bushing that was found to be loose in its fitting on the

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

forward right stabilizer attachment located on the rear fuselage cant frame. This condition, if not corrected, could lead to failure of the horizontal stabilizer attach fittings.

Since issuance of that AD, the manufacturer has determined that the problem of torque looseness was found to exist only in airplanes manufactured during a certain period, and was not applicable to all Shorts Model SD3-60 airplanes.

Short Brothers PLC has issued Service Bulletin SD360-55-10, Revision 2, dated November 1987, which limits the effectivity only to Model SD3-60 airplanes, Serial Numbers SH3601 to SH3667, inclusive. The United Kingdom Civil Aviation Authority (CAA) has classified this revision to the service bulletin as mandatory.

This airplane model is manufactured in the United Kingdom and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

The FAA proposes to revise the applicability of AD 88-01-10 to exclude certain U.S.-registered planes that have been determined not to be affected by the unsafe condition addressed in that AD.

The economic impact analysis would be revised to reflect the appropriate number of airplanes now affected by this action. As indicated below, the total number of U.S.-registered planes would now be 44, rather than 66, as was indicated in the economic impact analysis of AD 88-01-10.

It is estimated that 44 airplanes of U.S. registry would be affected by this AD, that it would take approximately 4 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$7,040.

The regulations set forth in this notice would be promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44

FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane (\$160). A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By revising the applicability statement of AD 88-01-10, Amendment 39-5819 (53 FR 14; January 4, 1988), as follows:

**Short Brothers:** Applies to Model SD-360 series airplanes, Serial Numbers SH3601 to SH3667, certificated in any category. Compliance required as indicated, unless previously accomplished.

To preclude failure of the horizontal stabilizer attach fittings, accomplish the following:

A. Within the next 3 months after the effective date of this AD, inspect the interference fit bushings in each of the four horizontal attach fittings in accordance with Shorts Service Bulletin Number SD360-55-10, dated November 1985.

B. If the bushing is found to be loose in its fitting and the movement exceeds 0.005 inches, replace the fitting before further flight.

C. If the bushing is found to be loose in its fitting and the movement does not exceed 0.005 inches, replace the fitting within the next 60 days.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon

request to Short Brothers PLC, 2011 Crystal Drive, Suite 713, Arlington, Virginia 22202-3702. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on June 13, 1988.

Frederick M. Isaac,  
Acting Director, Northwest Mountain Region.  
[FR Doc. 88-13863 Filed 6-20-88; 8:45 am]  
BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 88-NM-63-AD]

#### Airworthiness Directives; British Aerospace Model BAC 1-11 200 and 400 Series Airplanes

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

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This notice proposes to amend an existing airworthiness directive (AD), applicable to British Aerospace Model BAC 1-11 200 and 400 series airplanes, which currently requires structural inspections and repairs or replacement, as necessary, on high time British Aerospace Model 1-11 200 and 400 series airplanes to assure continued airworthiness. That action was prompted by the fact that some British Aerospace Model BAC 1-11 200 and 400 series airplanes have exceeded the manufacturers' original fatigue design life goal. These older airplanes are the ones most likely to develop fatigue cracks. This proposal is prompted by a structural re-evaluation, which identified the requirements for additional inspection procedures for some variations of the airplane. It also identified the need to change some threshold inspection times, repetitive inspection intervals, and methods of inspections. This proposed amendment defines structural inspection requirements for the identified items necessary to maintain the structural integrity of these airplanes.

**DATES:** Comments must be received no later than August 20, 1988.

**ADDRESSES:** Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-63-AD, 17900 Pacific Highway South, C-

68966, Seattle, Washington 98168. The applicable service information may be obtained from British Aerospace, Inc., P.O. Box 17414, Dulles International Airport, Washington, DC 20041. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Ms. Armella Donnelly, Standardization Branch, ANM-113; telephone (206) 431-1967. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

##### Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 88-NM-63-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

##### Discussion

On October 30, 1987, FAA issued AD 87-24-06, Amendment 39-5772 (52 FR 44097; November 18, 1987), to require structural inspections and repairs or replacement, as necessary, on high time British Aerospace Model BAC 1-11 200 and 400 series airplanes to assure continued airworthiness.

Since the issuance of that AD, a structural re-evaluation of these airplanes has identified the need for

additional inspection procedures for some variations of the airplane. This reevaluation was accomplished since some of these airplanes have now exceeded 70,000 landings and a need was identified to change some of the threshold inspection times, repetitive inspection intervals, and methods of inspection for fatigue cracks, and to introduce into the inspection program additional inspections for aircraft equipped with Rolls Royce engines. These additional inspections are necessary to ensure the structural integrity of these airplanes that have exceeded the manufacturer's fatigue design life goal.

British Aerospace has issued Alert Service Bulletin 51-A-PM5830, Issue 3, dated March 19, 1987, which describes specific items/areas to be inspected, including additional inspections of engine mount/attachment structure on aircraft equipped with Rolls-Royce Spey MK 506 engines, MK 511 engines, and MK 512 engines. The inspections for the MK 506 and MK 511 engines are recommended to be accomplished on aircraft between 68,000 and 72,000 landings. Inspection of MK 512 engines is recommended to be accomplished between 67,000 and 71,000 landings. This service bulletin not only recommends additional inspections, but also recommends changes to repetitive inspection intervals, threshold inspection times, and methods used for some inspections.

This airplane model is manufactured in the United Kingdom and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable airworthiness bilateral agreement.

Since this condition is likely to exist or develop on other airplanes of this same type design registered in the U.S., an AD is proposed which would require revision of the Model BAC 1-11 200 and 400 series airplane operators maintenance program, within six months after the effective date of the revised AD, and would require additional inspections of certain structural items to detect cracks, corrosion, and other damage in accordance with the service bulletin previously mentioned. If defects are found, they are to be reported to the manufacturer. The additional inspections are not a substitute for the existing approved program, but are supplementary requirements for long-term operation. The compliance time reflected in the original AD will remain the same, but the additional inspections would be required within one year after the effective date of the revised AD.

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Action 1980 (Pub. L. 96-511) and have been assigned OMB Control Number 2120-0056.

It is estimated that 70 airplanes of U.S. registry would be affected by this AD, that it would take approximately 129 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$361,200.

The regulations set forth in this notice would be promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, British Aerospace Model BAC 1-11 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

## § 39.13 [Amended]

2. By revising AD 87-24-06, Amendment 39-5772 (52 FR 44097; November 18, 1987), by adding new paragraphs 3. and 4., and redesignating existing paragraphs 3., 4., and 5., as 5., 6., and 7., respectively, as follows:

**British Aerospace:** Applies to Model BAC 1-11 200, 400, series airplanes, certificated in any category. Compliance is required as indicated below, unless previously accomplished.

To ensure continuing structural integrity, accomplish the following:

1. On or before December 24, 1988, incorporate revision into the FAA-approved maintenance inspection program which requires accomplishment of the inspections and repairs, as necessary, of each Structural Significant Item as listed in Table 1 of British Aerospace BAC 1-11 Alert Service Bulletin 51-A-PM5830, Supplemental Inspection Document, Issue 2, dated March 21, 1983. The revision to the maintenance program must include procedures to notify the manufacturer of the results of all inspections, including nil defects, of significant structural items. The inspection thresholds, repetitive intervals, and inspection techniques are listed in the alert service bulletin.

2. Inspect each Structural Significant Item on or before June 24, 1989, or prior to the accumulation of the number of landings listed in the landing threshold indicated in the alert service bulletin, whichever occurs later, and thereafter, repeat these inspections at intervals not to exceed the landings specified in the service bulletin.

3. Within six months from the effective date of this amendment, incorporate a revision into the FAA-approved maintenance inspection program which requires inspection, repairs, and replacements, as necessary, in accordance with Tables 1, 2, and 3 of British Aerospace BAC 1-11 Alert Service Bulletin 51-A-PM5830, Issue 3, dated March 19, 1987. The revision to the maintenance program must include procedures to notify the manufacturer when Structural Significant Items are found cracked or otherwise significantly deteriorated. The inspection thresholds, repetitive intervals and inspection techniques are listed in the service bulletin.

4. Within one year after the effective date of this amendment, or prior to the accumulation of landings listed in the landing threshold indicated in Alert Service Bulletin 51-A-PM5830, Issue 3, dated March 19, 1987, whichever occurs later, and thereafter, at intervals not to exceed the landing specified in that service bulletin, accomplish the inspection and repair, if necessary, of the Structural Significant Items identified in Table 1, 2, and 3 of that service bulletin.

5. If cracks are found, prior to further flight:

a. Replace with a serviceable part of the same part number; or

b. Repair in accordance with the Structural Repair Manual, listed in the service bulletin;

c. Repair in accordance with a method approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

6. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

7. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the inspections and/or modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturers may obtain copies upon request to British Aerospace, Inc., P.O. Box 17414, Dulles International Airport, Washington, DC 20041. This information may be examined at the FAA, Northwest Mountain Region 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on June 15, 1988.

Frederick M. Isaac,

Acting Director, Northwest Mountain Region.

[FR Doc. 88-13968 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

## 14 CFR Part 39

[Docket No. 87-NM-55-AD]

**Airworthiness Directives; Garrett Turbine Engine Company Models TSCP 700-4B and TSCP 700-5 Auxiliary Power Units, Installed in, but Not Limited to, McDonnell Douglas Model DC-10 and Airbus Industrie Model A-300 Series Airplanes**

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

**ACTION:** Supplemental Notice of Proposed Rulemaking (NPRM); reopening of comment period.

**SUMMARY:** This notice proposes to revise an earlier proposed airworthiness directive (AD), applicable to Garrett Models TSCP 700-4B and TSCP 700-5 Auxiliary Power Units (APU) as installed in McDonnell Douglas Model DC-10 and Airbus Industrie Model A-300 series airplanes, respectively, which would have required an increase in the tie rod stretch. This proposal revises the proposed rule by providing, as an optional method of compliance, a life limit on in-service first stage low pressure compressor disks of 8,000 cycles, and replacement at that time with an improved disk. The initial proposal was prompted by a report of an APU compressor tie rod separation, following a first stage compressor disk rim separation, that resulted in an

uncontained release of rotor components. This condition, if not corrected, could lead to additional uncontained APU rotor failures and the potential for compartment fires.

**DATE:** Comments must be received no later than August 1, 1988.

**ADDRESSES:** Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 87-NM-55-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Garrett Airline Service Division, A Division of the Garrett Corporation, P.O. Box 29003, Phoenix, Arizona 85038. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or 4344 Donald Douglas Drive, Long Beach, California.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Roy McKinnon, Aerospace Engineer, Propulsion Branch, ANM-140L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 4344 Donald Douglas Drive, Long Beach, California 90808; telephone (213) 514-6327.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

**Availability of NPRM**

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket

No. 87-NM-55-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

#### Discussion

A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive (AD), which would have required an increase in the tie rod stretch of Garrett Models TSCP 700-4B and TSCP 700-5 auxiliary power units (APU), was published in the Federal Register on July 6, 1987 (52 FR 25237). The period for public comment closed on August 21, 1987.

Numerous commenters requested the FAA consider an alternate method of compliance with the proposed AD. Specifically, commenters suggested that, as an alternative to performing the tie rod stretch, operators could instead place a life limit on the low pressure disk.

The FAA concurs with the commenters. The increase in the tie rod stretch is considered to be one solution to address the unsafe condition because it increases the clamping forces on the rotating group to a level well above the anticipated separating forces caused by unbalance. The only failure of a Mark II LPC-1 disk resulted in severe rotating group unbalance, unstacking of the curvics, and separation of the tie rod. This allowed the rotating group to unstack with disk release. Analytical studies, combined with field history, confirm that disk separations of five or more platforms are very remote. No separations greater than five platforms have been reported on the TSCP 700 compressor. The increase in the tie rod stretch increases the clamping forces above that required to contain the disk if five platforms separate, while not exceeding its strength limits.

Further extensive investigation by the FAA and the manufacturer has resulted in the issuance of Revision 3 of Garrett Service Bulletin TCOP700-49-A5666, dated December 15, 1987, which has added a procedure where operators may life-limit the in-service disks at 8,000 cycles, replace the disks with an improved part, and return the "used" disks for credit. The FAA has reviewed and approved this revision of the service bulletin. The disk life limit is acceptable to the FAA because no failures have occurred under 8,000 cycles.

In summary, the objective of the tie rod restretch is to introduce the necessary steps to maintain safety in the event of future separations and unbalance. The alternative action of life-limiting the disk at 8,000 cycles also achieves this objective. By removing the disk at 8,000 cycles, operators' concerns about the increased complexity, the time

needed to restretch, and the recurring inspections, are eliminated.

The FAA has determined that the NPRM must be revised to include the life-limiting procedures outlined in the new revision to the Garrett Service Bulletin, described above, as an alternative method of compliance. Additionally, a paragraph has been added that would provide terminating action for the requirements of the AD, by replacing the disk with a deflector-peened disk, in accordance with Garrett Service Bulletin TSCP 700-49-5695, Revision 1, dated December 22, 1987.

The applicability of this proposed rule has been clarified to identify the models of airplanes which may be equipped with the affected APU unit.

The proposed rule has been revised to remove all references to the use of "later-FAA approved revisions" of the applicable service bulletin, in order to be consistent with FAA policy in that regard. The FAA has determined that this change will not increase the economic burden on any operator, nor will it increase the scope of the AD, since later revisions of the service bulletin may be approved as an alternate means of compliance with the AD, as provide by paragraph D.

This proposal constitutes a revision to the original NPRM that is sufficiently different to require amendment of the NPRM and reopening of the comment period.

It is estimated that 229 APU's installed in airplanes of U.S. registry would be affected by this AD, that it would take approximately 3 manhours per unit to accomplish the tie rod restretch, and that the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators who elect to perform the restretch is estimated to be \$27,480. This cost would be reimbursed by the manufacturer. The cost to those operators who elect to replace the disk at 8,000 cycles would be approximately \$3,037 per disk.

The regulations set forth in this notice would be promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant

to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane (\$120 or \$3,037). A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### §39.13 [Amended]

2. By revising the Notice of Proposed Rulemaking, Docket 87-NM-55-AD, published in the Federal Register on July 6, 1987 (52 FR 25237), to read as follows:

**Garrett Turbine Engine Company:** Applies to Garrett Model TSCP 700-4B Auxiliary Power Units (APU), prior to serial number P-90670; and Model TSCP 700-5 APU's, prior to serial number P-80441; as installed in, but not limited to, McDonnell Douglas DC-10 and Airbus Industries A300 series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent compressor tie rod separation in the event of disk rim separation, accomplish the following:

A. Relieve the tie rod stretch and restretch the tie rods in accordance with the Accomplishment Instructions of Garrett Alert Service Bulletin TSCP 700-49-A5666, Revision 2, dated April 10, 1987, in accordance with the following schedule:

**Note:** For the purpose of this AD, the Garrett method of cycle counting may be used on the first stage low pressure compressor disk.

1. If the first stage low pressure compressor disk has been allowed to run above 91% and has accumulated more than 6,000 cycles after the effective date of the AD, complete the tie rod restretch in accordance with the Accomplishment Instructions, and within the cycle times defined by Figure 1, of the above Service Bulletin. The date shown in Figure 1 is replaced by the effective date of this AD.

2. If the first stage low pressure compressor disk has accumulated more than 6,000 cycles since new (CSN), but the  $N_1$  speed has been limited to 91% maximum, the tie rod restretch must be accomplished within 3,000 cycles after the effective date of this AD, but not to exceed the disk life limit of 12,000 CSN.

3. If the first stage low pressure compressor disk has accumulated 6,000 CSN or less and the  $N_1$  speed has been allowed to go above 91% the tie rod restretch must be accomplished prior to the accumulation of 8,000 CSN.

4. If the first stage low pressure compressor disk has accumulated 6,000 CSN or less, but the  $N_1$  speed has been limited to 91% maximum, the tie rod restretch must be accomplished prior to the accumulation of 9,000 CSN.

B. Compliance with option 2, "Disk Replacement at 8,000 Cycles," of the Accomplishment Instructions of Garrett Service Bulletin TSCP 700-49-A5666, Revision 3, dated December 15, 1987, is considered an acceptable alternate means of compliance with the requirements of this AD.

C. Replacement of the disk with a deflector-peened disk, in accordance with Garrett Service Bulletin TSCP 700-49-5695, Revision 1, dated December 22, 1987, constitutes terminating action for the requirements of this AD.

D. Alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Los Angeles Aircraft Certification Office, FAA, Northeast Mountain Region.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to the Garrett Airline Service Division, A Division of the Garrett Corporation, P.O. Box 29003, Phoenix, Arizona 85038. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at 4344 Donald Douglas Drive, Long Beach, California.

Issued in Seattle, Washington, on June 13, 1988.

Frederick M. Isaac,  
Acting Director, Northwest Mountain Region.

[FR Doc. 88-13970 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-B-M

## 14 CFR Part 71

[Airspace Docket No. 88-ACE-061]

### Proposed Alteration of Transition Area, Grinnell, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to alter the 700-foot transition area at Grinnell, Iowa, to provide additional controlled airspace for aircraft executing a new instrument approach procedure to the Grinnell, Iowa, Airport utilizing the nondirectional radio beacon (NDB) and VOR/DME.

DATE: Comments must be received on or before July 24, 1988.

ADDRESSES: Send comments on the proposal to: Federal Aviation Administration, Manager, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426-3408.

The official docket may be examined at the Office of the Regional Counsel, Central Region, Federal Aviation Administration, Room 1558, 601 East 12th Street, Kansas City, Missouri.

An informal docket may be examined at the Office of the Manager, Traffic Management and Airspace Branch, Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Lewis G. Earp, Airspace Specialist, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, FAA, Central Region, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426-3408.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested persons may participate in the proposed rulemaking by submitting such written data, views or arguments as they may desire. Communications should identify the airspace docket number, and be submitted in duplicate to the Traffic Management and Airspace Branch, Air Traffic Division, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106. All communications received on or before the closing date for comments will be considered before action is taken on the proposed amendment. The proposal contained in this Notice may be changed in light of the comments received. All comments received will be available both before and after the closing date for comments in the Rules Docket for examination by interested persons.

#### Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Traffic Management and Airspace Branch, 601 East 12th Street, Kansas City, Missouri 64106, or by calling (816) 426-3408.

Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for further NPRMs should also request a copy of Advisory Circular No. 11-2A which describes the application procedure.

#### Discussion

The FAA is considering an amendment to Subpart G, § 71.181 of the Federal Aviation Regulations (14 CFR 71.181) by altering the 700-foot transition area at Grinnell, Iowa. To enhance airport usage, the Grinnell, Iowa, Airport is being provided with additional controlled airspace for aircraft executing a new instrument approach procedure utilizing the NDB and VOR/DME. The establishment of this new instrument approach procedure based on these approach aids entails alteration of the transition area at Grinnell, Iowa, at and above 700 feet above ground level (AGL) within which aircraft are provided air traffic control service. The intended effect of this action is to ensure segregation of aircraft using the approach procedure under Instrument Flight Rules (IFR) and other aircraft operating under Visual Flight Rules (VFR).

Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

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**

Accordingly, pursuant to the authority delegated to me, the FAA proposes to amend Part 71 of the FAR (14 CFR Part 71) as follows:

**PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS****Grinnell Municipal Airport, Iowa [Amended]**

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; E.O. 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:

**Grinnell, Iowa [Revised]**

The airspace extending upward from 700 feet above the surface within an eight and one-half (8.5) statute mile radius of the Grinnell, Iowa Airport Bend (Lat. 41°42'18"N., Long. 92°43'45"W.)

Issued in Kansas City, Missouri, on June 9, 1988.

Clarence E. Newbern,

Manager, Air Traffic Division.

[FR Doc. 88-13865 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

**14 CFR Part 71**

[Airspace Docket No. 88-ACE-07]

**Proposed Alteration of Transition Area; O'Neill, NE**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This notice proposes to alter the 700-foot transition area at O'Neill, Nebraska, to provide additional controlled airspace for aircraft executing a new instrument approach procedure to the O'Neill Municipal Airport utilizing the Runway 31 VOR.

**DATE:** Comments must be received on or before July 24, 1988.

**ADDRESSES:** Send comments on the proposal to: Federal Aviation Administration, Manager, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426-3408.

The official docket may be examined at the Office of the Regional Counsel, Central Region, Federal Aviation Administration, Room 1558, 601 East 12th Street, Kansas City, Missouri.

An informal docket may be examined at the Office of the Manager, Traffic Management and Airspace Branch, Air Traffic Division.

**FOR FURTHER INFORMATION CONTACT:**

Dale L. Carnine, Airspace Specialist, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, FAA, Central Region, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426-3408.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

Interested persons may participate in the proposed rulemaking by submitting such written data, views or arguments as they may desire. Communications should identify the airspace docket number, and be submitted in duplicate to the Traffic Management and Airspace Branch, Air Traffic Division, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106. All communications received on or before the closing date for comments will be considered before action is taken on the proposed amendment. The proposal contained in this Notice may be changed in light of the comments received. All comments received will be available both before and after the closing date for comments in the Rules Docket for examination by interested persons.

**Availability of NPRM**

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Traffic Management and Airspace Branch, 601 East 12th Street, Kansas City, Missouri 64106, or by calling (816) 426-3408.

Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for further NPRMs should also request a copy of Advisory Circular No. 11-2A which describes the application procedure.

**Discussion**

The FAA is considering an amendment to Subpart G, § 71.181 of the Federal Aviation Regulations (14 CFR 71.181) by altering the 700-foot transition area at O'Neill, Nebraska. To enhance airport usage, a new instrument approach procedure is being developed for the O'Neill, Nebraska, Municipal Airport utilizing the Runway 31 VOR. The establishment of this new instrument approach procedure based on this approach aid entails alteration of the transition area at O'Neill, Nebraska, at and above 700 feet above ground level (AGL) within which aircraft are provided air traffic control service. The intended effect of this action is to ensure segregation of aircraft using the

approach procedure under Instrument Flight Rules (IFR) and other aircraft operating under Visual Flight Rules (VFR). Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

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**

Accordingly, pursuant to the authority delegated to me, the FAA proposes to amend Part 71 of the FAR (14 CFR Part 71) as follows:

**PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS****O'Neill Municipal Airport, Nebraska [Amended]**

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; E.O. 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:

**O'Neill, Nebraska [Revised]**

That airspace extending upward from 700 feet above the surface within a 5.5 mile radius of the O'Neill Municipal Airport (lat. 42°33'15"N., long. 98°41'15"W.); within 3.5 miles each side of the O'Neill VORTAC 315° radial, extending from the 5.5 mile radius to 12 miles northwest of the VORTAC and within 3.0 miles each side of the O'Neill VORTAC 148° radial, extending from the 5.5 mile radius to 8.5 miles southeast of the VORTAC and that airspace extending upward from 1,200 feet above the surface.

Issued in Kansas City, Missouri, on June 9, 1988.

Clarence E. Newhern,

Manager, Air Traffic Division.

[FR Doc. 88-13866 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 71

[Airspace Docket No. 88-AGL-10]

#### Proposed Establishment of Transition Area; Kenosha, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish the Kenosha, WI, transition area to accommodate a new VOR Runway 24R Standard Instrument Approach Procedure (SIAP) to Kenosha Municipal Airport, Kenosha, WI. The intended effect of this action is to ensure segregation of the aircraft using approach procedures instrument conditions from other aircraft operating under visual weather conditions in controlled airspace.

**DATE:** Comments must be received on or before July 28, 1988.

**ADDRESS:** Send comments on the proposal in triplicate to: Federal Aviation Administration, Regional Counsel, AGL-7, Attn: Rules Docket No., 88-AGL-10, 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:

Harold G. Hale, Air Traffic Division, Airspace Branch, AGL-520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7360.

#### SUPPLEMENTARY INFORMATION:

##### 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. 88-AGL-10." 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, S.W., 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 Kenosha, WI.

The development of a new VOR Runway 24R SIAP requires that the FAA designate airspace to ensure that the procedure will be contained within controlled airspace. The minimum descent 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.

Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

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

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:

#### PART 71—[AMENDED]

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; E.O. 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:

#### Kenosha, WI [New]

That airspace extending upward from 700 feet above the surface within an 8.5 mile radius of Kenosha Municipal Airport, Kenosha, WI, (Lat. 42°35'43"N., Long. 87°55'39"W.); excluding the portions which overlie the Chicago, IL, and Milwaukee, WI, transition areas.

Issued in Des Plaines, Illinois, on June 8, 1988.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 88-13867 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

## 14 CFR Part 75

[Airspace Docket No. 88-AWA-4]

## Proposed Establishment of Jet Route J-596, Maine

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish new Jet Route/High Level Route HL/J-596 between Sherbrooke, PQ, Canada to Halifax, NS, Canada via Bangor, ME. The Canadian Government has requested this route and this action supports the proposal. The route provides an efficient routing for traffic between the Canadian points and has no significant effect on the use of U.S. airspace.

**DATE:** Comments must be received on or before August 1, 1988.

**ADDRESSES:** Send comments on the proposal in triplicate to: Director, FAA, New England Region, Attention: Manager, Air Traffic Division, Docket No. 88-AWA-4, Federal Aviation Administration, 12 New England Executive Park, Burlington, MA 01803.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue SW., Washington, DC.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

**FOR FURTHER INFORMATION CONTACT:** Lewis W. Still, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9250.

**SUPPLEMENTARY INFORMATION:**

## 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, aeronautical, 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. 88-AWA-4." 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 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 Inquiry Center, APA-230, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484.

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 Part 75 of the Federal Aviation Regulations (14 CFR Part 75) to establish new Jet Route/High Level Route HL/J-596 from Sherbrooke, PQ, Canada Via Bangor, ME, to Halifax, NS, Canada. Transport Canada has requested this route and this action is to support that proposal. The route provides an efficient routing for traffic between the Canadian points and has no significant effect on the use of U.S. airspace. Section 75.100 of Part 75 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

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 75

Aviation safety, Jet routes.

## The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 75 of the Federal Aviation Regulations (14 CFR Part 75) as follows:

**PART 75—ESTABLISHMENT OF JET ROUTES AND AREA HIGH ROUTES**

1. The authority citation for Part 75 continues to read as follows:

Authority: 49 U.S.C. 1348(a) 1354(a), 1510; E.O. 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.09.

## § 75.100 [Amended]

2. § 75.100 is amended as follows:

## J-596 [New]

From Sherbrooke, PQ, Canada via Bangor, ME, to Halifax, NS, Canada. The airspace within Canada is excluded.

Issued in Washington, DC, on June 9, 1988.

Temple H. Johnson,  
Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 88-13864 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

**SECURITIES AND EXCHANGE COMMISSION**

## 17 CFR Parts 239, 270, and 274

[Release No. IC-16431; File No. S7-10-88]

## Payment of Asset-Based Sales Loads by Registered Open-End Management Investment Companies

AGENCY: Securities and Exchange Commission.

ACTION: Proposal of rule amendments.

**SUMMARY:** The Commission is proposing amendments to an existing rule that permits a registered open-end management investment company ("mutual fund" or "fund") to use fund assets to pay costs associated with the distribution of fund shares. The reason for the proposal is to address certain practices that have developed under the existing rule.

The proposed amendments would, among other things, clarify and enhance standards for approval or continuation of distribution plans, require that payments under a distribution plan be made on a current basis and be for specific distribution services actually provided to the fund, define payments made under a distribution plan as "asset-based sales loads" and prohibit funds that adopt or continue distribution plans from being held out to the public as "no-load" funds or from being otherwise offered in a misleading manner using similar terminology. Additionally, the proposed amendments would clarify that, for purposes of the rule, each separate series of a mutual fund should be treated as a separate fund.

The Commission is also proposing amendments to another existing rule that exempts from the requirement of prior Commission approval certain distribution agreements between funds and their affiliated persons. These amendments are intended to expand the ability of affiliated funds to finance distribution efforts jointly. These amendments are intended to expand the ability of affiliated funds to finance distribution efforts jointly. The proposed rule amendments would allow a mutual fund, under certain conditions, to enter into joint distribution agreements with one or more other funds that are affiliated with the fund, with affiliated persons of the fund, or with the fund's principal underwriter. The rule amendments would also provide that, for purposes of the rule, each separate series of a mutual fund should be treated as a separate fund.

Finally, the Commission is proposing to amend the registration statement form for mutual funds. This amendment would require an additional disclosure to be made regarding the amount of payments under distribution plans.

**DATE:** Comments must be received on or before September 19, 1988.

**ADDRESS:** Send comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. (Reference to File No. S7-10-88). All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

**FOR FURTHER INFORMATION CONTACT:** With respect to the proposed rule amendments, Rochelle G. Kauffman, Attorney, (202) 272-3045, or Brian M. Kaplowitz, Chief, (202) 272-2048, Office of Regulatory Policy; with respect to accounting issues, Lawrence A. Friend,

Chief Accountant, (202) 272-2106, Office of Disclosure and Review; Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Securities and Exchange Commission today is asking for public comment on proposed amendments to rule 12b-1 (17 CFR 270.12b-1) under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) ("Act"). Rule 12b-1 permits, subject to specified conditions, a mutual fund to adopt a plan ("12b-1 plan") to use a portion of fund assets to finance activities that are primarily intended to result in the sale of fund shares. The proposed amendments, if adopted, would address certain distribution practices that have developed since rule 12b-1 was originally adopted.<sup>1</sup>

Specifically, the proposed amendments would: (a) Require funds to take steps designed to reduce the amount of any excess distribution spending by a third party that has been carried forward in anticipation of reimbursement under the 12b-1 plan; (b) require funds to base decisions to adopt or continue 12b-1 plans on appropriate business estimates and projections; (c) clarify the requirement that a 12b-1 plan must be likely to benefit shareholders; (d) require that the amounts accrued under a fund's 12b-1 plan reasonably correlate with the fund's distribution expenditures; (e) clarify that the level of payments under a 12b-1 plan must be within the range of what would have been negotiated at arm's-length in light of all of the surrounding circumstances; (f) require funds, in determining whether to implement or continue a 12b-1 plan, to consider whether total distribution charges exceed, or are reasonably likely to exceed the maximum front-end sales load permitted under the Rules of Fair Practice of the National Association of Securities Dealers ("NASD Rules"); (g) require disclosure of whether and under what circumstances, over the life of the investment, total distribution charges could exceed the maximum sales load limits in the NASD Rules; (h) require each 12b-1 plan to specify the maximum amount that can be spent annually for distribution under the plan, based on the anticipated level of distribution services to be provided to the fund; (i) restrict the ability of funds to use payments under 12b-1 plans to pay for non-distribution services; (j) restrict the ability of funds to reimburse a third party for excess distribution spending after the effective date of the amendments, if the

reimbursement occurs more than one year after the end of the calendar quarter during which spending took place; (k) require annual shareholder approval for continuation of any 12b-1 plan; (l) clarify the circumstances under which funds may make payments for distribution after termination of a 12b-1 plan; and (m) define payments made under 12b-1 plans as "asset-based sales loads" and prohibit funds that adopt or continue 12b-1 plans from being held as "no-load" funds or from being otherwise offered in a misleading manner using similar terminology. The amendments would also: (a) Clarify that, for purposes of the rule, each separate series of a series fund should be treated as a separate fund, and (b) reorganize the provisions of the rule to make the rule easier to understand and follow.

The Commission is also proposing amendments to rule 17d-3 (17 CFR 270.17d-3) under the Act, which provides an exemption from the Act's prohibition against joint transactions or arrangements for certain agreements between a fund and its non-fund affiliates relating to the distribution of fund shares. The proposed amendments would, if adopted, (i) expand, subject to certain conditions, the exemptive relief provided by the rule to permit a fund to enter into joint distribution agreements with other funds that are affiliated with the fund, its affiliates, or its principal underwriter; and (ii) clarify that, for purposes of the rule, each separate series of a fund should be treated as a separate fund.

Finally, the Commission is proposing an amendment to item 7 of form N-1A (17 CFR 239.15A), under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). This amendment would require disclosure in the fund's prospectus of whether and under what circumstances total distribution charges could exceed the maximum sales loads permitted under the NASD Rules.

## Background

### A. Payment of Distribution Expenses by a Mutual Fund Under the Act

#### 1. Legislative History and Statutory Provisions

The Act, in general, reflects a Congressional concern with mutual fund distribution financing. This concern is evidenced by provisions in the Act that specifically address each method of distribution financing of which Congress was aware in 1940.<sup>2</sup> Among these

<sup>1</sup> Rule 12b-1 was adopted in Investment Company Act Rel. No. 11414 (Oct. 28, 1980) [45 FR 73898, Nov. 7, 1980] (the "Adopting Release").

<sup>2</sup> These provisions include section 22 of the Act (15 U.S.C. 80a-22), relating to sales loads charged by

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provisions is section 12(b) of the Act (15 U.S.C. 80a-12(b)), which provides:

It shall be unlawful for any registered open-end company (other than a company complying with the provisions of section 10(d)) to act as a distributor of securities of which it is the issuer, except through an underwriter, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The legislative history of section 12(b) characterizes the section as one "[that] protects the open-end company against excessive sales, promotion expenses, and so forth."<sup>3</sup> Additionally, shortly after the adoption of the Act, a commenter discussing section 12(b) stated:

Apparently the Commission was particularly fearful of the possibility that open-end investment companies in their formative stages might be made to shoulder the unprofitable burden of selling and distributing their shares during this period of heavy expense and small return, building up the investment company for the benefit of some controlling person.<sup>4</sup>

Thus, section 12(b) was intended to prevent possible abuses by giving the Commission authority to regulate the use of fund assets to pay for the distribution of fund shares.<sup>5</sup>

## 2. Commission and Staff Interpretations

Before the adoption of rule 12b-1, the Commission opposed the use of fund assets to pay for the distribution of fund shares.<sup>6</sup> This opposition was based on a

open-end investment companies, and section 27 of the Act (15 U.S.C. 80a-27), governing the sales of periodic payment plan certificates by registered investment companies. Congress also specifically addressed the use of fund assets to cover distribution expenses in section 10(d) of the Act (15 U.S.C. 80a-10(d)), which provides a limited exception from the Act's independent director requirements for investment companies that are closely affiliated with investment advisers and where such investment companies are primarily designed to make a medium of investment diversification available to the adviser's smaller customers. Section 10(d)(5) provides that a company relying on section 10(d) may not incur "sales or promotion expenses," and section 10(d)(3) provides that no sales load may be charged on securities issued by such a company.

<sup>3</sup> See Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess. 112 (1940) (Statement of David Schenker).

<sup>4</sup> See A. Jaretzki, *The Investment Company Act of 1940*, 26 Wash. U.L.Q. 303, 324-25 (1941).

<sup>5</sup> At the time rule 12b-1 was adopted, the Commission discussed the scope of its rulemaking authority under section 12(b) of the Act. See Adopting Release, *supra* note 1.

<sup>6</sup> See Investment Company Act Rel. No. 9470 (Oct. 4, 1976) (41 FR 44770, Oct. 12, 1976) at note 1 and accompanying text ("Release No. 9470").

concern that, if funds were allowed to pay such expenses, the decisions as to the level of expenditures for distribution would be made or influenced by the fund's investment adviser. Since the adviser's compensation is typically based on the size of the fund, the Commission believed that the adviser might be inclined to spend excessive amounts on the distribution of fund shares in an effort to increase fund assets and its own compensation.<sup>7</sup>

Despite the traditional position, however, investment companies were allowed on a number of occasions to bear distribution expenses. First, certain funds that had "internalized" management functions<sup>8</sup> were allowed to pay distribution expenses out of fund assets.<sup>9</sup> Where an internally managed

<sup>7</sup> In addition, the Commission staff in certain "no-action" letters, questioned the use of fund assets for distribution based on several provisions of the Act. For instance, the staff took the position that payments for distribution out of fund assets might constitute an "excessive" or "discriminatory" sales load in violation of section 22 of the Act. See *Axe-Houghton Fund A, Inc.* (pub. avail. Dec. 18, 1973). In that no-action letter, the staff also objected to the payment of continuing fees to a fund's principal underwriter and the sharing of those fees with dealers that had distributed fund shares on the grounds that this practice could constitute a breach of fiduciary duty under section 36(a) (15 U.S.C. 80a-35(a)) and might also be inconsistent with the fiduciary obligations of fund directors under section 15(b) (15 U.S.C. 80a-15(b)) (relating to continuation of the fund's underwriting contract). *Id.* On another occasion, the staff stated that, given the potential conflict of interest present where the fund bears distribution expenses, "it would be necessary to consider particularly the possibility of a violation of section 36(b)" of the Act (15 U.S.C. 80a-35(b)). See Carl L. Shipley, Esq. (pub. avail. June 9, 1975).

<sup>8</sup> An investment company is said to have internalized its management functions where most or all of the services traditionally provided by the investment adviser or third parties are performed at cost by salaried employees of the fund or by subsidiaries of the fund. See generally *Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth*, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 49 (1966) ("Public Policy Implications"). See also Wharton School of Finance and Commerce, *A Study of Mutual Funds*, H.R. Rep. No. 2274, 87th Cong., 2d Sess. 441 (1962) ("Wharton Report"). Internally managed funds may receive investment advice from a third-party investment adviser, but the adviser typically provides only advice and is not represented on the fund's board of directors.

<sup>9</sup> For example, in 1972, the Commission granted exemptions from sections 12(d)(3) (15 U.S.C. 80a-12(d)(3)) and 17(d) (15 U.S.C. 80a-17(d)) of the Act and from rule 17d-1 under the Act (17 CFR 270.17d-1) to permit the Broad Street fund complex, consisting of four open-end companies and one closed-end company, to internalize management through a service corporation that was wholly-owned by the funds. All management services, including advisory services and distribution, were performed either by fund employees or by wholly-owned subsidiaries of the funds. See *Broad Street Investing Corp.*, et al., Investment Company Act Rel. Nos. 7071 and 7072 (Mar. 18, 1972) (37 FR 5846, Mar. 22, 1972) (notices of applications) and 7114 and 7117 (Apr. 14, 1972) (orders). On another occasion, the staff granted no-action assurance where distribution expenses were to be paid by an internally managed

fund uses fund assets to pay for the distribution of its shares, decisions of whether and to what extent distribution expenses should be paid are generally made by fund employees or employees of a fund subsidiary. Therefore, the Commission believed that internalization of management functions would significantly reduce the conflicts of interest that are otherwise present when fund assets are used to pay for distribution.<sup>10</sup>

The Commission also did not generally object to the payment of fund distribution expenses by the fund's investment adviser, even though such arrangements could arguably constitute a use of fund assets to pay for distribution.<sup>11</sup> Where an investment adviser paid for fund distribution out of its own resources, no use of fund assets for distribution was deemed to have occurred.<sup>12</sup> However, where the advisory fee was increased in contemplation of payments for distribution by the adviser, the staff took the position that the advisory fee

fund that had an external investment adviser. However, in that case, the external adviser provided only investment advice and was unrepresented on the fund's board of directors. Moreover, a majority of the fund's directors had been appointed by a United States District Court after the fund had engaged in litigation against its former adviser. See *The Pegasus Fund* (pub. avail. May 22, 1975).

<sup>10</sup> Even in the case of an internally managed fund, however, salaried officers and employees involved in the decision-making process may receive salaries or bonuses based on the growth of fund assets or the sale of fund shares. See *Public Policy Implications*, *supra* note 8, at 105, therefore, potential conflicts of interest may not be eliminated entirely.

<sup>11</sup> Since fund advisers derive their earnings from advisory fees paid by the Fund, arrangements whereby the adviser pays for that purpose. Before the adoption of rule 12b-1, adviser payment of fund distribution expenses, whether directly or through the operation at a loss of an affiliated principal underwriter, had become common among funds that charged sales loads since, in the years since the adoption of the Act, it had become increasingly difficult to impose a sales load large enough to cover all fund distribution expenses. Fierce competition among fund organizations seeking to persuade retail dealers to sell fund shares had resulted in a large portion of sales loads being allocated to dealer compensation. The balance of the sales loads was generally insufficient to cover other fund distribution expenses. See generally *Public Policy Implications*, *supra* note 8, at 208-09.

<sup>12</sup> See *Investment Company Act Rel. No. 10252* (May 23, 1978) (43 FR 23589, May 31, 1978), giving Advance Notice of Proposed Rulemaking with regard to the bearing of distribution expenses by mutual funds ("Advance Notice Release"). In the Advance Notice Release, the Commission noted that, because of the Commission's traditional opposition to the use of fund assets for distribution, fund distribution expenses not covered by sales loads had been paid by the fund's investment adviser.

might result in a violation of section 36(b) of the Act.<sup>13</sup>

In the mid-1970's the Commission began to reexamine its traditional opposition to the use of fund assets to finance the distribution of fund shares. During this reexamination, which was largely the result of net redemptions in parts of the fund industry and the rising popularity of funds that did not charge sales loads to investors ("no-load" funds), the Commission staff received a letter from Mutual Liquid Assets, Inc. ("MLA"), an open-end, no-load investment company, requesting a no-action position with respect to a proposed distribution arrangement.<sup>14</sup> MLA's investment adviser and principal underwriter proposed to reallocate 50% of its management fee to dealers that sold fund shares. The staff granted the MLA request, but noted that fund distribution financing was under staff study. No-action relief was therefore conditioned on the fund's representation that, if the staff subsequently were to take the position that MLA's distribution arrangements did not comply with the Act, the fund would modify its procedures accordingly. The staff also conditioned its response on MLA's directors being fully informed of the uncertain legal status of the distribution arrangements.

The granting of the MLA no-action request prompted several industry representatives to complain of an apparent change in long-held staff views. In response to industry concerns, and as part of its reexamination of distribution financing, the Commission announced in October 1976 that it would hold public hearings on the appropriateness of arrangements whereby open-end investment companies directly or indirectly bear expenses related to the distribution of their shares.<sup>15</sup> The Commission

specifically requested comment on the questions of: (1) Whether it would be legal under any circumstances for a mutual fund to bear distribution expenses, and (2) if legal, whether such arrangements would be in the public interest.

At the hearings that followed and in the written comments that were received, a number of participants urged the Commission to take the position that investment company directors may, in their discretion, authorize the use of a portion of the fund's assets to promote the sale of its shares. Other participants argued that payments for distribution would be improper since a fund's investment adviser is a primary beneficiary of increased sales of fund shares. The latter group of participants also argued that any benefit to shareholders from the use of fund assets to pay for distribution would be speculative at best.

### 3. Development and Proposal of Rule 12b-1

After consideration of the testimony and written statements presented in connection with the hearings, the Commission, in May 1978, issued an Advance Notice of Proposed Rulemaking ("Advance Notice Release")<sup>16</sup> to solicit further public comment on: (1) Whether permitting fund assets to be used to finance distribution could, in some instances, benefit investors, and (2) possible conditions that could be imposed on the use of fund assets for distribution to safeguard fund shareholders. The Advance Notice Release set forth the objectives that any condition on the use of funds assets for distribution would be intended to accomplish<sup>17</sup> and suggested

staff denied the request pending further Commission action concerning distribution financing. At the request of counsel for Banner, the matter was brought to the attention of the Commission, which declined to review the staff's denial. See *Banner Redi-Resources Trust* (pub. avail. Mar. 14, 1977); *Banner Redi-Resources Trust* (pub. avail. Mar. 18, 1977).

<sup>13</sup> See *supra* note 12.

<sup>14</sup> The objectives set forth were: (1) Minimizing the conflict of interest on the part of a fund's investment adviser or officers with respect to a decision to bear distribution expenses by limiting the degree to which the advisory fee would be affected by sales; (2) ensuring that fund assets would be used for distribution only when, after appropriate consideration, the fund's disinterested directors and shareholders determined such use to be in the fund's interest; and (3) ensuring that shareholders would be treated fairly in connection with the bearing of distribution expenses. At the time the Advance Notice Release was issued, the term "disinterested directors" was used only to mean fund directors who are not interested persons of either the funds or its adviser within the meaning of section 2(a)(19) of the Act (15 U.S.C. 80a-2(a)(19)). The concept of "disinterested directors" was, for rule 12b-1 purposes, further refined in the proposed

a number of possible conditions that could be included in a rule.<sup>18</sup> The Commission also stated that any rules relating to fund payments for distribution would be proposed under section 12(b) of the Act, and would not provide a "safe harbor" from liability under section 36 of the Act. Finally, the Commission stated that a fund's investment adviser would be allowed to continue paying for funds distribution expenses out of its own resources, but that the fund's board of directors would have to satisfy itself "that the advisory fee is fair and is determined without making allowance for distribution expenses the adviser might bear."<sup>19</sup>

In response to the Advance Notice Release, the Commission received over fifty comments. In general, the commenters did not question the objectives set forth in the release, but criticized many of the possible conditions suggested by the Commission. After reviewing the comments, the Commission issued a release proposing rule 12b-1 under the ("Proposing Release").<sup>20</sup> The terms of the proposed rule reflected a shift in emphasis from the regulatory approach outlined in the Advance Notice Release to a more procedural approach in the Proposing Release. In particular, the Proposing Release placed on the fund's disinterested directors substantial responsibility for any decision to use fund assets for distribution.

Proposed rule 12b-1 would have made it unlawful for a fund to finance distribution, directly or indirectly, except in compliance with a plan formulated and adopted in accordance

and final versions of the rule. See *infra* notes 22 and 30 and accompanying text.

<sup>18</sup> The conditions suggested by the Commission include tying advisory fees to a multiple of the fund's net asset value per share (rather than total assets), requiring fixed-dollar advisory fees, providing a list of factors to be considered by a fund's board of directors, requiring that the disinterested directors consult independent counsel or other independent experts, providing for annual renewal of distribution arrangements, providing that distribution contracts be terminable on 60 days' notice and providing for a flat fee to be paid for distribution rather than payment of a percentage of fund assets. See *Advance Notice Release, supra* note 12.

<sup>19</sup> *Id.* Additionally, the Commission stated its opinion that the term "no-load" or equivalent terminology should not be used by a fund that uses assets to pay for distribution. However, the Commission noted that such a fund could state that it charged "no sales commission" if it also made it clear that shareholders will pay for distribution by means of charges against assets.

<sup>20</sup> See *Investment Company Act Rel. No. 10662* (Sept. 7, 1979) (44 FR 54014, Sept. 17, 1979) [the "Proposed Release"]. The comments received on the Advance Notice Release are discussed in detail in the Proposed Release at text accompanying notes 4-30.

<sup>13</sup> See *Armstrong Associates, Inc.* (pub. avail. Sept. 18, 1975), in which the staff agreed to take a no-action position where a no-load fund's adviser remitted sums to its parent, which acted as the fund's principal underwriter. The underwriter, in turn, made continuing payments to registered representatives that distributed fund shares. The staff conditioned no-action relief on a number of factors, including a representation that the advisory fee would be no higher after implementation of the arrangement than before.

<sup>14</sup> See *Mutual Liquid Assets* (pub. avail. June 15, 1976).

<sup>15</sup> See *Release No. 9470, supra* note 8. In this release, the Commission stated that it had instructed the staff not to grant any request for acceleration of MLA's registration statement and to withdraw the no-action position. After the hearings, but before the Advance Notice Release was issued, see *supra* note 12, the staff received a request for no-action assurance or temporary rulemaking from counsel for *Banner Redi-Resources Trust* to allow that fund to pay for distribution in substantially the same manner as had been proposed by MLA. The

with the procedural and substantive provisions of the rule. The procedural requirements set forth in the proposed rule were patterned on the Act's requirements for approval of investment advisory contracts, but were intended to be more stringent than those requirements.<sup>21</sup>

The proposed rule expanded the definition of the term "disinterested director" to include not only those fund directors who were not interested persons of the fund, as defined in section 2(a)(19) of the Act, but also persons who would have no direct or indirect financial interest in the operation of the fund distribution plan or in any agreement related to the plan (the "disinterested directors").<sup>22</sup> To increase the independence of those directors from the fund's investment adviser, the proposal would have required that the selection and nomination of new disinterested directors be assigned solely to the fund's existing disinterested directors.<sup>23</sup>

Additionally, the proposed rule applied to both "direct" and "indirect" use of fund assets to pay for distribution, although, in response to comments on the Advance Notice Release, the Commission pointed out

<sup>21</sup> For instance, the proposal would have required that a distribution plan be approved by two-thirds of a fund's shareholders and directors, rather than by the simple majority required for approval of advisory contracts under section 15(a) of the Act (15 U.S.C. 80a-15(a)). The proposal would have required that a fund's disinterested directors have the power to terminate the plan and any related agreements, unlike section 15(a)(3) of the Act. Section 15(a)(3) provides such authority only to a majority of the entire board of directors. Finally, the proposed rule would have required that the fund's board of directors review the operation of the plan on a quarterly basis. The Act contains no comparable requirement applicable to investment advisory contracts.

<sup>22</sup> See Proposing Release, *supra* note 20, at text accompanying n.32. As noted above, this refinement of the disinterested director concept had not been included in the Advance Notice Release. See *supra* note 17.

<sup>23</sup> The proposed rule provisions regarding fund directors were intended to ensure that (1) disinterested directors would be free from domination or undue influence by management; (2) all directors would be fully informed; and (3) all directors would exercise reasonable business judgment and would act in a manner consistent with their fiduciary duties. The proposed rule would not have required that the disinterested directors have the assistance of outside counsel and experts. While this requirement had been contemplated in the Advance Notice Release, the Commission decided not to include it in the proposal, given the possibility that such a requirement "could impose undue costs in some cases." However, the Commission recognized that the disinterested directors may become too dependent on the fund's adviser for the information necessary to making an informed determination regarding fund spending for distribution. Therefore, the Commission stated that the directors should give the question of getting outside help "very serious thought." See Proposing Release, *supra* note 20.

that an investment adviser could continue to pay for distribution out of its profits, as long as those profits were not "excessive." The Commission also proposed to require a fund that uses fund assets to finance distribution to disclose all material aspects of its distribution plan, and of any agreements with other persons relating to implementation of the plan, in the fund's currently effective prospectus. Finally, the Commission reiterated its position that it would be inappropriate for a fund bearing distribution expenses to refer to itself as "no-load" or use equivalent terminology.<sup>24</sup>

In addition to proposed rule 12b-1, the Commission proposed rule 17d-3 under the Act to provide an exemption from section 17(d) of the Act (15 U.S.C. 80a-17(d)) and rule 17d-1 thereunder (17 CFR 270.17d-1)<sup>25</sup> to the extent necessary to permit funds to enter into agreements with their affiliated persons or principal underwriters (or affiliated persons of such persons or underwriters) whereby payments for distribution under a 12b-1 plan are made by the fund. The proposed rule would have conditioned exemptive relief on the distribution agreements complying with proposed rule 12b-1, thereby reflecting the judgment that the safeguards of rule 12b-1 made it unnecessary for prior Commission review and approval of such payments. However, the exemption provided by proposed rule 17d-3 would not have extended to arrangements for the joint sharing of distribution expenses by mutual funds that are affiliated persons (or affiliates of affiliates) of each other, such as mutual funds in the same fund complex.<sup>26</sup>

The Commission received thirty-two comments on proposed rules 12b-1 and 17d-3, a majority of which came from the mutual fund industry. Several commenters urged the Commission to reaffirm its traditional opposition to the use of fund assets to pay for distribution, asserting that the conflicts of interest between the adviser and fund

<sup>24</sup> The Commission had taken this position in a temporary order issued to the registered investment companies comprising The Vanguard Group, Inc. in connection with an application by those companies relating to the joint financing of distribution ("Vanguard application"). See Investment Company Act Rel. No. 9927 (Sept. 13, 1977) (42 FR 47607, Sept. 21, 1977). For a detailed discussion of the Vanguard application, see *infra* at text accompanying notes 132-138.

<sup>25</sup> Section 17(d) of the Act and rule 17d-1 thereunder generally prohibit a registered investment company from entering into a joint enterprise or other joint arrangement or profit-sharing plan with any affiliated person or principal underwriter of the fund or with an affiliated person of such a person or underwriter, unless prior approval has been granted by Commission order.

<sup>26</sup> See Proposing Release, *supra* note 20.

shareholders with respect to such payments are irreconcilable. However, a majority of the commenters favored adoption of a rule allowing open-end management investment companies to use fund assets to pay for distribution, while opposing a number of the conditions in the proposal.<sup>27</sup>

#### B. Adoption and Operation of Rules 12b-1 and 17d-3

##### 1. Rule 12b-1

In the release adopting rule 12b-1, the Commission restated its concerns about: (1) The conflicts that may exist between the interests of a fund and those of its investment adviser in deciding whether the fund should pay its distribution costs; (2) the likelihood that the fund will benefit from paying distribution costs; and (3) the fairness of a distribution financing arrangement to then existing fund shareholders. The Commission incorporated into the final rule text substantive standards and procedural guidelines, very similar to those of the proposal, that were intended to address these concerns.

As adopted, rule 12b-1 makes it unlawful for an open-end management investment company to act as a distributor of securities of which it is the issuer, other than through an underwriter, unless any payments by the company in connection with the distribution are made pursuant to a written plan that describes all material aspects of the proposed distribution financing and that is adopted in accordance with the rule.<sup>28</sup> The rule provides that a fund will be deemed to be acting as a "distributor of securities of which it is the issuer, other than through an underwriter," if it engages directly or indirectly in financing any activity which is primarily intended to result in the sale of fund shares.<sup>29</sup>

Rule 12b-1, as adopted, reflects the Commission's heavy reliance upon fund directors, particularly disinterested directors, to protect the interests of the fund and its shareholders and to minimize the conflicts of interest that would exist if the fund's investment adviser were to make the decisions of whether and to what extent the fund should bear distribution costs. Thus, the rule provides that a fund's 12b-1 plan

<sup>27</sup> The comments received on the proposed rule are discussed in detail in the Adopting Release, *supra* note 1, at text accompanying notes 6-45.

<sup>28</sup> Paragraphs (a)(1) and (b).

<sup>29</sup> Paragraph (a)(2). The rule provides that such activities include, but are not necessarily limited to, advertising, compensation of underwriters, dealers and sales personnel, the printing and mailing of prospectuses to other than current shareholders, and the printing and mailing of sales literature. *Id.*

and all related agreements must be approved initially by a majority of the fund's board of directors and by a majority of the fund's disinterested directors.<sup>30</sup> The plan must also be approved initially by the holders of a majority of the fund's outstanding voting securities.<sup>31</sup> Finally, the 12b-1 plan must provide, in substance, that it will continue in effect for more than one year only if it is approved annually by a majority of the fund's board of directors and of the disinterested directors.<sup>32</sup>

Rule 12b-1 places on fund directors a duty to request and evaluate such information as is reasonably necessary to make an informed determination of whether to adopt or continue a 12b-1 plan.<sup>33</sup> The rule also instructs the directors to consider and give appropriate weight to all pertinent factors in deciding whether to implement or continue a 12b-1 plan,<sup>34</sup> and provides that fund directors may implement or continue such a plan only if the directors who vote in favor of the plan find that there is a reasonable likelihood that the plan will benefit the fund and its shareholders.<sup>35</sup>

Additionally, the rule requires every 12b-1 plan to provide that it may be terminated at any time by a vote of a majority of the fund's disinterested directors or of the fund's outstanding voting securities.<sup>36</sup> Each plan must also provide that it may not be amended to increase materially the amount to be spent for distribution without shareholder approval and that all material amendments to the plan must be approved by a majority of the fund's board of directors and of the disinterested directors.<sup>37</sup>

The rule also requires a fund relying on the rule to commit the selection and nomination of its disinterested directors to existing disinterested directors.<sup>38</sup> This requirement was intended to increase the likelihood that a fund's disinterested directors would be able to act independently of fund management. The Commission considered such independence essential, given the shareholder protection role assigned to the disinterested directors by the rule.

Rule 12b-1 states that each 12b-1 plan and related agreement must require all persons authorized to direct the disposition of money paid or payable by the fund ("12b-1 payments" or "12b-1 fees") to provide the fund's board of directors with a quarterly report of the amounts expended and the purposes for which expenditures have been made.<sup>39</sup> Additionally, each related agreement must provide that it may be terminated at any time by a majority of the fund's disinterested directors or of the fund's outstanding voting securities, on no more than 60 days' notice and without payment of any penalty.<sup>40</sup> An agreement related to a plan must also, by its terms, terminate in the event of assignment.<sup>41</sup>

In addition to adopting rule 12b-1, the Commission adopted the related disclosure and reporting requirements essentially as proposed.<sup>42</sup> The Commission also restated the position (which it later reversed) that it would be inappropriate for a fund that finances the distribution of its shares to hold itself out as "no-load" or use equivalent terminology.<sup>43</sup>

<sup>30</sup> Paragraph (b)(3)(iii). Although the proposal had required that the plan be approved by a two-thirds vote, the proposal merely required majority vote for purposes of termination. Accordingly, the Commission adopted this provision as proposed.

<sup>31</sup> Paragraph (b)(4). See *Proposing Release, supra* note 20.

<sup>32</sup> Paragraph (c).

<sup>33</sup> Paragraph (b)(3)(ii).

<sup>34</sup> Paragraph (b)(3)(iv)(A).

<sup>35</sup> Paragraph (b)(3)(iv)(B).

<sup>36</sup> See *supra* text accompanying note 24.

<sup>37</sup> The Commission noted, however, that it would give further consideration to the question of no-load

## 2. Rule 17d-3

In addition to adopting rule 12b-1, the Commission also adopted rule 17d-3. That rule provides an exemption from section 17(d) of the Act and rule 17d-1 to the extent necessary to allow funds to enter into agreements with affiliated persons or principal underwriters (or affiliated persons of such persons or underwriters), under which payments are made by the fund for distribution. However, the Commission specifically limited the scope of rule 17d-3, stating that the rule was not intended to provide exemptive relief for arrangements whereby funds share distribution costs. The Commission stated that it would be inappropriate for the rule to be extended to cover such joint financing arrangements since similar issues had been raised in a then-pending proceeding involving an application for exemptive relief filed by The Vanguard Group, Inc. ("The Vanguard Proceeding").<sup>44</sup>

### C. Developments Relating to Fund Distribution Practices Since the Adoption of Rules 12b-1 and 17d-3

#### 1. The Reexamination of Fund Distribution Practices and Rule 12b-1

The Commission did not include in rule 12b-1 a recitation of all the distribution activities that funds could finance under the rule. Additionally, the Commission specifically noted that the rule does not restrict the kinds or amounts of payments which could be made by a fund. The rule was intended to be flexible enough to cover new distribution financing arrangements that might be developed by the mutual fund industry.<sup>45</sup> However, the Commission recognized the potential for problems under a permissive rule of this type and sought to address these by: (i) Emphasizing the crucial of a fund's disinterested directors under the rule, and (ii) stating that the Commission and its staff would monitor the operation of rules 12b-1 and 17d-3 closely, and would be prepared to adjust the rules to make the restrictions on the use of fund

labelling in the context of a pending proceeding that had evolved out of the Vanguard application. See *supra* note 25. The Commission's opinion in that proceeding was published four months after rule 12b-1 was adopted. See *Investment Company Act Rel. No. 11645* (Feb. 25, 1981), 22 SEC Docket 238 ("Vanguard Opinion"). For a detailed discussion on the use of "no-load" labelling under the Vanguard Opinion, see *infra* text accompanying notes 97-100.

<sup>44</sup> For a discussion concerning developments relating to joint distribution financing under section 17(d) since the adoption of rule 17d-3, including the Vanguard Proceeding, see *infra* text accompanying notes 132-142.

<sup>45</sup> See *Adopting Release, supra* note 1.

<sup>30</sup> Paragraph (b)(2). The final version of the rule adopted the proposal's expanded concept of "disinterested directors." The proposal would have required that both two-thirds of the disinterested directors and two-thirds of the board as a whole approve the use of fund assets for distribution. The Commission, however, decided that a majority voting requirement was more appropriate, both because it was uncertain whether the practical effect of the two-thirds voting requirement would justify deviation from the normal requirement of a majority vote, and because, in most cases, the support of as many disinterested directors would be required to achieve a majority vote as would be required to achieve a two-thirds vote. See *Adopting Release, supra* note 1.

<sup>31</sup> Paragraph (b)(1). The Commission had originally proposed that the plan be approved by a two-thirds vote of shareholders, but reevaluated the requirement in light of comments received regarding the practical difficulties funds may have in getting sufficient shareholder participation to meet the two-thirds requirement. See *Adopting Release, supra* note 1.

<sup>32</sup> Paragraph (b)(3)(i). The proposed rule had required the approval of two-thirds of the fund's board of directors and of the disinterested directors. See *Adopting Release, supra* note 1.

<sup>33</sup> Paragraph (d). The rule also places a corresponding duty on the parties to any agreement relating to a distribution plan to provide the information requested by the directors. *Id.*

<sup>34</sup> *Id.* The rule does not list specific factors to be considered, but contains a Note that refers directors to the *Proposing Release* and the *Adopting Release* for a discussion of such factors. The *Adopting Release* contains a list of factors that normally would be relevant to a determination of whether to use fund assets for distribution.

<sup>35</sup> Paragraph (e). The rule requires the directors to make this determination in the exercise of reasonable business judgment and in light of their fiduciary duties under state law and sections 36(a) and (b) of the Act. *Id.*

assets for distribution either more or less strict, as appropriate.

Since the adoption of rule 12b-1, over 1,120 funds (approximately 52%) have adopted 12b-1 plans and have used fund assets to pay for a wide variety of distribution expenses. The use of the rule by the fund industry has resulted in many distribution practices that could not have been anticipated when the rule was adopted. Consequently, in early 1986, the Commission's Division of Investment Management ("Division") began an in-depth review of those practices. The review has focused on a number of distribution arrangements that, while perhaps complying with the terms of the present rule, create problems in light of (i) the crucial role ascribed by the rule to disinterested directors, (ii) the Commission's traditional concerns regarding the conflicts of interest that are present when fund assets are used to finance the distribution of fund shares, and (iii) the need to enhance fund investors' understanding of the nature and impact of distribution fees paid by the fund.

Many of the Division's initial concerns were set out in a staff memorandum that was made publicly available in response to an inquiry regarding rule 12b-1 ("Staff Memorandum").<sup>46</sup> The Staff Memorandum also sets forth a number of disclosure items that the Division would ask registrants with certain types of 12b-1 plans to include in their registration statements.<sup>47</sup> These disclosures were not intended as a solution to the problems in this area, but rather as a means of giving investors access to detailed information until the Commission could respond formally to the issues presented.<sup>48</sup>

<sup>46</sup> The Staff Memorandum, which was dated May 21, 1986, was included with a staff response to an inquiry regarding the Division's review of the 12b-1 area. See *The Colonial Group, Inc.* (pub. avail. June 4, 1986).

<sup>47</sup> The review of fund distribution practices by the staff as part of its normal review of disclosure documents was specifically anticipated by the Commission at the time rule 12b-1 was proposed. See *Proposing Release*, *supra* note 20.

<sup>48</sup> The Commission has recently addressed certain disclosure issues relating to rule 12b-1 by adopting amendments to form N-1A (17 CFR 239.15A), the registration form used by open-end management investment companies. The amended form requires the consolidation of all expense-related information in a table located near the front of each fund prospectus and also requires certain narrative disclosure relating to 12b-1 plans. See *Investment Company Act Rel. No. 16244* (Feb. 1, 1988) (53 FR 3192, Feb. 4, 1988) ("Fee Table Amendments"). The Commission also adopted related revisions to the staff guidelines to form N-1A.

Since the commencement of the Division's review, the Commission and the Division have received advice and inquiries on fund distribution from a number of sources. For instance, the Division has received over one thousand letters from individual investors commenting on industry practices under rule 12b-1. Many of these investors expressed the opinion that the Commission should forbid all use of fund assets to pay for distribution, characterizing such charges as "hidden loads." In other letters, investors expressed support for increased disclosure relating to 12b-1 fees and sales loads. The investors also criticized the current Commission position that funds that have 12b-1 plans, but do not impose front-end or deferred sales loads, can hold themselves out to the public as "no-load" funds.<sup>49</sup> The investors believed that the ability of funds that charge 12b-1 fees to use no-load terminology should be restricted, if not eliminated entirely. In addition, to comments from investors, the Commission and staff have received a number of inquiries regarding rule 12b-1 from members of Congress responding to constituent complaints.<sup>50</sup>

The Division's review has also prompted input on rule 12b-1 from the mutual fund industry. In August 1986, the Investment Company Institute submitted the "Statement of the Investment Company Institute Regarding the Operation of Rule 12b-1 Plans" ("ICI Statement") to the Commission.<sup>51</sup> The ICI Statement focused on a number of areas of concern and questions that had been raised by the Division.

Generally speaking, the ICI Statement argued that: (i) There is no evidence of serious abuse of rule 12b-1 by the fund industry, and (ii) fund investors have found 12b-1 plans to be an attractive alternative to financing distribution through payment of a front-end sales

<sup>49</sup> The Commission's position regarding the use of the "no-load" label was taken in the context of the Vanguard Proceeding. See *infra* text accompanying notes 98-100.

<sup>50</sup> In response to one such inquiry from Rep. John D. Dingell, Chairman of the House Committee on Energy and Commerce, John Shad, then Chairman of the Commission, forwarded a staff memorandum describing the rule and the status of the Division's review. See *Honorable John D. Dingell* (pub. avail. Oct. 14, 1986).

<sup>51</sup> The ICI Statement was included in Chairman Shad's response to Chairman Dingell. See *id.* The following discussion is intended only to summarize the overall conclusions and recommendations made in the ICI Statement. Other conclusions and representations made by the ICI on specific topics relating to rule 12b-1, where relevant, are discussed elsewhere in this release.

load.<sup>52</sup> In light of these conclusions, the ICI stated that "radical changes to Rule 12b-1 or in the Staff's application of the Rule would be a disservice to investors."<sup>53</sup> However, the ICI did note that "the Commission and the industry share a common interest in assuring that the interests of mutual fund investors are fully protected" and that "where the operation of 12b-1 plans can be improved, appropriate action should be taken and will be supported by the industry."<sup>54</sup>

While the ICI expressed the view that most, if not all, present fund practices under rule 12b-1 do not raise serious questions that would justify regulatory change, the ICI Statement did contain two recommendations for Commission action. First, the ICI stated that it shared the Division's concern over the promotional use of the term "no-load" where a fund is using a 12b-1 plan to impose the functional equivalent of sales load. Accordingly, the ICI suggested that the Commission should prohibit funds that have 12b-1 plans and make continuing distribution payments in excess of .25% of net assets annually from referring to themselves as "no-load" funds.<sup>55</sup> The ICI also reversed its earlier opposition to the Commission's fee table proposal and recommended that the Commission amend form N-1A to require "at or near the beginning of the prospectus consecutive straightforward tabular presentations [that] would disclose the fund's non-recurring charges to shareholders and recurring annual expenses."<sup>56</sup>

<sup>52</sup> Section 2(a)(35) of the Act defines a "sales load" as the difference between the price of a security to the public and that portion of the proceeds from its sale which is received and invested or held for investment by the issuer (or in the case of a unit investment trust, by the depositor or trustee), less any portion of such difference deducted for trustee's or custodian's fees, insurance premiums, issue taxes, or administrative expenses or fees which are not properly chargeable to sales or promotional activities. In the case of a periodic payment plan certificate, "sales load" includes the sales load on any investment company securities in which the payments made on the certificate are invested, as well as the sales load on the certificate itself.

<sup>53</sup> See ICI Statement, *supra* note 52, at 8.

<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.* 11-12 and 33-36.

<sup>56</sup> *Id.* at 40. As discussed above, the Commission recently amended form N-1A to require, *inter alia*, a tabular presentation of expenses in the fund prospectus. See *Fee Table Amendments*, *supra* note 48. These amendments were initially proposed in *Investment Company Act Rel. No. 14230* (Nov. 9, 1984) (49 FR 45171, Nov. 15, 1984) and repropoed in *Investment Company Act Rel. No. 15932* (Aug. 18, 1987) (52 FR 32018, Aug. 25, 1987).

The Commission has learned of a number of practices that may suggest a need for changes in rule 12b-1. The possible need for changes does not mean, however, that such practices violate present rule 12b-1 or any other aspect of the Federal securities laws. The proposal is simply an expression of possible regulatory adaptation in response to the developments discussed in the release.<sup>57</sup>

These practices, which are the catalysts for the amendments to rules 12b-1 and 17d-3 now being proposed, concern (i) 12b-1 plans ("compensation plans") under which the level of payments to be made by the fund is not specifically related to the level of distribution services to be provided; (ii) 12b-1 plans ("reimbursement plans") that tie fund payments to the level of distribution services provided, but may permit annual distribution spending in excess of annual payments by the fund, with the expectation that the excess amounts will be reimbursed in future years, often with interest; (iii) the use of the label "no-load" by funds that have adopted 12b-1 plans; (iv) the use of 12b-1 plans to exceed the limitation on maximum sales charges contained in the NASD Rules; (v) the development and use of so-called "defensive" 12b-1 plans; and (vi) joint financing of distribution by certain affiliated funds.

## 2. The Development and Use of "Compensation" Plans

One type of 12b-1 plan in present use is a "compensation" plan.<sup>58</sup> The distinguishing characteristic of a compensation plan is its failure to correlate payments made by the fund to distribution services rendered to the fund. Instead, the annual level of payments is fixed in advance, typically as a percentage of the fund's average net assets, and the fund's principal underwriter or other recipient of the payments is empowered to determine the level of distribution services to be provided or purchased. This arrangement could, of course, result in the fund receiving distribution services that exceed that which could have otherwise been purchased with the amounts paid under the plan,<sup>59</sup> but the arrangement

could also result in the fund paying an amount for distribution that exceeds what could be considered reasonable compensation for the distribution services actually provided, or, in an extreme case, pay for no services at all.<sup>60</sup>

Because funds could make payments under compensation plans in excess of that justified by the services provided, the Division requested the propriety of compensation plans under rule 12b-1, stating that the rule was intended to permit funds to use assets to pay only for actual distribution expenses.<sup>61</sup> The ICI Statement, on the other hand, argued that rule 12b-1 permits compensation plans because the rule does not specifically require that payments be limited to actual distribution expenses.<sup>62</sup>

While nothing in present rule 12b-1 specifically prohibits compensation plans, such plans are a cause for regulatory concern because they obscure the role of fund directors in setting the level of distribution fees.<sup>63</sup>

the fund has a compensation plan, the excess costs would be borne by the fund's principal underwriter or other third party, and there would be no express expectation that the costs would be reimbursed by the fund out of future payments under the 12b-1 plan.

<sup>60</sup> Fund directors operating under the present rule should be aware of the potential for abuse created by compensation plans. Once aware, they should take steps to ensure that the amounts paid by the fund for distribution are reasonable in light of the distribution services that have been purchased or performed. This is akin to the standard articulated by the United States Court of Appeals for the Second Circuit in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983) ("*Gartenberg*") with respect to management fees under section 36(b) of the Act. In that case, the court stated that the appropriate standard is "essentially whether the fee schedule represents a charge within the range of what would have been negotiated at arm's-length in light of all the surrounding circumstances." 694 F.2d at 928. Thus, for the purpose of making the requisite director findings under present rule 12b-1, directors of funds with compensation plans should focus on whether the total estimated 12b-1 payments satisfy the *Gartenberg* standard when considered in light of the total estimated level of services to be provided in exchange for the payments. Of course, directors applying the *Gartenberg* standard to payments under a compensation plan would still have to request and be provided with estimates and information regarding the type of distribution services to be provided to the fund under the plan. This standard, which is implicit in the present rule, would be made explicit by the proposed amendments to the rule. See *infra* notes 160-166 and accompanying text.

<sup>61</sup> See Staff Memorandum, *supra* note 46.

<sup>62</sup> See ICI Statement, *supra* note 51, at 67-68.

<sup>63</sup> The Division's discussion of compensation plans in the Staff Memorandum has engendered much discussion of the propriety of "profits" under rule 12b-1. Nothing in the present rule 12b-1 prohibits payments for distribution that include an element of profit for the investment adviser. However, any level of profit should not be determined solely by the recipient of the payment, as appears to be the case where a fund's principal

The directors' responsibilities under the rule were designed to provide that the directors, not advisers or underwriters, make the fundamental decisions regarding distribution spending.<sup>64</sup> Under a compensation plan, however, fundamental decisions such as the type and extent of distribution services to be financed, and the amounts to be expended for such services are, in important respects, delegated to the fund's principal underwriter or to some other recipient of payments under the 12b-1 plan. Where the principal underwriter or third party actually making decisions regarding the use of fund assets for distribution is also the fund's investment adviser, or is an affiliate of the adviser, the arrangement may result in the very conflict of interest that led to the Commission's traditional concern about the use of fund assets to finance distribution.<sup>65</sup>

## 3. The Development and Use of "Reimbursement" Plans

Another type of 12b-1 plan that is a cause of concern has been labelled a "reimbursement" plan. Under this type of 12b-1 plan, a fund enters into an agreement with another party, typically the fund's principal underwriter, whereby the other party provides distribution services on the fund's behalf. The fund agrees to reimburse the other party for specific expenses incurred in providing or procuring the services.<sup>66</sup> However, the plan also

underwriter has discretion over the level of distribution services to be provided in exchange for a fixed payment by the fund. Rather, the level of profit, if any, should be estimated and approved by the fund's board of directors.

<sup>64</sup> In determining whether to implement or continue a 12b-1 plan, fund directors are required to evaluate the terms of the plan. This evaluation requires analysis of the entire 12b-1 plan, including the nature and approximate amounts of the expenditures to be made. As the Commission stated when rule 12b-1 was proposed, "[c]ertainly the directors would want to know approximately how much was going to be spent and how." See Proposing Release, *supra* note 20. Where fundamental decisions regarding these matters have been taken out of the hands of fund directors and are to be decided by the recipient of payments under the plan, the directors' ability to make this analysis and the other judgments required by the rule may be impaired.

<sup>65</sup> See *supra* note 4 and accompanying text.

<sup>66</sup> Some plans permit reimbursement only of "reasonable" expenses. These plans, which may or may not include examples of what expenses would be reasonable (e.g., sales commissions not exceeding a specified percentage of the value of the shares sold), presumably give fund directors the authority to refuse to reimburse all or part of any expenditures found unreasonable. Other plans are silent on the issue of reasonableness although, as acknowledged by industry representatives and discussed below, all expenditures under a 12b-1 plan are subject to an "arm's-length" standard similar to

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provides that annual payments by the fund cannot exceed a stated annual ceiling,<sup>67</sup> typically expressed as a specified percentage of the fund's average net asset value.<sup>68</sup>

Some reimbursement plans do not permit fund assets to be used to reimburse another party for distribution expenditures in excess of the annual ceiling. Many other reimbursement plans provide that, if reimbursable expenditures by the other party during the year exceed the annual ceiling, the difference between expenditures and the ceiling ("excess distribution spending") will or may be totalled and "carried forward" in anticipation of repayment under the plan in future years. The fund may also impose a contingent deferred sales load ("CDSL") on redeeming shareholders and use the CDSL proceeds, if any, to reduce the amount of excess distribution spending that has been carried forward.<sup>69</sup>

Although reimbursement plans and related agreements may be drafted to create a legal obligation on the part of the fund to reimburse excess amounts previously expended by the fund's principal underwriter or other third party on the fund's behalf,<sup>70</sup> most do not

contain such a provision.<sup>71</sup> Some plans and agreements are silent and others specifically disclaim the existence of a legal obligation to pay.<sup>72</sup> Reimbursement plans and related agreements also usually provide some means by which the fund can permanently halt reimbursement of amounts previously expended on fund distribution, although the precise method of ceasing reimbursement payments varies from plan to plan.<sup>73</sup> For instance, a plan might provide that reimbursement will occur unless the fund's disinterested directors decide not to reimburse the principal underwriter or other party.<sup>74</sup> Alternatively, the plan

<sup>71</sup> Rule 12b-1 makes it unlawful for a fund to make any distribution payments that are not made pursuant to a 12b-1 plan. Where an obligation to reimburse the principal underwriter after termination of the plan has been created by the terms of a 12b-1 plan and related agreements, any payments made by the fund after termination to fulfill the legal obligation to pay can still be said to be made pursuant to the plan. On the other hand, if the plan and agreements do not create a legal obligation to pay, any post-termination payments cannot be said to have been made pursuant to the plan. Therefore, such payments would violate rule 12b-1 unless the fund adopts and maintains in effect a new 12b-1 plan that specifically permits payments intended to reimburse distribution spending on the fund's behalf under the old plan. Of course, in order to implement or continue such a plan, fund directors would have to conclude that payments for distribution expenses in prior years is reasonably likely to benefit the fund and its current shareholders. Additionally, the method used by the fund to account for the amounts carried forward will depend on whether the fund's obligation to pay is a legal obligation. See *infra* notes 92-99 and accompanying text. Finally, the existence of a legal obligation may constitute a "borrowing," thereby raising questions under sections 18 and 13(a)(2) of the Act (15 U.S.C. 80a-18 and 13(a)(2)).

<sup>72</sup> In any event, the existence or nonexistence of a legal obligation to reimburse is a material aspect of the distribution financing under the plan and, as such, should be specifically addressed in the plan itself. Additionally, related agreements with any person that engages in distribution spending with the expectation of reimbursement should specifically address whether or not the fund is obligated to repay all or part of the amounts spent by that party.

<sup>73</sup> The ability of a fund's directors or shareholders to halt reimbursement of amounts expended on the fund's behalf should be distinguished from actions which merely result in the postponement of reimbursement. As discussed previously, many 12b-1 plans give fund directors the right to establish a rate of payment under the plan that is less than the annual ceiling under the plan. See *supra* note 67. If fund directors were to exercise their power under such a provision to reduce or even suspend payments under the plan, such reduction or suspension would obviously have an effect on the reimbursement of amounts expended for fund distribution. In the case of a fund with a plan that permits excess distribution spending to be carried forward to future years, reducing or suspending payments under the plan in a given year would simply postpone the date of reimbursement.

<sup>74</sup> One variation of this type of reimbursement plan provides that excess distribution spending may be carried forward for payment in future years only if the disinterested directors specifically approve the carry-forward.

might require the directors to terminate the agreement with the other party, or even the 12b-1 plan itself,<sup>75</sup> in order to halt reimbursement.<sup>76</sup>

The uncertainties surrounding the legal obligation of funds to reimburse principal underwriters for excess distribution spending could be expected to discourage underwriters from spending large amounts on fund distribution activities. However, industry representatives acknowledge that, barring unusual circumstances, fund directors will continue the 12b-1 plan in effect and will reimburse the principal underwriter or other third party,<sup>77</sup> even in the absence of a legal obligation to do so.<sup>78</sup> In reliance on this

<sup>75</sup> Rule 12b-1(b)(3)(iv) requires each related agreement under a 12b-1 plan to provide for termination of the agreement by a majority of the fund's disinterested directors at any time. Similarly, under rule 12b-1(b)(3)(iii), a 12b-1 plan may be terminated at any time by a majority of the fund's disinterested directors, or by a vote of a majority of the fund's outstanding voting securities. It should be pointed out that termination of a 12b-1 plan would invariably terminate the ability of the principal underwriter or other party to continue spending in anticipation of reimbursement, unless an appropriate replacement 12b-1 plan were adopted by the fund.

<sup>76</sup> Under the terms of some plans, however, even termination of the 12b-1 plan would not be sufficient to completely halt reimbursement of amounts previously expended on the fund's behalf. Under one such plan, in the event the plan is terminated or not continued, the fund is obligated to continue making payments at the maximum annual rate under the plan for the lesser of (i) the time necessary to reimburse the principal underwriter or other party for all amounts previously expended for fund distribution, or (ii) four years after the date of termination or discontinuance. The plan provides, however, that any continuation of payments after termination would be subject to the approval of a majority of the fund's disinterested directors. Additionally, payments would cease if the fund directors terminated or failed to reapprove the principal underwriter's contract under section 15(b) of the Act. Finally, even if the underwriting contract were discontinued, the fund has stated that reimbursement could still occur if the parties entered into another distribution agreement.

<sup>77</sup> Fund directors may choose to allocate all or part of a fund's 12b-1 payments to reduce the amount of excess distribution spending that has been carried forward from past years. Of course, such allocations must be permissible under the plan then in effect. Moreover, under rule 12b-1, fund directors would, in deciding whether to make such payments, have to weight the benefits of paying for past distribution services against the impact of such payments on the fund and its current shareholders and otherwise satisfy themselves that there is a reasonable likelihood that the plan will benefit the fund and its current shareholders.

<sup>78</sup> The ICI has stated its belief that, because termination of, or radical changes to, the provisions of a 12b-1 plan could "upset the reasonable expectations" of persons that sell fund shares and could also "affect their initial and continuing willingness to promote the sale of fund shares and provide services to shareholders," fund directors "should be able to make clear that, absent compelling circumstances to the contrary, the fund will continue its [12b-1 plan] indefinitely." See ICI

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that applicable to management fees under section 36(b) of the Act as expressed by the court in *Gartenburg*, *supra* note 60.

<sup>67</sup> Many 12b-1 plans, whether or not reimbursement plans, specify an annual ceiling on payments out of fund assets but give the directors discretion to establish a lower rate at which payments under the plan will be made. Such a provision permits the 12b-1 fees to be adjusted to reflect the fund's current need for distribution spending. Additionally, once a lower rate has been set, fund directors can increase the fee up to the annual ceiling specified in the plan without obtaining the shareholder approval that would be required if the ceiling itself had to be raised.

<sup>68</sup> There have also been a few 12b-1 plans under which the annual ceiling on payments is expressed solely or partially as a percentage of net sales, which is the principal amount of total sales of fund shares (generally not including sales attributable to reinvested dividends and capital gains distributions) minus the value of shares redeemed during the year.

<sup>69</sup> A CDSL is a sales load that is paid by the shareholder, if at all, at the time fund shares are redeemed. The amount of the CDSL declines as the investor holds fund shares until, eventually (typically five to six years after purchase), the CDSL is eliminated entirely. The scheduled decline of the level of the CDSL generally reflects that the shareholder is paying for distribution through the fund's 12b-1 plan.

<sup>70</sup> In the case of a reimbursement plan that does not permit reimbursement of excess distribution spending (*i.e.* spending above the annual ceiling), the fund could be still legally obligated to reimburse amounts spent that do not exceed the annual ceiling. With regard to a plan that permits excess distribution spending to be carried forward in anticipation of reimbursement in future years, the fund could be legally obligated to reimburse all amounts spent on fund distribution.

expectation, third parties have expended millions of dollars in excess distribution spending in anticipation of eventual reimbursement under 12b-1 plans.<sup>79</sup>

(a) *Reimbursement Plans and the Role of Directors Under Rule 12b-1.* The implementation or continuation of a reimbursement plan by a fund may create two major problems which are related to each other. These problems threaten to undermine the primary safeguard provided by the rule, namely the crucial role of fund directors, particularly the disinterested directors, in making decisions relating to distribution financing.

The first problem is that the existence of a large amount of unreimbursed excess distribution spending carried forward from prior years may make a fund's directors reluctant either to discontinue the 12b-1 plan or reduce the amounts payable under the plan, even in circumstances under which it is in the best interest of the fund to do so. Fund directors may feel a constraint, despite the absence of any legal obligation to reimburse these amounts.<sup>80</sup>

Because payments under a fund's 12b-1 plan are typically subject to a ceiling that is based on a percentage of the fund's average net asset value, actual payments under the plan during the early years of the fund may be relatively

small. On the other hand, the fund's principal underwriter or some other party may engage in a high level of excess distribution spending during these early years, particularly if payments are being made for high cost items such as sales commissions to persons that sell fund shares. Where a reimbursement plan results in low payments by the fund and high expenditures on the fund's behalf, the amount of excess distribution spending for which the principal underwriter or other third party expects to be reimbursed may become quite large, both in absolute dollar terms and as a percentage of a fund's net assets.<sup>81</sup>

In an extreme case, the amounts carried forward may rapidly become so large that termination of the fund's 12b-1 plan, or a reduction in the level of fund payments under the plan, could adversely affect the financial well-being of the other party. Moreover, if the other party is an affiliate of the fund's investment adviser, termination or reduction of fund payments under the plan could also have an adverse effect on the adviser. Even disinterested directors that are genuinely independent of fund management may become reluctant to discontinue a 12b-1 plan or reduce the level of payments under the plan if such action would have a serious detrimental impact on the fund's principal underwriter or adviser.<sup>82</sup>

The reluctance of fund directors to terminate a reimbursement plan or reduce the level of payments under it leads to the second problem, which relates to the role of fund directors in approving distribution expenditures. In adopting rule 12b-1, the Commission anticipated that a fund's directors, especially its disinterested directors, would approve in advance the extent to which fund assets would be used for distribution. Such prior approval was deemed crucial in light of the responsibility of the directors to determine that the use of fund assets for distribution is consistent with the best interests of the fund and its shareholders. Many funds that have adopted reimbursement plans, however, appear to have limited the involvement of fund directors to: (i) Approving categories of reimbursable distribution expenses, (ii) establishing an annual ceiling on actual payments by the fund

under the plan, and (iii) reviewing expenditures for fund distribution on a quarterly basis. The involvement of the directors in determining how much is actually spent for distribution is therefore often quite limited. Instead, decisions as to the level of total distribution spending on the fund's behalf (which may be far in excess of the annual ceiling) are made by the fund's principal underwriter, with little or no prior input or approval from the fund's directors. Yet, under the most reimbursement plans, once the amounts have been spent, the fund is likely to reimburse those amounts.

(b) *The Impact of Reimbursement Plans on Fund Shareholders.* Many of the distribution financing techniques that have been developed under rule 12b-1, including reimbursement plans, have been developed in an attempt by the mutual fund industry to offer investors a product that charges distribution costs over a period of several years instead of imposing a front-end sales load.<sup>83</sup> Allowing investors to defer payment of distribution expenses may benefit investors, as long as total distribution expenses are allocated among those investors on an equitable basis that reflects the benefits derived by each shareholder or group of shareholders.<sup>84</sup> However, using reimbursement plans to defer investor payments for distribution may not have this result. Rather, a reimbursement plan may result in future fund shareholders bearing the burden of reimbursing the fund's principal underwriter for distribution spending that primarily benefits current fund shareholders.

When an investor purchases shares of a fund that has a reimbursement plan, the fund's principal underwriter typically advances on the fund's behalf the cost of certain distribution expenses associated with the sale of fund shares, such as the amount of any sales commission paid to the selling broker-dealer. At least in the early years of a fund's existence, the total of such advances is likely to exceed payments

Statement, *supra* note 51, at 63. While the Commission does not necessarily agree with this characterization of the circumstances under which the fiduciary duties of fund directors would require termination or modification of the fund's 12b-1 plan, the ICI's position is indicative of the prevailing industry attitude regarding the termination of 12b-1 plans.

<sup>79</sup> For example, during one fiscal year, the distributor of one fund expended approximately \$37,468,000 on fund distribution expenses, while receiving \$36,646,039 in 12b-1 payments from the fund and approximately \$15,245,000 in CDSL payments from redeeming fund shareholders. Since total 12b-1 payments and CDSL proceeds exceeded actual distribution expenditures during the year, the excess amounts were used to reduce unreimbursed excess distribution spending carried forward from prior years. However, even after this reduction, the amount carried forward in anticipation of future reimbursement still totaled approximately \$164,006,000. The disinterested directors of the fund in question have determined that the fund is under no contractual obligation to reimburse the distributor for excess distribution spending carried forward in the event the plan is terminated or discontinued. However, with respect to amounts expended prior to the date of the directors' finding, the distributor has advised the fund that, if the plan is terminated, it may assert a claim for reimbursement. As of February 28, 1987, the amount of unreimbursed expenses incurred by the distributor prior to the date of the directors' finding stood at approximately \$145,637,000. See SEC File No. 2-82976.

<sup>80</sup> Even if the plan is terminated, the existence of a large amount of unreimbursed expenses may impel the directors to adopt a replacement 12b-1 plan that permits payment of the amounts unreimbursed under the old plan.

<sup>81</sup> The level of unreimbursed excess distribution spending as a percentage of a fund's net assets may also be affected by market activity. An event such as the stock market break of October 19, 1987, would dramatically increase that percentage, especially as compared to the strong market advances that preceded that date.

<sup>82</sup> See, e.g., *supra* note 80.

<sup>83</sup> See generally ICI Statement, *supra* note 51, at 26-33.

<sup>84</sup> In recognition of the benefits that may accrue to shareholders from deferred distribution financing arrangements, the Commission will consider whether to propose a rule that would provide broad exemptive relief to permit funds to charge sales loads on a deferred basis. Such a rule would give funds the flexibility to provide the benefits of deferral without the difficulties inherent in 12b-1 plans. The benefits of deferring payment for distribution stem primarily from the ability of the investor to have more money invested in the fund at the time of purchase than would be the case if a front-end sales load were imposed.

made under the 12b-1 plan, with the result that excess distribution spending may be carried forward in anticipation of reimbursement in future years. The theory behind reimbursement plans that permit excess distribution spending to be carried forward in this manner is that each shareholder will eventually pay sufficient amounts through the 12b-1 fee to cover the expenditures incurred on the fund's behalf as a result of that shareholder's purchase. As long as the shareholder remains in the fund for a sufficient period of time to allow this to occur, the burden of excess distribution spending is theoretically borne by the primary beneficiaries of such spending.<sup>85</sup>

While in theory each shareholder in a fund that has a reimbursement plan should pay an amount for distribution that is sufficient to cover the distribution expenses incurred on his behalf, such a result is far from certain. For instance, an investor may redeem fund shares before the amounts expended on his behalf have been fully recovered through payments under the 12b-1 plan. While some funds have imposed CDSLs on redeeming shareholders in an attempt to impose on each shareholder a fair share of the distribution expenses, not all funds impose CDSLs. Moreover, even where a CDSL is imposed, factors such as a decline in the net asset value per share of the fund,<sup>86</sup> or an exchange from the fund to another fund,<sup>87</sup> may

<sup>85</sup> If a fund's principal underwriter consistently spends more for distribution than fund payments under the plan, it is likely that an investor's 12b-1 payment will be used to finance the entry into the fund of new shareholders, rather than being used to reimburse any amounts carried forward. However, since the need for large amounts of distribution spending decreases as a fund matures, it reasonably may be expected that, eventually, the 12b-1 payments made by those new shareholders (or later shareholders) will be used to reimburse the underwriter.

<sup>86</sup> The rate of fund payments under a 12b-1 plan is often calculated as a percentage of the fund's average net asset value. Similarly, a typical CDSL is calculated as a stated percentage of the lesser of the purchase price of the shares redeemed or the same percentage of the net asset value of those shares at the time of redemption. If the value of fund shares declines, both the level of 12b-1 payments attributable to the shareholder and the CDSL paid on redemption will be reduced, making it less likely that the combination of the two charges will be sufficient to offset the amounts expended to make the original sale of the shares to the investor.

<sup>87</sup> Where an investor exercises an exchange privilege and exchanges the shares of one CDSL fund for another, the CDSL is typically not paid at the time of the exchange. Rather, payment is postponed until the shareholder redeems the acquired shares. See Investment Company Act Rel. No. 15494 (Dec. 23, 1986) (51 FR 47260, Dec. 31, 1986) (proposing rule 11a-3 under the Act) at text accompanying n.16. Where 12b-1 fees or CDSLs are paid by the shareholder after the exchange, the shareholder may avoid paying any 12b-1 fees or CDSLs that could be used to offset the expenditures

prevent the full amount of the expenditures from being recovered. Where the shareholder leaves a fund without having fully repaid the expenditures made to sell his shares, the excess costs are borne by the remaining shareholders.<sup>88</sup>

(c) *Accounting for Excess Distribution Spending Under a Reimbursement Plan.* Another set of questions concerning reimbursement plans relates to whether excess distribution spending carried forward in anticipation of reimbursement should be treated as a liability of the fund for accounting purposes. Shortly after the Commission's staff began its review of the use of rule 12b-1 by the fund industry, the staff encountered several types of reimbursement plans. Certain of these plans specifically created an obligation on the part of the fund to repay, in the event the plan was terminated, all or part of the excess distribution spending done in anticipation of reimbursement. Other reimbursement plans were silent on the issue of whether the fund was obligated to pay in the event of termination.<sup>89</sup>

made on behalf of the fund originally purchased. The fund's underwriter (since funds typically share the same underwriter) would continue to receive approximately the same amount from the investor, but the amounts expended in connection with the investor's original purchase that were not recovered prior to the exchange would be borne by the remaining investors in the exchanged fund. The inequities that may be caused by an exchange could be mitigated or eliminated by an appropriate system for tracking 12b-1 payments and CDSLs and giving credit for such payments to the fund originally acquired. However, the Commission is not aware of any fund complexes that have instituted such procedures, and, depending on the procedures used, such arrangements may involve the funds in a situation implicating rule 17d-1.

<sup>88</sup> Another instance of the benefits and burdens of a 12b-1 plan falling on different groups of shareholders is found in the practice of accruing amounts to be used for distribution under a 12b-1 plan at a rate that exceeds the level of current distribution spending by the fund, an obverse of the "carry forward" method. This practice may be appropriate where the additional amounts accrued, but not paid, are likely to be spent on distribution in the near future. However, a problem arises where the accrued amounts far exceed that level. When this occurs, the burden of the additional amounts being accrued is being borne by existing fund shareholders, who suffer an immediate reduction in the net asset value of their shares. On the other hand, the benefits to be derived from the additional amounts accrued will not occur until the amounts are spent, by which time the shareholders that bore the burden of the accrual may have redeemed their shares. Such a gross imbalance of the benefits and burdens of 12b-1 payments could make it difficult for fund directors to conclude that the plan is reasonably likely to benefit the fund and its shareholders. The proposed amendments would require directors to determine whether such an imbalance exists and to take appropriate corrective action. See *infra* notes 157-159 and accompanying text.

<sup>89</sup> As noted above, the existence or absence of a fund's legal obligation to pay in the event of termination is a material aspect of the 12b-1 plan

Moreover, funds with both kinds of plans often paid "interest" or other carrying charges on the amount carried forward.<sup>90</sup> Because none of these funds was reflecting the existence of the amount carried forward in anticipation of reimbursement in their financial statements, the staff began inquiring, as part of its review of registration statements filed by such funds, whether those financial statements had been prepared in accordance with generally accepted accounting principles ("GAAP").<sup>91</sup>

Briefly, the staff's position with respect to the accounting treatment of amounts carried forward under a reimbursement plan was that the amounts may represent, in certain cases, a "liability" that is probable of being discharged in the future. Consequently, the staff maintained that a fund should be required to estimate the amount that was probable of being discharged,<sup>92</sup> to include that amount as a liability on its balance sheet, and to include the amount as a current expense on its income statement.<sup>93</sup>

In response to the staff's position, the fund industry raised a number of objections which were summarized in the ICI Statement.<sup>94</sup> The main argument was that the amounts carried forward could not be considered a liability of the fund because, in many cases, the principal underwriter would have no legal right to reimbursement if the fund's

and, as such, must be addressed specifically in the plan and the related agreements. See *supra* note 71.

<sup>90</sup> It has been argued that such charges are justifiable because the principle underwriter is advancing sums on the fund's behalf and should be entitled to interest payments. See ICI Statement, *supra* note 51, at 78-79. While interest payments are not prohibited by the rule, either as it now exists or as it is proposed to be amended, fund directors that approve the payment of interest under a 12b-1 plan must examine carefully the rate of interest charged to determine whether that rate is within the range of what would have been negotiated at arm's-length between the parties. In this regard, it would be appropriate for the directors to examine the underwriter's own cost of financing and also to compare the rate to be charged with the rate the fund could expect to pay if it were to borrow comparable sums directly from a bank. It should also be noted that the existence of interest or carrying charges seriously diminishes any benefits investors may obtain from deferring the payment of sales charges, presumably making it more difficult for directors to make the "benefit" finding required by the rule.

<sup>91</sup> See Staff Memorandum, *supra* note 46, at 21-22.

<sup>92</sup> As envisioned by the staff, this estimation would reflect CDSLs likely to be paid by investors if the proceeds of such loads were to be used to reduce the amount carried forward in anticipation of reimbursement.

<sup>93</sup> If the amounts carried forward represent a liability, payment of which is probable, such accounting treatment would be required by GAAP.

<sup>94</sup> See ICI Statement, *supra* note 51, at 79-90.

12b-1 plan were terminated.<sup>95</sup> Moreover, the ICI argued that, if the fund were legally obligated to pay after termination, GAAP would not require that an amount be accrued as a liability because the amounts are not subject to "reasonable estimation" under Financial Accounting Standards No. 5 ("FAS 5"), entitled "Accounting For Contingencies."<sup>96</sup>

The amended rule would recognize that the proper accounting treatment of amounts carried forward in anticipation of reimbursement must necessarily vary according to the circumstances of each particular case. However, in determining whether any or all amounts carried forward should be accrued as a liability of the fund and treated as a current expense, the following factors should be considered:

(1) Fund directors under rule 12b-1, under certain circumstances, may be required to terminate a 12b-1 plan or a related agreement in order to act in a manner consistent with their fiduciary obligations. Consequently, unless the 12b-1 plan or related agreement specifically creates a legal obligation on the part of the fund to pay all or part of the amounts carried forward after termination of

the plan, the continuation of payments under the plan cannot be termed "probable;"

(2) Where a fund is legally obligated to pay all or part of the amount carried forward in the event the plan or agreement is terminated, whether the amount to be paid after termination should be accrued as a liability of the fund will depend on whether such amount can be reasonably estimated;

(3) If the fund is legally obligated to pay in the event the plan or agreement is terminated, amounts carried forward that represent payments for specific services previously provided to the fund (or reimbursement for specific expenditures previously made on the fund's behalf) can be reasonably estimated, notwithstanding that the principal underwriter or other party may be required to provide additional services or to make additional expenditures; and

(4) Where the amount carried forward exceeds the maximum level of CDSL proceeds that could possibly be received, the excess amounts should be estimated and accrued if the fund is legally obligated to pay those amounts in the event of termination.

#### 4. The Use of the "No-Load" Label by Funds That Pay for Distribution Out of Fund Assets

As noted above, in both the Advance Notice Release and the Proposing Release, the Commission took the position that it would be inappropriate for a fund that bears distribution expenses out of its assets, but that does not charge a sales load, to refer to itself as a "no-load" fund or use equivalent terminology. This position was originally taken in a temporary order granted in the Vanguard Proceeding, which arose out of an application by the Vanguard funds to internalize<sup>97</sup> and jointly finance the distribution of their shares.<sup>98</sup> In the Adopting Release, the

Commission restated the position that the use of the "no-load" label by funds paying for distribution would be improper, but stated that it would give further consideration to the issue in the context of the Vanguard Proceeding, which was still pending at that time.

Four months after the adoption of rule 12b-1, the Commission issued an opinion in the Vanguard Proceeding (the "Vanguard Opinion") and granted the applicants an order approving the joint distribution arrangement.<sup>99</sup> In the Vanguard Opinion, the Commission determined that the Vanguard funds could use the term "no-load," even though distribution costs were financed out of fund assets. Further, the Commission stated that other no-load funds that elect to use fund assets to finance the costs of distribution in compliance with rule 12b-1 could continue to use "no-load" terminology.<sup>100</sup> However, the Commission also stated that, in light of shifting mutual fund practices, it would be examining in the future the use of "no-load" terminology by funds and fund complexes bearing distribution expenses.

Since the issuance of the Vanguard Opinion, funds that pay for distribution out of assets and that do not impose a sales load on investors have routinely held themselves out to the public as "no-load" funds.<sup>101</sup> This practice apparently has led to considerable investor confusion, as evidenced by a large number of investor complaints received by the Commission.<sup>102</sup> Members of the fund industry also have suggested that the Commission should modify its position on the use of no-load labelling by funds with 12b-1 plans. As discussed above, the ICI has recommended that funds that annually pay more than .25% of average net assets for distribution should not be allowed to use the no-load label. This recommendation was based

<sup>95</sup> See *supra* note 8 for a general discussion of internalization of fund management.

<sup>96</sup> See Investment Company Act Rel. No. 9927, *supra* note 24. In 1975, the management and administrative functions of the funds in the Vanguard group were internalized, with the result that the funds continued to receive only investment advisory and distribution services from Wellington Management Company, the fund's investment advisor and principal underwriter. All other management and administrative functions were provided by the Vanguard Group Inc. ("VGI"), a service company wholly owned by the funds in proportion to their relative net assets. In 1977, the directors of the Vanguard funds approved a proposal to internalize the marketing and distribution of shares issued by the Vanguard funds through Vanguard Marketing Corporation, a subsidiary of VGI. The Vanguard Proceeding developed out of an application filed by VGI and the Vanguard funds seeking approval under section 17(d) and rule 17d-1 to implement the internalization of the distribution function. The internalization of management by the Vanguard funds is discussed in more detail in the Vanguard Opinion, *supra* note 43, at notes 12-17 and accompanying text.

<sup>99</sup> See Vanguard Opinion, *supra* note 43.

<sup>100</sup> In reaching its conclusion, the Commission noted that shareholders of no-load funds had long been indirectly assessed distribution expenses in cases where the fund's investment adviser used a portion of its advisory fee to pay for marketing costs. The Commission also noted that, in light of the recent adoption of rule 12b-1, investors in funds that charged no sales loads could no longer assume that fund assets would not be used to promote the sale of fund shares.

<sup>101</sup> The Commission and the staff have taken the position that it would be misleading for a fund that imposes or which may impose a deferred sales load, including a CDSL, to hold itself out as a "no-load" fund. See Investment Company Act Rel. No. 13048 [Feb. 23, 1983] (proposal of rule 6c-8 under the Act); Staff Memorandum, *supra* note 46, at n.30.

<sup>102</sup> These letters have been received both directly by the Commission and through members of Congress. See *supra* text accompanying notes 49-50.

<sup>95</sup> Specifically, the ICI argued that, under Statement of Financial Accounting Concepts No. 6 (Doc. 1985) ("FAC 6"), a "liability" exists only if three essential characteristics are present: (1) The liability must embody a present duty or responsibility to one or more entities that entails a settlement by probable future transfer or use of assets at a specified or determinable event or on demand; (2) the duty or responsibility must obligate a particular enterprise, leaving it little or no discretion to avoid the future sacrifice; and (3) the transaction or other event obligating the enterprise must have already happened. The ICI argued that amounts carried forward (1) did not meet the first characteristic because there is no legal obligation to pay after termination; (2) did not meet the second characteristic because, in the absence of a legal obligation to pay after termination, the fund has discretion to terminate the plan and avoid such payments; and (3) did not meet the third characteristic because the ongoing services to be provided, for which the underwriter is compensated pursuant to the plan, have not been completed. See ICI Statement, *supra* note 51, at 83-84. The ICI also argued that, even if amounts carried forward could be called a "liability," those amounts would not have to be accrued because payment is not "probable," given the ability of a fund's directors or shareholders to terminate the plan (in the absence of an agreement to continue payments to the underwriter after termination). *Id.* at 84-85.

<sup>96</sup> With respect to funds that charge CDSLs, the ICI argued that, because CDSL proceeds are used to repay a portion of the amount carried forward and because the amount of such proceeds depends on variables such as the incidence and amount of redemptions, the amount that will actually be paid out of fund assets cannot reasonably be estimated. Moreover, even where a CDSL is not imposed, the ICI argued that reasonable estimation of amounts carried forward is made impossible by a number of factors that affect the level of sales and redemptions of fund shares and cause changes in the value of the fund's portfolio. The ICI argues that, because 12b-1 fees are based on the fund's level of net assets, the amount to be accrued cannot reasonably be estimated. *Id.* at 85.

on the premise that 12b-1 payments in excess of .25% of net assets can be considered the equivalent of an initial sales load.<sup>103</sup> Finally, the ability of funds that have 12b-1 plans to use no-load terminology has been the subject of a number of critical articles in the press.<sup>104</sup>

#### 5. The Use of Rule 12b-1 to Charge More for Distribution Than Could Have Been Charged Under the NASD Rules of Fair Practice

As discussed above, the distribution of the shares of open-end management investment companies was traditionally financed through the imposition of a sales load paid directly by the investor at the time fund shares were purchased.<sup>105</sup> In 1940, the Commission was of the opinion that the level of sales loads charged on fund shares should be left to competition among distributors.<sup>106</sup> However, in 1966, the Commission recommended that Congress amend the Act in such a way as to lower mutual fund sales charges.<sup>107</sup> This recommendation was the result of a number of factors examined by the Commission, including the failure of competition among fund

principal underwriters to result in lower charges to fund investors.<sup>108</sup>

When Congress amended the Act in 1970,<sup>109</sup> it did not follow the recommendation made by the Commission in 1966 with respect to sales charges.<sup>110</sup> Rather, Congress amended section 22(b) of the Act, giving the National Association of Securities Dealers ("NASD") the authority to adopt rules restricting NASD members from distributing fund shares where the public offering price includes an "excessive sales load."<sup>111</sup> Congress also empowered the Commission to alter or supplement such NASD rules any time after eighteen months had passed from the date of the amendments.<sup>112</sup>

Under the authority granted by section 22(b), the NASD amended Article III, section 26(d), of its Rules of Fair Practice (referred to herein as "NASD Rules Section 26(d)") to prohibit NASD members from offering or selling the shares of an open-end management investment company if the public

offering price set forth in the company's prospectus includes a sales charge that is "excessive," taking into consideration all relevant circumstances.<sup>113</sup> NASD Rules section 26(d) provides a list of conditions to which sales charges must conform in order to avoid being deemed excessive. The first of these conditions states that the maximum sales charge on any transaction shall not exceed 8.5% of the offering price.<sup>114</sup>

Both section 22(b) of the Act and NASD Rules section 26(d) speak in terms of sales loads or charges that are included in the public offering price of fund shares.<sup>115</sup> Therefore, the NASD has interpreted its limitations on excessive sales charges as not applying to sales charges imposed indirectly on investors through distribution payments made out of fund assets under rule 12b-1.<sup>116</sup>

Because the NASD does not apply its limitations to payments under 12b-1 plans, it has become possible for funds to use a 12b-1 plan, either separately or in combination with initial or deferred sales loads, to charge investors more for distribution than could have been charged as an initial sales load under those limitations. This possibility led the Division to explore the question of whether it is necessary to impose additional limitations on the use of rule 12b-1 so that funds do not circumvent NASD Rules section 26(d) and thereby frustrate the Congressional intent embodied in section 22(b) of the Act.

In its statement on rule 12b-1, the ICI raised several points regarding the Division's inquiries concerning the interrelationship of rule 12b-1 and the NASD Rules.<sup>117</sup> The ICI assumed that

<sup>103</sup> See ICI Statement, *supra* note 51, at 33-36. The ICI argued that such a limitation would largely limit the Vanguard Opinion to its facts, since the maximum amount payable for distribution under the Commission order in the Vanguard Proceeding is .20% of average net assets.

<sup>104</sup> See, e.g., *Load or No Load? Sometimes Investor Can't Tell*, Chicago Tribune, May 18, 1987, p. 12, col. 1; *MetLife-State Street Attracts \$2.6 Billion*, Wall St. J., Apr. 27, 1987, p. 43, col. 1; *No-Load Group Gripped by Identity Crisis*, Wall St. J., Nov. 17, 1986, p. 61, col. 1; *In Through the Back Door*, St. Petersburg Times, Oct. 13, 1986, p. 4E, col. 1; *Investors of the World: United Against Hidden Fees*, Wash. Bus., Aug. 11, 1986, p. 51, col. 1; *Careful, It's Loaded*, Forbes, Sept. 16, 1985, p. 82; *12b-1 Plans: A Revealing Look at Hidden Costs*, Barron's, Aug. 12, 1985, p. 46; *Critics Say Brokerage Firms Hide Fees on Their New 'No-Load' Mutual Funds*, Wall St. J., Aug. 8, 1985, p. 25, col. 4; *Spotting Hidden Costs in Mutual Funds*, U.S. News & World Rep., Aug. 5, 1985, p. 68; *When a Load Becomes a Burden*, Money, July 1985, p. 135; *Loads of Complexity*, Fin. Plan., May 1985, p. 118; *Backdoor Loads*, Forbes, Apr. 8, 1985, p. 168; *Loading the No-Load Mutual Funds*, N.Y. Times, Jan. 8, 1984, p. 11, col. 1.

<sup>105</sup> See generally, Public Policy Implications, *supra* note 8, at 204-09.

<sup>106</sup> See *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcommittee of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess., 290-91 (Statement of David Schenker).

<sup>107</sup> See Public Policy Implications, *supra* note 8, at 221-223. Specifically, the Commission recommended that the Act be amended (1) to provide that sales charges for fund shares may not exceed 5% of the net asset value of the shares at the time of purchase, and (2) to give the Commission authority to vary the statutory maximum by rule, regulation or order. *Id.* at 223.

<sup>108</sup> The Commission noted that the retail price maintenance provisions of section 22(d) of the Act preclude price competition among retailers of fund shares by requiring that all purchasers of fund shares be charged "a current public offering price described in the prospectus." In the absence of the downward pressure that would result from effective retail price competition, the major competition affecting the level of mutual fund sales charges was the competition among principal underwriters seeking to persuade retail dealers to sell shares of particular funds. As a result of this competition, the level of sales loads demonstrated a tendency to increase, rather than decrease. See Public Policy Implications, *supra* note 8, at 221.

<sup>109</sup> See Investment Company Amendments Act of 1970, Pub. L. No. 91-547, 84 Stat. 1413-1436 (1970).

<sup>110</sup> A bill introduced in 1967 would have amended the Act to include the Commission's recommendation regarding sales charges. See *Mutual Fund Legislation of 1967: Hearings on S. 1659 Before the Senate Comm. on Banking and Currency, Part 2, 90th Cong., 1st Sess., 924 (1967)* (text of S. 1659). However, this bill was not enacted after hearings had been held. In addition, later bills did not incorporate this aspect of the Commission recommendation, apparently due to a Congressional decision to rely upon the self-regulatory mechanism of the securities industry to deal with the problem of excessive sales loads. See S. Rep. No. 1351, 90th Cong., 2d Sess. 7-8 (1968).

<sup>111</sup> As amended, section 22(b)(1) gives the NASD authority to prohibit its members from purchasing, in connection with a primary distribution of redeemable securities of which any registered investment company is the issuer, any such security from the issuer or from any principal underwriter except at a price equal to the price at which such security is then offered to the public less a commission, discount, or spread which is computed in conformity with a method or methods, and within such limitations as to the relation thereof to said public offering price, as such rules may prescribe in order that the price at which such security is offered or sold to the public shall not include an excessive sales load but shall allow for reasonable compensation for sales personnel, broker-dealers, and underwriters, and for reasonable sales loads to investors \* \* \* (emphasis added).

<sup>112</sup> See section 22(b)(2).

<sup>113</sup> Notice of the proposed rule change was published in Investment Company Act Rel. No. 8893 (Aug. 14, 1975) (40 FR 36813, Aug. 22, 1975). The Commission order approving the rule change was contained in Investment Company Act Rel. No. 8890 (Oct. 10, 1975), 8 SEC Docket 66.

<sup>114</sup> See NASD Rules, Article III, section 26(d)(1). The other conditions listed in the section establish lower maximum sales charges where fund investors are not given certain favorable treatment with respect to dividend reinvestment and quantity discounts on sales charges imposed on single and multiple share purchases.

<sup>115</sup> A similar phraseology is included in section 2(a)(35) of the Act, which defines the term "sales load." See *supra* note 52.

<sup>116</sup> When section 22(b) was amended in 1970, funds did not make payments out of assets for distribution. See *supra* notes 8-15 and accompanying text. Similarly, funds operating in 1970 also did not impose sales loads other than as a portion of the public offering price of fund shares. The use of deferred sales loads, specifically CDSLs, by funds other than registered insurance company separate accounts did not occur until 1982. See E.F. Hutton Investment Series, Inc., Investment Company Act Rel. Nos. 1,2079 (Dec. 4, 1981) [46 FR 60703, Dec. 11, 1981] (notice of application) and 12135 (Jan. 4, 1982) (order).

<sup>117</sup> See ICI Statement *supra* note 51, at 91-98.

the Division intended to recommend that the Commission delegate to the NASD responsibility for establishing maximum sales charges under rule 12b-1.<sup>118</sup> The ICI also assumed that delegation of this function to the NASD would require that 12b-1 fees be imposed on a shareholder account basis.<sup>119</sup> The ICI argued that the Commission should not go forward with such a delegation because: (i) No evidence exists of excessive sales charges or other abuses in the current operation of 12b-1 plans; (ii) unlike the regulation of front-end sales loads, NASD regulation of 12b-1 plans would involve consideration of a highly complex set of factors which would be better left to the business judgment of fund directors; and (iii) the assessment of 12b-1 fees on a shareholder account basis may be operationally impractical for outstanding fund shares and would be expensive and burdensome for all funds.<sup>120</sup> The ICI did acknowledge that, when fund directors evaluate the reasonableness of the payments to be made under a 12b-1 plan, the existing NASD sales charge limitations may serve as a useful guideline.<sup>121</sup> However, the ICI argued that the NASD limits cannot be mechanically applied to asset-based payments made under 12b-1 plans and that determining whether 12b-1 payments are reasonable in light of the NASD limits should be left to the business judgment of fund directors.<sup>122</sup>

The ability of funds to use payments under 12b-1 plans to exceed the NASD sales charge limitations may nonetheless present a problem in light of the Congressional intent behind section 22(b) of the Act. Through that section, Congress gave the NASD rulemaking authority with respect to sales charges so that such charges might allow for both reasonable compensation for sales personnel, broker-dealers, and underwriters and for reasonable sales loads to investors. NASD Rules section 26(d) effectuates this purpose for conventional sales loads. Yet it bears repeating that 12b-1 fees often are used to pay sales commissions and all other types of distribution costs traditionally covered by a sales load. If funds are to be permitted to use payments under

12b-1 plans, alone or in combination with front-end or deferred sales loads, to charge investors more for sales and promotional activities than would be permitted as a front-end sales load under NASD Rules section 26(d), the intent of Congress in amending section 22(b) may not be achieved.

Additionally, the possibility that funds may use 12b-1 plans to exceed the NASD limits is not a remote danger, but an existing fact. While it may often be difficult to determine whether and at what point total distribution payments made by an investor will exceed the NASD limits, some funds have both imposed a separate 12b-1 fee and charged investors the maximum sales load permitted by the NASD rules. In such cases, the use of rule 12b-1 to exceed the NASD limits is not a remote possibility, but has already occurred.<sup>123</sup>

#### 6. The Development of "Defensive" 12b-1 Plans

When rule 12b-1 was adopted, the Commission specifically made the rule applicable to both direct and indirect payments out of fund assets for distribution. In discussing the concept of "indirect" distribution financing, the Adopting Release contained language that implied that such indirect payments could result where a person that finances distribution received payments "ostensibly" for providing non-distribution services. The Commission also stated that an indirect use of fund assets for distribution would result if any allowance were made in the investment adviser's fee to provide money to finance distribution. Therefore, the Commission concluded that when an adviser finances the distribution of fund shares, the directors of the fund, in discharging their responsibilities in connection with the approval of the advisory contract, must satisfy themselves either that the management fee is not a conduit for the indirect use of the fund's assets for distribution, or that the fund has complied with rule 12b-1.<sup>124</sup>

The Commission also emphasized in the Adopting Release that there is no indirect use of fund assets for distribution if the adviser makes distribution-related payments out of its

own resources. The Commission stated that, in determining whether there is an indirect use of fund assets, it is appropriate to relate a fund's payments under the advisory contract to the adviser's expenditures for distribution and to view such expenditures as having been made from the adviser's profits under the contract. To the extent that such profits are "legitimate" or "not excessive," i.e. not in violation of section 36 of the Act, no indirect payment for distribution occurs.<sup>125</sup>

The applicability of rule 12b-1 to "indirect" payments for distribution, coupled with the language contained in the Adopting Release, has resulted in the adoption by many funds of so-called "defensive" 12b-1 plans.<sup>126</sup> Unlike

<sup>125</sup> The mere fact that, in a given year, distribution spending by an adviser equals or exceeds the level of the adviser's profits under the advisory contract does not necessarily mean that there has been an indirect use of fund assets for distribution. The proper test is whether the level of fees under the advisory contract is in compliance with section 36(b) of the Act, which deems a fund's investment adviser to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by the fund or its shareholders to the adviser or its affiliates. If the advisory contract would not result in a breach of fiduciary duty under section 36(b), given the level of non-distribution management services provided and all other relevant circumstances, fund directors may assume, unless the circumstances indicate otherwise, that distribution spending by the adviser in excess of profits under the contract is the result of the adviser's using its other resources. For a discussion of the procedural and substantive standards to be applied in determining whether an advisory contract with an adviser that provides distribution services complies with section 36(b), see *Schuyt v. Rowe Price Prime Reserve Fund, Inc.*, 663 F. Supp. 962 (S.D.N.Y. 1987), *aff'd per curiam*, 835 F.2d 45 (2d Cir. 1987), *cert denied*, 108 S. Ct. 1594 (1988).

<sup>126</sup> This language in the Adopting Release has also resulted in funds paying for non-distribution services under 12b-1 plans, a practice that is not prohibited by the present rule (but that would be proscribed by the proposed amendments, see *infra* at notes 173-176 and accompanying text). A number of funds have entered into arrangements whereby fund shares are made available for purchase by the customers of a bank or other financial institution. In many cases, the fund also makes payments to the institution for providing "administrative services" or "shareholder services." Some funds have paid for such services through a 12b-1 plan, apparently to address the possibility that the payments may later be characterized as distribution expenditures. Whether particular shareholder or other services are "primarily intended to result in the sale of fund shares" and, therefore, must be paid under a 12b-1 plan, will depend on the surrounding circumstances. However, to the extent a fund is paying for legitimate non-distribution services, such payments need not be made under a 12b-1 plan, even if the recipient of the payments is also involved in the distribution of fund shares. Of course, such payments would have to comply with the other provisions of the Act, including section 17(d); such payments would not be covered by rule 17d-3.

<sup>123</sup> When the Fee Table Amendments were proposed, the Commission included a proposal to require that funds disclose whether the amount of payments under a 12b-1 plan, when combined with any sales loads, could exceed the applicable NASD maximum sales charge. See Investment Company Act Rel. No. 15932 (Aug. 18, 1987) (52 FR 32018, Aug. 25, 1987). This proposal was not included in the final version of the amendments. See Fee Table Amendments, *supra* note 48, at n. 31.

<sup>124</sup> See Adopting Release, *supra* note 1.

<sup>118</sup> *Id.* at 91.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 92.

<sup>121</sup> *Id.* at 57.

<sup>122</sup> The ICI stated that such a determination of reasonableness may require a judgment as to the average length of investment in the fund in order to estimate the total amount of 12b-1 fees that might be generated. However, it was argued that any such judgment should be left to the directors, to be made on the basis of such information as may reasonably be available. *Id.* at 59.

other 12b-1 plans, defensive plans do not provide for separate payments out of fund assets for distribution financing. Rather, these plans simply state that the fund's investment adviser is authorized to use a portion of the management fee to pay for the distribution of fund shares.<sup>127</sup> By authorizing such payments, funds with defensive plans seek to protect themselves from allegations that the advisory contract is a "conduit" for distribution spending. The stated justification for defensive plans is often that such a plan allows the directors to consider distribution spending by the adviser when considering whether the advisory fee satisfies the standards of section 36(b).<sup>128</sup>

The Commission wishes to emphasize that it is not necessary for a fund to adopt or continue a defensive 12b-1 plan simply because the fund's adviser pays for the distribution of fund shares. If the fund's directors are satisfied that any distribution payments made by the adviser are made out of the adviser's own resources (including, but not limited to, the profits under the advisory contract), the directors may reasonably conclude that the advisory contract is not a conduit for the payment of distribution expenses. If such a conclusion is reached, the fund need not adopt a 12b-1 plan to cover distribution payments borne by the adviser.

#### 7. Developments Relating to Joint Distribution Financing and Rule 17d-3

As discussed above, rule 17d-3 was adopted by the Commission to provide exemptive relief from section 17(d) of the Act and rule 17d-1 thereunder to the extent necessary to allow funds to enter into distribution agreements with affiliated persons or principal underwriters (or affiliated persons of such persons or underwriters), pursuant to which payments are made by the fund

for distribution.<sup>129</sup> In light of the then-pending Vanguard Proceeding, which related to joint distribution financing under section 17(d), the Commission did not extend the exemptive relief provided by rule 17d-3 to arrangements for the joint payment of distribution costs by funds.<sup>130</sup>

Since the adoption of rule 17d-3, the Commission has, on two occasions, considered whether funds that share a common investment adviser should be allowed to finance jointly activities that are primarily intended to result in the sale of shares issued by the funds.<sup>131</sup> The first Commission consideration of this question occurred shortly after the adoption of rule 17d-3, in the context of the Vanguard Proceeding.<sup>132</sup>

In the Vanguard Opinion, the Commission granted approval under section 17(d) and rule 17d-1 to the extent necessary to allow the funds comprising the Vanguard group to finance jointly the distribution of their shares out of fund assets.<sup>133</sup> The amount to be paid for distribution by each of the funds was to be calculated according to the "Vanguard Modified Formula" ("VMF"), which provided for a two-part quarterly contribution by each fund, one part based on the fund's relative net assets during the preceding quarter and one part based on the fund's relative sales of new shares during the preceding twenty-four months.<sup>134</sup>

Additionally, so that a new fund would not be unduly burdened, the VMF included a provision that no fund's payments (expressed as a percentage of its assets) could exceed 125% of the average expenses of the group (expressed as a percentage of the group's total assets).<sup>135</sup> Any amounts in excess of this ceiling were to be reallocated among the remaining funds on the basis of the VMF.<sup>136</sup>

In the Vanguard Opinion, the Commission acknowledged that the VMF would not apportion distribution costs among the Vanguard funds in precisely the same ratio that each fund would directly benefit from the proposed distribution arrangement. However, the Commission concluded that the allocation of costs in relation to benefits among each of the funds would fall within a "reasonable range of fairness" because, among other things, the proposed distribution arrangement was an integral part of the ongoing efforts by the Vanguard directors to (i) Internalize management and distribution functions and thereby enhance the independence of every fund from its investment adviser, and (ii) reduce each fund's operating costs, without sacrificing the quality of the services performed.<sup>137</sup> The Commission also pointed out that not all of the discernible benefits from the arrangement could be easily quantified. These benefits included each fund's enhanced independence from its investment adviser, reductions in advisory fees and economies of scale resulting from the internalization process. Given the internalization of management and the unique structure of the Vanguard complex, the Commission concluded that internalizing distribution would benefit every fund in the complex and that promoting asset growth through sales of shares would confer benefits on all the funds in the complex, as well as on the particular fund whose shares were sold.<sup>138</sup>

<sup>127</sup> Defensive plans should be distinguished from 12b-1 plans that simply channel distribution payments through the fund's investment adviser. Where separate payments are made, or a specified portion of the management fee paid to the adviser is earmarked for distribution, the 12b-1 plan cannot be characterized as a defensive plan.

<sup>128</sup> See ICI Statement, *supra* note 51, at 22-23. The Commission is specifically declining to state an opinion as to the effectiveness of the defensive plan as insulation against liability under section 36(b). However, it should be restated that rule 12b-1 was not intended to provide a "safe harbor" from section 36 liability. Additionally, at least one court has taken the position that "[a] claim that payments made under rule 12b-1 are excessive when combined with advisory fees, where both payments are made to 'affiliated persons' of an investment adviser, is cognizable under section 36(b)." See *Meyer v. Oppenheimer Management Corp.*, 764 F.2d 76, 83 (2d Cir. 1985).

<sup>129</sup> While rule 12b-1 does not specifically prohibit the payment of non-distribution expenses under a 12b-1 plan, simply channelling such payments through the plan does not change the character of the payments. Therefore, a fund may not rely on the exemption provided by rule 17d-3 with respect to payments not made in connection with the distribution of fund shares, even if non-distribution payments are made under the fund's 12b-1 plan. Of course, whether or not payments are for distribution is a question of fact to be decided by the fund's board of directors. See *supra* note 128.

<sup>130</sup> See *supra* note 44 and accompanying text. The Commission emphasized, however, that it did not intend to categorize certain transactions as raising the applicability of section 17(d) and rule 17d-3. See Adopting Release, *supra* note 1.

<sup>131</sup> Funds that share a common investment adviser may, depending on the circumstances, be deemed to be under common control, and, therefore, to be "affiliated persons" of each other under section 2(a)(3)(C) of the Act (15 U.S.C. 80a-2(a)(3)(C)). If such funds are affiliated persons of each other, section 17(d) and rule 17d-1 of the Act would prohibit arrangements whereby such funds jointly finance the distribution of their shares.

<sup>132</sup> See Vanguard Opinion, *supra* note 43.

<sup>133</sup> This joint financing arrangement was part of a continuing effort by the Vanguard funds to internalize management and distribution functions. See *supra* note 24.

<sup>134</sup> See Vanguard Opinion, *supra* note 43 at text accompanying n.19.

<sup>135</sup> *Id.* at text accompanying n.20. Additionally, the Commission order issued in the Vanguard Proceeding included a condition that annual spending for distribution by a fund could not exceed 0.2% of that fund's average month-end net assets.

<sup>136</sup> Payments by the funds were to be made to Vanguard Marketing Corporation, a wholly-owned subsidiary of VGI. *Id.* at text accompanying notes 12-13.

<sup>137</sup> See *supra* note 98.

<sup>138</sup> Where benefits to the participants result from a joint enterprise, joint arrangement, or profit sharing plan, the Commission is obliged to consider whether each investment company involved is receiving benefits that accrue on a basis different from or less advantageous than the benefits that accrue to other participants. See rule 17d-1(b). See also Vanguard Opinion, *supra* note 43, at n.33.

The second Commission consideration of joint distribution financing arrangements between funds that share a common investment adviser took place in the context of an exemptive application filed by the funds that are managed by Investors Diversified Services, Inc. ("IDS").<sup>139</sup> In that application, the IDS funds proposed to allocate distribution expenses among themselves by adopting and implementing substantially identical 12b-1 plans under which each fund would pay IDS a charge assessed against fund assets to help defray expenses incurred in connection with: (i) The distribution of the shares of all the funds, (ii) the maintenance and improvement of a field sales force available to provide services to all shareholders of IDS funds, and (iii) the development of new products and markets. The fees to be paid to IDS were to be accrued on a daily basis by multiplying the number of shareholder accounts on that day by six dollars, and by dividing that product by the number of days in the year. The amounts accrued in this manner were to be paid monthly. However, the total fund expenses in any month, including any investment management compensation received by IDS, could not exceed one percent (.75% for money market funds) of the fund's average daily net assets for the fiscal year then in progress.

The Commission granted the IDS application under section 17(d) and rule 17d-1 to allow the implementation of the proposed joint distribution arrangement, based on a number of representations made by the applicants. One representation was that the services of IDS field sales representatives are equally available to the shareholders of each fund. Another representation was that the board of each fund had determined that, in light of the difficulty of specifically identifying the distribution expenses of a particular fund, it would be fair and appropriate for each fund to help defray a portion of the costs incurred by IDS in providing such services by paying an amount determined on the basis of the number of that fund's shareholder accounts. Applicants also represented that each board had determined that any economic disparity among the funds from implementation of the proposed distribution arrangement would be sufficiently offset by "intangible benefits" (e.g., enhanced shareholder

services) which were expected to accrue to each fund.<sup>140</sup>

Since 1983, when the IDS application was granted, the Commission has not had occasion to consider formally the status of joint distribution arrangements under section 17(d) and rule 17d-1. However, the Commission staff has, on several occasions, received informal inquiries relating to the ability of funds that share a common investment adviser to finance jointly such activities as advertising, the printing and mailing of sales literature, and other activities that are or may be primarily intended to result in the sale of shares issued by the funds involved.<sup>141</sup> Additionally, during its review of fund distribution practices under rule 12b-1, the Division became aware that many funds with the same investment adviser were jointly financing such activities as the overhead expenses of the fund's distributor and other persons that sell fund shares. In such cases, total overhead is allocated among all of the funds distributed by that person. Under these and similar arrangements where expenses are allocated among funds that share a common investment adviser (or common principal underwriter) questions may arise as to the applicability of section 17(d) and rule 17d-1.<sup>142</sup>

<sup>140</sup> It should be noted that the factual situation presented in the IDS application differed in many respects from the sales practices common throughout most of the fund industry. The Applicants represented that shares of IDS funds are marketed to investors through a sales force of field sales representatives trained and maintained by IDS. It was also represented that this sales force and the high level of initial and continuing personal contact between field representatives and fund investors made IDS virtually unique in the investment company industry.

<sup>141</sup> See, e.g., Investment Company Institute (pub. avail. May 5, 1983) (no-action request relating to joint financing of advertising by money market funds). The staff has informally taken the position that no joint financing of distribution would be deemed to occur simply because funds with a common investment adviser make 12b-1 payments under compensation plans to the same principal underwriter as long as each fund's 12b-1 payments satisfy the *Gartenberg* standard when examined in light of the distribution services provided to that fund. As discussed below, the *Gartenberg* standard is applicable to payments made under 12b-1 plans. See *infra* notes 160-166 and accompanying text. See also *supra* notes 60, 66.

<sup>142</sup> Regardless of the applicability of section 17(d) and rule 17d-1 to a joint distribution arrangement between two or more funds, such arrangements may raise problems under rule 12b-1. Where amounts paid or payable under a fund's 12b-1 plan are used to finance activities that are primarily intended to result in the sale of shares issued by another fund, such payments may not be reasonably likely to benefit the fund and its shareholders. Consequently, the directors of any fund that has a 12b-1 plan that provides for such joint distribution financing should inquire carefully into the method or methods by which joint expenses are to be allocated among the participating funds, to determine that fund assets are not being used to subsidize the distribution

## Discussion

To address the issues discussed above, the Commission is proposing amendments to rules 12b-1 and 17d-3 under the Act. The proposed amendments to rule 12b-1 are intended to (a) Require funds to take steps designed to reduce the amount of any excess distribution spending by a third party that has been carried forward in anticipation of reimbursement under the 12b-1 plan; (b) require funds to base decisions to adopt or continue 12b-1 plans on appropriate business estimates and projections; (c) clarify the requirement that a 12b-1 plan must be reasonably likely to benefit shareholders; (d) provide that the level of amounts accrued under a fund's 12b-1 plan reasonably correlate with the level of the fund's distribution expenditures; (e) clarify that the level of payments under a 12b-1 plan must be within the range of what would have been negotiated at arms-length in light of all of the surrounding circumstances;<sup>143</sup> (f) require funds, in determining whether to implement or continue a plan, to consider whether total distribution charges exceed, or are reasonably likely to exceed, the maximum front-end sales load permitted under the NASD Rules; (g) require disclosure of whether and under what circumstances, over the life of the investment, total distribution charges could exceed the maximum sales load limits in the NASD Rules; (h) require each 12b-1 plan to specify the maximum amount that can be spent annually for distribution under the plan, based on the anticipated level of distribution services to be provided to the fund; (i) restrict the ability of funds

expenses of another fund. In this regard, it should be pointed out that, although the VMF allocation (see *supra* text accompanying note 136) was based in part on the relative net asset value of the funds involved, that method of allocation was justified only on the basis of the unique circumstances present in the Vanguard Proceeding. As a general matter, allocation of joint distribution expenses on the basis of relative net asset value would result in larger funds subsidizing the distribution expenses of smaller funds because payments would not necessarily be related to the benefits received by each fund. If this were the case, the directors of the larger fund would not be able to make the findings required by rule 12b-1 since such subsidization would not appear reasonably likely to benefit the fund and its shareholders. In fact, the primary beneficiary of such subsidization would appear to be the subsidized fund and its investment adviser, who would generally stand to receive a larger advisory fee if the size of that fund increased due to new sales of shares.

<sup>143</sup> This requirement is patterned after the standard articulated in the *Gartenberg* decision, 694 F.2d 923 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), with respect to management fees. For further discussion, see *infra* text accompanying notes 160-166.

<sup>139</sup> See Investment Company Act Rel. Nos. 13278 (May 26, 1983) (48 FR 24820, June 2, 1983) [notice of application] and 13414 (July 29, 1983) (48 FR 36229, Aug 9 1983) [order].

to use payments under 12b-1 plans to pay for non-distribution services; (j) restrict the ability of funds to reimburse a third party for excess distribution spending after the effective date of the amendments, if the reimbursement occurs more than one year after the end of the calendar quarter during which spending took place; (k) require annual shareholder approval for continuation of any 12b-1 plan; (l) clarify the circumstances under which funds may make payments for distribution after termination of a 12b-1 plan; and (m) define payments made under 12b-1 plans as "asset-based sales loads" and prohibit funds that adopt or continue 12b-1 plans from being held out as "no-load" funds or from being otherwise offered in a misleading manner using similar terminology. The amendments would also (a) clarify that, for purposes of the rule, each separate series of a series fund should be treated as a separate fund, and (b) reorganize the provisions of the rule to make the rule easier to understand and follow.

The proposed amendments to rule 17d-3 under the Act are intended to extend that rule's exemptive relief to allow a fund to enter into agreements with one or more other funds that are affiliated persons of the fund, affiliated persons of such persons, or affiliated persons of the fund's principal underwriter, pursuant to which activities primarily intended to result in the sale of shares issued by the participating funds will be financed jointly. The proposed amendments would condition this exemption on compliance with several provisions: (1) That each fund's 12b-1 plan permits such joint distribution payments; (2) that the method or methods by which joint distribution expenses are allocated are specifically set out in the agreement and not likely to result in one fund subsidizing the distribution expenses of another; (3) that, based on reasonable business estimates, the joint distribution arrangement will result in cost savings for each participating fund; and (4) that the fund will not be participating in a joint financing arrangement on a basis different from or less advantageous than other participants. Additionally, as in the proposed amendments to rule 12b-1, the proposed amendments to rule 17d-3 would clarify that, for the purposes of the rule, the separate series of a series fund should be treated as separate funds.

#### A. Proposed Amendments to Rule 12b-1

As discussed in more detail below, the Commission is proposing a number of substantive amendments to rule 12b-1. The Commission is also proposing to

reorganize rule 12b-1 by placing the provisions that deal with similar topics together in the text of the rule under specific subject headings.

#### 1. Substantive Amendments to the Rule

When rule 12b-1 originally was adopted, the Commission emphasized that permitting the use of fund assets for distribution represented a major regulatory change. In formulating the rule, the Commission placed the fundamental decisions of whether and to what extent fund assets may be used for distribution in the hands of each fund's directors, particularly the disinterested directors. By so doing, the Commission made the disinterested directors primarily responsible for protecting the fund and its shareholders from the potential abuses that could result if important decisions regarding the use of fund assets for distribution were made or unduly influenced by the fund's investment adviser. As stated in the Adopting Release, "[s]ince rule 12b-1 does not restrict the kinds or amounts of payments which could be made, the role of the disinterested directors in approving such expenditures is crucial."<sup>144</sup>

Since 1980, the innovative use of rule 12b-1 by the fund industry has resulted in a wide variety of increasingly complex distribution arrangements. Many of these arrangements, while not prohibited by the rule, were not or could not have been anticipated when the rule was drafted. As a result, the rule and prior releases provide little specific guidance on the standards to be followed in making the decisions required by the rule. To remedy this and also to address certain of the issues outlined above, the Commission is proposing to amend rule 12b-1.

a. *The Elimination of Excess Distribution Spending Carried Forward in Anticipation of Reimbursement.* As noted above, problems may arise where 12b-1 plan permits distribution spending in excess of annual payments by the fund.<sup>145</sup> The proposed amendments to

<sup>144</sup> See Adopting Release, *supra* note 1. While the proposed amendments would restrict in certain ways the purposes for which amounts payable under the 12b-1 plan could be used, such restrictions are not intended to lessen the role of the disinterested directors under the rule. In fact, one of the major purposes to be served by the proposed restrictions would be to prevent a fund from engaging in certain activities that could potentially compromise the ability of the disinterested directors to act independently in the best interests of the fund and its shareholders, such as where a large amount of excess distribution spending has been carried forward in anticipation of reimbursement under the 12b-1 plan in future years. See *supra* text accompanying note 82.

<sup>145</sup> See *supra* notes 65-90 and accompanying text.

rule 12b-1, most notably the provisions contained in proposed paragraph (c), are intended to restrict the ability of funds to reimburse such excess distribution spending.<sup>146</sup> The proposed restrictions would apply to excess distribution spending that occurs on or after the effective date of the amendments.<sup>147</sup> However, these rule changes would not affect the unreimbursed amounts already spent on the fund's behalf in earlier years and carried forward in anticipation of reimbursement.

To address this situation, the Commission is also proposing an amendment that is intended to result in the eventual elimination of the reimbursed amounts existing at the time the rule amendments become effective. Paragraph (b)(5) of the proposed amendments would apply to the continuation of an existing 12b-1 plan permitting payments to be made to reimburse any person for excess distribution spending prior to the effective date of the amendments.<sup>148</sup> Any plan that would continue such reimbursements after the effective date of the amendments would have to include provisions designed, in light of the surrounding circumstances, to pay off the total amount of reimbursed expenses within a reasonable period of time. Because circumstances vary from fund to fund, proposed paragraph (b)(5) is intended to provide fund directors with flexibility in deciding how to reduce and eventually pay off presently existing unreimbursed amounts.<sup>149</sup> The directors would have to conclude that any provisions in the 12b-1 plan that are designed to eliminate the unreimbursed amounts, would be reasonably likely to benefit, and would be in the best

<sup>146</sup> See *infra* notes 175-183 and accompanying text.

<sup>147</sup> Because present rule 12b-1 does not prohibit reimbursement arrangements, the applicability of the proposed amendments would be limited to plans adopted or continued in the future. This would avoid restricting the ability of funds to reimburse amounts that were advanced under the present rule in good faith and with an expectation of reimbursement. However, if the proposed amendments are adopted in final form, any repayments of the prior reimbursed amounts would still have to satisfy all the other requirements of the rule, including the *Gartenberg* standard incorporated in proposed paragraph 12b-1(b)(3)(ii).

<sup>148</sup> If the proposed amendments are adopted, reimbursement of such excess distribution spending would be improper unless, at the time such spending took place, the fund's reimbursement plan specifically provided for reimbursement of excess distribution spending.

<sup>149</sup> Just as this provision would prohibit reimbursement for payments not made pursuant to a specific provision in a fund's 12b-1 plan, so this provision would not require that fund directors pay unreimbursed amounts that the fund is not legally obligated to pay.

interests of, the fund and its shareholders.<sup>150</sup>

As noted, the provisions to be included in a fund's 12b-1 plan under proposed paragraph (b)(5) would be designed, in light of the surrounding circumstances, to result in elimination of the reimbursed amounts "within a reasonable period of time." What time period is reasonable will depend on the circumstances of the particular fund. The factors that may be considered in establishing the time period include the impact of the reimbursement provisions of the fund and its shareholders, the size of the fund, the stage of growth and development of the fund, the size of the unreimbursed amount, including, where applicable, interest payments on that amount, and the present impact that termination of the 12b-1 plan would have on the fund's underwriter or other party to whom the unreimbursed amounts would be paid.

*b. Information requirements.* Present rule 12b-1(d) requires that when considering whether to implement or continue a 12b-1 plan, fund directors request and evaluate such information as may be reasonably necessary to an informed determination of whether the plan should be implemented or continued. Paragraph (d) also requires all parties to related agreements under the 12b-1 plan to provide the information requested by the directors. Additionally, the paragraph requires the directors to consider all pertinent factors and to include a description of the factors considered and the basis for the decision to use fund assets for distribution in the minutes of the board meeting.<sup>151</sup>

The substance of paragraph 12b-1(d) would be incorporated into proposed paragraph 12b-1(b)(4). Additionally, paragraph (b)(4)(i) of the proposed amendments would require that the information requested by fund directors include "appropriate business estimates and projections"<sup>152</sup> of the type

commonly used by those who manage and distribute fund shares when making marketing and other business decisions.<sup>153</sup>

The proposed amendments would also clarify the present language of paragraph (d) relating to the contents of the minutes of board meetings at which findings under rule 12b-1 are made. Proposed paragraph (b)(4)(iv) would require that the minutes specifically describe the factors, assumptions, estimates and projections considered by fund directors, and the basis for any decision to adopt or continue the plan. While rule 12b-1 presently requires that minutes relating to director findings under the rule be descriptive, inspections by the Commission staff have uncovered several instances where board minutes were too cryptic to permit the staff to examine compliance with the rule. These amendments would require that the minutes contain, at a minimum, a description of the factors, assumptions, estimates and projections considered, the basis for any decision to adopt or continue the 12b-1 plan, and the decision itself. Additionally, proposed paragraph (g) would amend the rule's recordkeeping provision to specifically require that information, estimates and projections, and any materials serving as the basis thereof, considered by the directors be preserved and made available for inspection by the Commission.<sup>154</sup>

*c. Reasonable Likelihood That the Plan Will Benefit the Fund and its Shareholders.* Under present rule 12b-1(e), to implement or continue a 12b-1 plan, fund directors must conclude, in the exercise of reasonable business judgment and in light of their fiduciary duties under state law and section 36 of the Act, there is a reasonable likelihood that the plan will benefit the fund and its shareholders. Proposed paragraph (b)(3)(i) of the rule, which incorporates this present duty, specifically would require that this conclusion be based on appropriate business estimates and projections. As discussed above, such estimates and

projections should be requested by, and provided to, the directors of the fund.

Certain benefits to a fund and its shareholders from implementing or continuing a 12b-1 plan cannot be easily quantified. The reference in the proposed rule amendments to estimates and projections is not, therefore, intended to suggest that these are the only types of information upon which the directors' conclusions may be based. Proposed paragraph (b)(3)(i) would also clarify that the directors must conclude that the 12b-1 plan is reasonably likely to benefit shareholders holding fund shares at the time the plan is implemented or continued, as well as future shareholders. In many instances, 12b-1 plans (with or without CDSLs) have become the primary means of financing the distribution of fund shares. Adopting or continuing a 12b-1 plan as an alternative to a front-end sales load may benefit those shareholders whose payment for distribution is thereby postponed. A number of funds have justified the implementation or continuation of a 12b-1 plan on the basis of this benefit.<sup>155</sup> However, since the burden of 12b-1 plans falls not only upon the incoming shareholders, but also upon existing shareholders, the proposed amendments to the rule would require specifically that fund directors find a likely benefit to both groups of shareholders.<sup>156</sup>

*d. Amounts Accrued Under a Fund's 12b-1 Plan.* Paragraph (b)(9) of the proposed amendments to rule 12b-1 would require fund directors to review, at least quarterly, whether amounts accrued under the 12b-1 plan as of the date of the review materially exceed the level of distribution spending for the next quarter. The paragraph provides that if the amounts thus far accrued materially exceed the past level of distribution spending, and if this additional amount accrued is not likely to be spent on distribution in the next quarter, then the rate of accrual under the plan must be reduced through such

<sup>150</sup> Paragraph (b)(3)(i).

<sup>151</sup> As discussed previously, the Note to rule 12b-1 refers directors to the Proposing Release and the Adopting Release for a discussion of factors that may be relevant. The Commission is proposing to amend the Note to rule 12b-1 to include a reference to this release. See *supra* note 34.

<sup>152</sup> As discussed below, the directors would also be specifically required to consider appropriate business estimates and projections when making the findings required by the rule. By proposing to include a specific reference to such estimates and projections, the Commission is not implying that a duty to request such information does not exist under the present rule. Rather, the proposed amendment is intended to clarify that fund directors should base their findings under the rule on the same type of information that is commonly used by those who manage and distribute fund shares when making marketing and other business decisions.

<sup>153</sup> The Commission recognizes that business estimates and projections are based on certain assumptions and do not necessarily provide an accurate forecast of future events. However, because estimates and projections are regularly used by fund managers and underwriters to plan marketing strategies and make other business decisions, such estimates and projections could provide valuable guidance to fund directors when making decisions regarding 12b-1 plans and related agreements.

<sup>154</sup> Such information may be preserved on photographic film or on magnetic tape, disk, or other computer storage medium in the manner prescribed in rule 31a-2 (17 CFR 270.31a-2) under the Act.

<sup>155</sup> See ICI Statement, *supra* note 51 at 55. Of course, the benefits described by the ICI Statement will only apply to those shareholders who do not hold their shares so long as to pay more than the equivalent of the maximum sales load permitted by NASD Rules.

<sup>156</sup> As discussed above, during the formulation of rule 12b-1, the Commission expressed concern regarding the fair treatment of existing fund shareholders in connection with the bearing of distribution expenses. See Advance Notice Release, *supra* note 12. Additionally, in the context of reimbursement plans, it appears that the benefits of a 12b-1 plan may be realized primarily by one group of shareholders while the burdens of the plan fall on a different group of shareholders. See *supra* notes 83-88 and accompanying text.

actions as the directors deem appropriate.

As discussed above, some funds may accrue amounts to be used for distribution under a 12b-1 plan at a rate that far exceeds the level of distribution spending for the fund.<sup>157</sup> Although this practice may be appropriate where the additional amounts accrued, but not paid, are likely to be spent on distribution in the near future, a problem arises where the accrued amounts far exceed that level. When this occurs, the burden of the additional amounts being accrued is borne by existing fund shareholders, who suffer an immediate reduction in the net asset value of their shares. However, the benefits to be derived from the additional amounts accrued will not occur until the amounts are spent, by which time many of those shareholders may have redeemed their shares.<sup>158</sup> Such an obvious imbalance of the benefits and burdens of 12b-1 payments could make it difficult to conclude that the plan is reasonably likely to benefit the fund and its shareholders.

Proposed paragraph (b)(9) would require fund directors to determine, on a periodic basis, whether the rate of accrual under the plan reasonably correlates with the level of distribution spending for the fund. The finding should be based on the quarterly expenditure reports required by paragraph (b)(8) of the rule to be provided by any person authorized to direct the disposition of amounts paid or payable under the fund's 12b-1 plan.<sup>159</sup> The finding should also be based on any appropriate business estimates and projections made pursuant to proposed paragraph (b)(4)(i). If the directors determine that the fund has accumulated or is about to accumulate accrued amounts under a 12b-1 plan that are not likely to be spent on distribution by the end of the next quarter, then action should be taken to reduce the accrual rate until the imbalance has been corrected.

*e. The Level of Distribution Payments Made Under a Fund's 12b-1 Plan.* Any determination that a 12b-1 plan is reasonably likely to benefit the fund and its shareholders involves consideration of the amounts to be paid under the

plan, assessment of the impact of total spending on the fund and its shareholders, and evaluation of the distribution services or activities to be received. However, the present rule and prior releases shed little light on the appropriate standards to be applied by directors when considering the level of payments under a fund's 12b-1 plan.

The proposed amendment would establish that the appropriate standard for fund directors to use in assessing the level of payments under a 12b-1 plan is similar to that articulated by the United States Court of Appeals for the Second Circuit in *Gartenberg v. Merrill Lynch Asset Management, Inc.* ("*Gartenberg*")<sup>160</sup> with respect to management fees under section 36(b) of the Act.<sup>161</sup> In that case, the court stated that the appropriate standard is "essentially whether the fee schedule represents a charge within the range of what would have been negotiated at arm's-length in light of all of the surrounding circumstances."<sup>162</sup> The standard enunciated by the court in *Gartenberg* and applied in subsequent cases<sup>163</sup> may also be the correct one for determining whether payments under a 12b-1 plan are appropriate in light of the distribution services being purchases. Therefore, proposed paragraph (b)(3)(ii) would apply this standard to distribution payments by requiring fund directors who vote to implement or continue a 12b-1 plan to conclude that, given the surrounding circumstances,<sup>164</sup> the amounts payable

under the plan represent a charge within the range of what would have been negotiated at arm's length.<sup>165</sup> This conclusion would have to be reached by the directors in light of their fiduciary duties under state law and section 36 of the Act, and based upon appropriate business estimates and projections.<sup>166</sup>

*f. NASD Limitations on Sales Charges.* As discussed above, while payments under 12b-1 plans are used to pay for sales and promotional activities, they are not literally subject to the limitations on maximum sales charges under Article III Section 26(d) of the NASD Rules.<sup>167</sup> To address the issues raised by this aspect of rule 12b-1, paragraph (b)(4)(iii) of the proposed amendments would specifically require fund directors, when determining whether to implement or continue a 12b-1 plan, to consider the extent to which shareholders have paid, or may pay, more for sales or promotional activities than the maximum sales charge that would be permissible under the NASD Rules. This decision would be made in light of all surrounding circumstances and based on all types of distribution charges imposed, whether those charges are front-end sales loads, deferred sales loads, asset-based sales loads, or a combination of the above. In addition, the proposed amendments would require disclosure in the fund's prospectus of whether and under what

<sup>160</sup> 694 F.2d 923 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983).

<sup>161</sup> The ICI Statement suggested that under certain circumstances, the *Gartenberg* standard is the appropriate standard for fund directors to use in assessing the level of payments under a 12b-1 plan. See ICI Statement, *supra* note 51, at 60-61.

However, the proposed amendments to rule 12b-1 would apply the standard somewhat differently than that suggested by the ICI.

<sup>162</sup> 694 F.2d at 928.

<sup>163</sup> See, e.g., *Meyer v. Oppenheimer Management Corporation*, 764 F.2d 76 (2d Cir. 1985); *Schuyt v. Rowe Price Prime Reserve Fund, Inc.*, 663 F. Supp. 962 (S.D.N.Y. 1987), *Aff'd per curiam*, 835 F.2d 45 (2d Cir. 1987), cert. denied, 108 S. Ct. 1594 (1988).

<sup>164</sup> In the context of a fund that is an investment vehicle for insurance products, the "surrounding circumstances" that directors must consider in approving a 12b-1 plan include the existence and level of any mortality or expense risk charge imposed on contractholders to the extent such charge may be used, directly or indirectly, to pay for distribution. Moreover, it would appear that a 12b-1 plan is far more justified in the case of a fund whose shares are sold to separate accounts of unaffiliated insurance companies than for a fund whose shares are sold to the separate accounts of a single company or to separate accounts of affiliated companies.

<sup>165</sup> The ICI cited the district court opinion in *Gartenberg* for the proposition that the cost of rendering a service is of relative unimportance. See ICI Statement, *supra* note 51, at 71. However, this position was taken by the district court as part of its holding that the principal factor to be considered when assessing fees under section 36(b) is the price charged by others in the industry for similar services. It should be noted that the Second Circuit specifically disagreed with this aspect of the district court opinion. See 694 F.2d at 929. Therefore, as discussed by the Second Circuit, the cost of providing services is one of several factors that may be important in determining whether a fee is excessive. *Id.* at 930.

<sup>166</sup> As noted by the court in *Gartenberg*, the expertise of a fund's independent directors, whether they are fully informed regarding the services and fees, and the extent of care and conscientiousness with which they perform their duties are important factors in determining whether a violation of section 36(b) has occurred. See *Gartenberg*, 694 F.2d at 930. These factors would also be relevant in any inquiry regarding whether a fund's disinterested directors have fulfilled their responsibilities under rule 12b-1. To the extent that a fund's disinterested directors are well-qualified, fully informed individuals who demonstrate a willingness to act independently of fund management, their determination that the standards of the rule have been met should be weighted heavily.

<sup>167</sup> The NASD maximum may vary depending on the characteristics of the particular fund. See *supra* note 114 and accompanying text. See also Article III Section 26(d) of the NASD Rules. For a discussion of the potential problems caused by the inapplicability of the NASD limits to 12b-1 payments, see *supra* text accompanying notes 105-123.

<sup>157</sup> See *supra* note 88.

<sup>158</sup> This practice is, in effect, the obverse of the "carry forward" problem in a fund whose 12b-1 plan permits distribution spending in excess of annual payments by the fund. The "carry forward" problem is that future shareholders may bear the burdens of distribution spending incurred for the benefit of shareholders who are no longer in the fund. See *supra* notes 83-88 and accompanying text.

<sup>159</sup> Proposed paragraph (b)(8) substantially incorporates present paragraph (b)(3)(ii).

circumstances a fund's shareholder will pay more than the maximum limits under the NASD Rules. Such disclosure may be amplified in a table or graph.<sup>168</sup>

These paragraphs are based on the principles expressed in the sales load limits of the NASD Rules. By requiring prospectus disclosure of whether and under what circumstances a shareholder will pay more than the maximum NASD limits, the proposed amendments would help fund investors be aware of the possibility that they may, in a given case, pay more under a 12b-1 plan than would be permissible as a front-end sales load.<sup>169</sup>

*g. Including an Annual Spending Ceiling in a 12b-1 Plan.* Proposed paragraph (f) of rule 12b-1 would specifically require each 12b-1 plan to specify the maximum amount that can be spent annually for distribution under the plan. This annual spending ceiling would have to be expressed either as a stated dollar amount or as a specified percentage of the fund's average total net asset value.

Virtually all funds with 12b-1 plans presently include an annual spending ceiling in the terms of the plan. Such ceilings are important because they enable fund directors to more easily assess the possible impact of fund distribution spending on a fund and its shareholders when making the determinations required by the rule. Moreover, an annual spending ceiling requirement is implicit in the terms of the present rule because, without such a specified ceiling, it would be impossible to determine whether an amendment to a 12b-1 plan would increase materially the amount to be spent for distribution, thereby requiring shareholder approval under present rule 12b-1(b)(4).

The proposed amendments to rule 12b-1 would require that the maximum annual ceiling be expressed as either a stated dollar amount or as a specified

percentage of the fund's average total net asset value. Because the overwhelming majority of funds already have annual spending ceilings expressed as a percentage of average total net assets, the proposed amendments, if adopted, may not require many funds to amend their plans. Moreover, proposed paragraph 12b-1(f) would specifically provide that the inclusion of an annual ceiling in a 12b-1 plan would not prevent a fund's directors from establishing a lesser amount to be spent under the plan in a given year.<sup>170</sup> Nevertheless, the maximum ceiling should be based on a realistic estimate of the level of distribution services to be provided to the fund on an annual basis, based on reasonable business estimates and projections. It would be inappropriate to set a ceiling so artificially high that there could be significant changes in the level of payments made under a 12b-1 plan without a new shareholder vote pursuant to paragraph (d)(1)(i) of the rule. While the ceiling may be proposed initially by the fund's principal underwriter, it would, of course, have to be approved by the fund's directors in their vote on the adoption or continuation of the 12b-1 plan. It is anticipated that the directors, in deliberating on those matters, will request and evaluate the estimates and projections used in setting the ceiling.

Finally, the proposed amendments would require only that the *maximum* annual ceiling be calculated by one of the methods specified. The proposal would not, for example, prevent a fund from including in its 12b-1 plan a provision that calculated the maximum annual spending ceiling as the *lesser* of a specified percentage of the fund's average net asset value, or a specified percentage of the fund's total net sales during the year. Similar methods of calculation could also be used, as long as the maximum amount was calculated as either a stated dollar amount or a specified percentage of the fund's average total net asset value.

*h. Use of Amounts Paid or Payable Under 12b-1 Plans.* Proposed paragraph (c) of rule 12b-1 would require that each 12b-1 plan and related agreement contain certain provisions restricting the purposes for which amounts paid or payable under the plan or agreement may be used. When rule 12b-1 was originally adopted, the Commission did not include restrictions on the use of amounts paid or payable under the rule. Instead, the rule relied on fund directors, particularly disinterested directors, to

act as a safeguard against potential abuses. The Commission still believes that the independence of fund directors from management provides the primary defense against abuse under the rule. However, because of certain practices that have developed under rule 12b-1 it may be necessary to restrict the purposes for which 12b-1 proceeds may be used.

Proposed paragraph 12b-1(c)(1) would require each 12b-1 plan and related agreement to limit the use of fund assets to payment for, or reimbursement of payment for, specific sales or promotional services or activities, identified in the plan, that actually have been or will be provided in connection with the distribution of fund shares.<sup>171</sup> This provision would accomplish two primary objectives. First, the provision would prohibit the implementation or continuation of compensation plans or any other plans that do not tie fund payments to specific services or activities actually provided.<sup>172</sup>

Second, by limiting a fund's payments under its 12b-1 plan and related agreements to payments for sales or promotional services or activities provided in connection with the distribution of the fund's shares, proposed paragraph (c)(1)(i) would prevent the use of the fund's assets under a 12b-1 plan to pay for non-distribution expenses or for the distribution expenses of another fund.<sup>173</sup> Proposed paragraph (c)(2), however, would make it clear that sales or promotional services or activities provided to the fund as a participating company in a joint distribution agreement under proposed rule 17d-3(b)

<sup>168</sup> An amendment to item 7 of form N-1A is being proposed which would implement this disclosure requirement.

<sup>169</sup> The ICI Statement maintained that fund investors often make a conscious investment decision to invest in a fund that pays for distribution through a 12b-1 plan (with or without a CDSL) rather than invest in a fund that pays for distribution through a front-end sales load. See ICI Statement, *supra* note 51, at 32-33. However, because investors may find it difficult to determine the likely impact of 12b-1 payments, they may be unaware that some funds are charging more than could have been charged as a front-end sales load. The proposed amendments simply represent an attempt to enable investors making an investment decision based, in part, on the method of paying for distribution, to be aware of a fact that is material to the decision, namely whether, and under what circumstances, an investor in a given fund is reasonably likely to pay more for distribution than could have been charged as a front-end sales load on fund shares under the NASD Rules.

<sup>170</sup> See *supra* note 67.

<sup>171</sup> Given the wide variety of payment arrangements that exist under rule 12b-1, proposed paragraph 12b-1(c) has been drafted in anticipation that funds may pay for distribution expenses or activities through a third party, such as the fund's principal underwriter, or pay the provider of services or activities directly. Additionally, the amendments would permit payment both for services or activities previously provided or for services or activities to be provided in the near future, thereby recognizing that prepayment for certain services or activities may be necessary.

<sup>172</sup> This provision would not prohibit payments for expenditures such as sales commissions which are calculated as a percentage of the purchase price of shares sold. Similarly, the payment of so-called "trail" fees, whether intended as sales commissions or as payments for specific distribution services, would be allowed, as long as the payments meet the directors' approval under the *Gartenberg* standard discussed above.

<sup>173</sup> To the extent non-distribution expenses are a legitimate fund expense, a fund could pay for such expenses outside the 12b-1 plan, subject to other applicable legal requirements. See *supra* notes 126, 129. Whether or not payments are for distribution is a question of fact to be decided by the fund's board of directors in light of the surrounding circumstances.

would be considered to be provided in connection with the distribution of the fund's shares.<sup>174</sup> In any event, payments by the fund could not exceed the annual ceiling under the fund's 12b-1 plan.<sup>175</sup>

Proposed rule 12b-1(c) would also restrict the ability of a fund to pay for distribution expenses incurred on the fund's behalf in prior years. This is intended to require that distribution services financed under 12b-1 plans are paid for on a current basis.

Proposed paragraph (c)(1)(ii) would require each 12b-1 plan and related agreement to provide that no amounts paid or payable by the fund may be used to pay for or reimburse payments for sales or promotional services or activities that are provided after the effective date of the rule amendments, unless payment takes place prior to the earliest of two points in time described in the rule text. Specifically, payment or reimbursement by the fund for a particular service or activity would have to take place prior to the earliest of (A) the last day of the one year period commencing on the last day of the calendar quarter during which the service or activity was performed or (B) the last day of the one year period commencing on the last day of the calendar quarter during which payment for the service or activity was made by a third party on behalf of the fund. Thus, the proposed amendments are intended to restrict the ability of a fund to use a 12b-1 plan to pay for services or activities that were provided more than one year prior to the calendar quarter during which payment or reimbursement is made by the fund.<sup>176</sup> The one year

period was derived from the one year term of 12b-1 plans under the present rule, although the period could span two terms of the plan.

As noted above, funds using the amended rule would determine the last permissible date on which payment for a service or activity could be made (the "last payment date") pursuant to the provisions of proposed paragraph (c)(1)(ii).<sup>177</sup> Funds calculating the last payment date under proposed paragraph (c)(1)(ii) would also have to determine the calendar quarter during which the particular service or activity will be performed. For ease of calculation, the proposed amendments would measure the maximum one year payment period by reference to calendar quarters, rather than the date on which each service or activity was performed. Consequently, it is anticipated that this determination would, in most instances, present few, if any, difficulties to funds relying on the rule.<sup>178</sup>

Where a fund relying on the rule has arranged for fund distribution expenses to be paid initially by a third party, such as the fund's principal underwriter, and later reimbursed by the fund, calculation of the last payment date would also require reference to the calendar quarter during which the third party paid for the particular services or activities in question. This additional provision for funds that use third party arrangements is intended to prevent such funds from extending the allowable payment period

fund's ability to make or reimburse payments for services and activities that occurred prior to that date. Such payments would, however, have to comply with the other provisions of the proposed amendments to rule 12b-1, including proposed paragraph (b)(5), relating to the responsibility of directors to take steps to eliminate the level of unreimbursed expenses from prior years within a reasonable period of time. See *supra* notes 145-150 and accompanying text.

<sup>177</sup> In order to facilitate arrangements whereby a fund may be required to pay all or part of a distribution expense prior to commencement of the one year period, proposed paragraph (c)(1)(ii) has been drafted only to require payment prior to the end of the one year period rather than to require payment during the applicable period.

<sup>178</sup> Where a person provides ongoing services to the fund, it may be more difficult to determine the point at which a particular service or activity would be deemed to have been provided. Under such circumstances, a fund may find it useful to make this determination by reference to such factors as the schedule that governs billing and payment for the service. For example, where the fund or its representative is billed for ongoing services on a monthly basis, it would appear appropriate to deem the ongoing services covered by the bill to have been provided during that month. Of course, it would be inappropriate for a fund to establish the last date services were provided by reference to a billing schedule that uses a relatively long period of time, if the schedule was structured solely or primarily for the purpose of extending the time allowable for payment or reimbursement under the rule.

simply by channelling payments for distribution through a third party.<sup>179</sup>

The imposition of the restrictions contained in proposed paragraph (c)(1)(ii) may make it difficult for funds to pay all of their distribution expenses under the current levels of their 12b-1 fees. However, these restrictions are intended to address the problems and potential problems that may arise from the carry forward of excess distribution spending from prior years. By precluding the build-up of excess distribution spending to be carried forward, the paragraph would reduce the potential reluctance of directors to discontinue a 12b-1 plan. The paragraph would also cause a better matching of the beneficiaries of distribution services with those who bear the costs of such services.<sup>180</sup>

Finally, it should be noted that the proposed amendments would not prevent a fund from obtaining sufficient financing to pay for distribution expenses. Other options available to the fund would include increasing the maximum amounts paid or payable under the fund's 12b-1 plan,<sup>181</sup> imposing or increasing front-end or deferred sales loads payable in connection with new sales of fund shares,<sup>182</sup> or having the fund's adviser pay for a portion of distribution expenses out of its own resources.<sup>183</sup>

*i. Shareholder Approval and Reapproval of 12b-1 Plans.* Proposed paragraph (b)(1) of rule 12b-1 would require that each 12b-1 plan be approved initially and reapproved at least annually by a vote of at least a majority of the fund's outstanding voting securities.<sup>184</sup> In addition, proposed

<sup>179</sup> Because it may be difficult for fund directors to be involved in the day-to-day application of the limitations set forth in proposed rule 12b-1(c)(1)(ii), it is anticipated that funds operating under the proposed amendments would comply with this restriction by approving appropriate guidelines for the fund's officers to follow in disbursing payments under the 12b-1 plan to make sure that payments are not made in violation of the proposed restrictions. In addition to approving such guidelines, the directors would also have to review periodically the operation of the guidelines and make any adjustments or refinements deemed necessary.

<sup>180</sup> See *supra* notes 83-88 and accompanying text.

<sup>181</sup> Such an increase would require a shareholder vote under proposed rule 12b-1(d)(1), which incorporates unchanged the substance of present rule 12b-1(b)(4).

<sup>182</sup> See *supra* notes 84.

<sup>183</sup> As discussed above, such payments need not be made under a 12b-1 plan. See *supra* text following note 128.

<sup>184</sup> Proposed paragraph (b)(2) of the rule would require that the plan, as well as any related agreements, be approved by a vote of the fund's board of directors and of the disinterested directors. This provision is substantively the same requirement as that found in paragraph (b)(2) of the present rule.

<sup>174</sup> As discussed above, arrangements whereby two or more funds jointly finance distribution expenses raise problems under rule 12b-1 because of the danger that one fund's assets may be used to subsidize the distribution of another fund's shares. See *supra* note 142. Because the proposed amendments to rule 17d-3 are intended to address similar concerns, the Commission is proposing to amend rule 12b-1 to restrict the use of payments under a 12b-1 plan for joint distribution financing to those arrangements that satisfy the requirements of rule 17d-3(b), as proposed to be amended. Consequently, even joint distribution arrangements that are not subject to section 17(d) and rule 17d-1 would be required to satisfy the rule 17d-3(b) requirements if the arrangement is financed under a participating fund's 12b-1 plan. This would be the case, for example, where two unaffiliated funds enter into a joint distribution arrangement. Moreover, because the separate series of a series fund would be considered to be separate funds under the proposed amendments to rules 12b-1 and 17d-3, joint distribution arrangements between separate series of a fund would also have to satisfy proposed rule 17d-3(b).

<sup>175</sup> See *supra* text accompanying note 170.

<sup>176</sup> By its terms, proposed paragraph (c)(1)(ii) would apply only to services and activities that occurred after the effective date of the amendments. Therefore, this provision would have no impact on a

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paragraph (b)(7) would require that the plan stipulate that it may only continue in effect beyond a period of one year if the continuance is specifically approved annually by a vote of both the fund's directors and its shareholders.

The requirement that shareholders reapprove the fund's 12b-1 plan at least on an annual basis was suggested initially by the Commission in the Advance Notice Release to rule 12b-1 in order to provide for continuing control by shareholders of the use of fund assets to pay distribution expenses after such arrangements were initially approved.<sup>185</sup> However, in light of comments received to the effect that annual shareholder approval was not necessary,<sup>186</sup> the Commission adopted rule 12b-1 to require that, subsequent to the adoption of a distribution plan, only modifications that would materially increase the amount of money to be spent need by submitted to the shareholders for approval. Annual shareholder approval is not presently needed if no such change is proposed.<sup>187</sup>

The amended rule would provide that shareholders have a continuing role in the approval of 12b-1 plans since the utility of a plan to a fund may change over time. Thus, while shareholders may see good reason to approve a plan in the early years of a fund to stimulate growth to a sufficient level for economies of scale to be achieved, they may have a quite different opinion of the utility of a 12b-1 plan once a fund has matured. Their solution to dissatisfaction with the plan could be to sell their interests in the fund, but such decisions could be costly if the fund has a CDSL or charges redemption fees. Proposed paragraph (b)(1) would thus require approval by shareholders of the 12b-1 plan at least annually. Shareholders would then be able to decide, based on past and current net sales, performance, expenses, and future projections, the amount of fund assets, if any, that would be allotted toward distribution.<sup>188</sup>

Because the Commission recognizes that for funds that do not charge a CDSL or redemption fee, or that have not charged a front-end sales load, shareholders dissatisfied with a 12b-1 plan could "vote with their feet," so to speak, the Commission also is seeking comment on whether the annual shareholder vote requirement of (b)(1) should be limited to funds that charge a CDSL, redemption fee, or front-end sales load.

*j. Proposed Amendments Relating to Fund Payments After Termination of a Plan or Related Agreements.* Proposed paragraph (d) of rule 12b-1 incorporates the provisions of the present rule that relate to the amendment and termination of 12b-1 plans and related agreements. Proposed paragraphs (d)(1)(iii) and (d)(2)(iii) would be added to the rule to make explicit that questions relating to fund payments for distribution after termination should be addressed in each 12b-1 plan and related agreement.<sup>189</sup>

Proposed paragraph (d)(1)(iii) would require each 12b-1 plan implemented or continued under the amended rule to include, in substance, one of two provisions relating to fund payments after termination. The first alternative would be to include in the plan a provision stating that, in the event the plan is terminated or otherwise discontinued, no further payments will be made by the fund. The second alternative would be to provide that, in the event of termination or discontinuation, further payments by the fund will be made only to the extent such payments are specifically permitted and described by the provisions of the plan, and then only to the extent such payments would be permitted under proposed paragraph (c). Proposed paragraph (d)(2)(iii) would contain similar alternatives for related agreements under a 12b-1 plan.<sup>190</sup>

If a fund operating under the proposed amendments anticipated making payments for distribution after the termination of the plan, the details regarding the calculation of such payments, the method of payment, and

other material provisions would have to be set forth specifically in the plan and appropriate related agreements.<sup>191</sup> Additionally, any agreement to make payments would have to restrict the fund's ability to make payments for distribution services and activities provided after the effective date of the amendments.<sup>192</sup> Finally, if no payments after termination would be permitted, that fact would have to be stated prominently in the plan and agreements so that the fund, its directors, officers, employees and shareholders, and parties to related agreements, will realize that the restriction on payment exists.

*k. Amendments Intended to Provide for Proper Labelling and Disclosure of 12b-1 Fees.* (1) 12b-1 Payments as "Asset-Based Sales Loads". The proposed amendments to rule 12b-1 would change the heading of the rule to read "Payment of Asset-Based Sales Loads by Registered Open-End Management Investment Companies." Additionally, proposed paragraph (a)(2) of the rule, which would define the scope of rule 12b-1, would state that a fund will be deemed to be acting as a distributor of securities of which it is the issuer, other than through an underwriter, if the fund pays an "asset-based sales load." The term "asset-based sales load" would be defined in proposed paragraph (h)(2) of the rule to mean any direct or indirect financing by a fund of sales of promotional services or activities in connection with the distribution of fund shares. The term "asset-based sales load" would also be used in several other provisions of the proposed amendments to refer to payments made under 12b-1 plans.

The use of the term "asset-based sales load" in the proposed amendments is not intended to have any impact on the scope of rule 12b-1. Nor is the use of the term intended to bring 12b-1 payments within the term "sales load" as defined in section 2(a)(35) of the Act<sup>193</sup> and used throughout the Act and the rules thereunder. Rather, the change in terminology is directed at the investor confusion that has arisen regarding

<sup>185</sup> See *supra* notes 12 at text accompanying n.8.  
<sup>186</sup> See Proposing Release, *supra* note 20 at n.25 and accompanying text. See also Adopting Release, *supra* note 1 at n.30 and accompanying text.  
<sup>187</sup> See Adopting Release, *supra* note 1. Although the proposed rule did not contain a shareholder reapproval condition, comments were received which argued against requiring shareholder approval of modifications of the initial arrangements.

<sup>188</sup> In order for shareholders to make such a determination, funds would need to disclose to shareholders a summary of the same type of information as must be considered by directors in their decision as to whether to continue a 12b-1 plan.  
<sup>189</sup> As discussed above, under present rule 12b-1, funds are required to address specifically all material aspects of the proposed distribution financing in the 12b-1 plan itself and in related agreements. See *supra* note 28 and accompanying text. Proposed paragraphs (d)(1)(iii) and (d)(2)(iii) are intended only to clarify this requirement with respect to payments after termination. See *supra* note 89.  
<sup>190</sup> With respect to a related agreement, payments could be made after termination or discontinuation only pursuant to the specific provisions of both the agreement and the fund's 12b-1 plan, as well as only if payment is consistent with proposed paragraph (c)(2).

<sup>191</sup> It would not be sufficient for the plan simply to authorize the fund's directors or disinterested directors to make these decisions.

<sup>192</sup> See paragraph (c)(1)(ii). Any payments after termination or discontinuation would also have to be intended as payment or reimbursement for specific sales or promotional services or activities that actually have been provided to the fund. See paragraph (c)(1)(i).

<sup>193</sup> See *supra* note 52.

payments for distribution under the rule.<sup>194</sup>

(2) Use of "No-Load" Terminology. Proposed paragraph (e) of rule 12b-1 would prohibit funds that have adopted 12b-1 plans under the rule from using their assets to pay for distribution if they hold themselves out to the public as "no-load" funds or use terminology that, given the context and presentation, is likely to convey to investors the impression that the fund does not impose any charges for sales or promotional expenses. These prohibitions would also apply if the proscribed action is taken by the fund's principal underwriter, affiliated persons, or by any person who, directly or indirectly, receives assets expended pursuant to the 12b-1 plan. It also would apply to any affiliated person of any listed person. Where a fund has adopted a 12b-1 plan, that fund is imposing on its shareholders the functional equivalent of a sales load. In addition, the current practice of funds with 12b-1 plans using "no-load" terminology,<sup>195</sup> has confused investors.

As discussed above,<sup>196</sup> the ICI has recommended that the Commission continue to permit funds that make annual payments of .25% or less of average net assets to use no-load terminology. In support of this position, the ICI has argued that 12b-1 payments should be considered the equivalent of a sales load only if annual payments exceed .25% of the fund's average net assets. However, under section 2(a)(35) of the Act, any portion of the public offering price that is properly attributable to sales or promotional activities would be considered a "sales load." Since the Act does not provide a *de minimis* exception from the definition of sales load, it would seem incongruous to permit such an exception for 12b-1 payments, which are used to finance the same types of activities, *i.e.*, payments of commissions to salespersons or promotional activities. Consequently, the proposed amendments would forbid the use of no-load terminology by all funds that have adopted 12b-1 plans.

Even if funds that have 12b-1 plans are prohibited from holding themselves out as "no-load" funds, a possibility exists that investors would be misled by the use of similar descriptive language by such funds. For instance, phrases such as "no sales charge," "no initial

sales charges" and "no initial sales load," without additional information, convey to the investor much the same impression that the label "no-load" does. Because subtle distinctions as to the meaning of such descriptive phrases are too often lost on individual investors,<sup>197</sup> the Commission is proposing to prohibit funds from using fund assets to make payments under 12b-1 plans where the fund or persons in the distribution network hold the fund out as "no-load" or use terminology that, given the context and presentation, is likely to convey to investors the impression that the fund does not impose any charges for sales and promotional expenses.

At the same time, proposed paragraph 12b-1(e) is intended to recognize that terms such as "no initial sales charge" may be literally true for a particular fund that does not charge an initial sales load and that has adopted a 12b-1 plan. The paragraph would strike a balance between the legitimate use of such phrases in fund disclosure documents, sales literature, and advertising, and the risk that investors will be misled into thinking that the fund does not impose sales charges of any kind. Because the proposed amendment specifically refers to the presentation of terminology and the context in which language is used, a fund would be able to use descriptive phrases such as those set forth above (assuming it would otherwise be appropriate to do so) as long as the advertisement, sales literature or disclosure document in which the phrase appears also states, in close proximity to the phrase, that the fund charged an asset-based sales load.

The prohibition on the use of the no-load label or any similar terminology used in a misleading manner applies to all funds that have adopted 12b-1 plans. Accordingly, funds that have adopted defensive 12b-1 plans would be subject to these restrictions. While defensive plans do not provide for separate payments, allowing funds with defensive 12b-1 plans to continue to call themselves "no-load" would encourage other funds to simply redirect their distribution costs through payments under the advisory contract. Any fund that has adopted a defensive 12b-1 plan could, of course, terminate the plan to call itself a "no-load" fund. As discussed previously, a 12b-1 plan is not

required for a fund's investment adviser to pay for distribution, as long as such payments are made out of the adviser's own resources.<sup>198</sup>

Proposed paragraph (e) would also apply to funds that pay various shareholder servicing costs to banks or other financial institutions under 12b-1 plans. As mentioned previously, a number of funds have entered into agreements whereby fund shares are made available for purchase by the customers of a bank or other financial institution. In many cases, these funds pay these institutions for providing "shareholder services." Some funds have paid for such services through a 12b-1 plan, apparently to address the possibility that the payments may be characterized as distribution expenditures.<sup>199</sup> Proposed rule 12b-1(e) would prohibit any fund that makes payments that could be characterized as distribution expenditures to banks and other institutions from using the no-load label or similar terminology if these funds make these payments through a 12b-1 plan.<sup>200</sup>

If proposed paragraph (e) of the rule 12b-1 is adopted, use of the "no-load" label or similar prohibited terminology in statutory and omitting prospectuses (*i.e.*, prospectuses prepared in accordance with rule 483 (17 CFR 230.482) under the Securities Act of 1933 ("Securities Act")) of funds that have adopted 12b-1 plans would be subject to liability under sections 12(2) and 17(a) of the Securities Act (15 U.S.C. 771(2) and 77q(a), respectively). Under existing interpretations of rule 156 under the Securities Act (17 CFR 230.156), use of such terminology in sales literature would subject the persons using the prohibited terminology to liability under section 17(a) of the Securities Act and section 10(b) of, and rule 10b-5 under, the Securities Exchange Act of 1934 (15 U.S.C. 78j(b) and 17 CFR 240.10b-5, respectively).<sup>201</sup>

<sup>198</sup> See *supra* notes 126-128 and accompanying text.

<sup>199</sup> See *supra* note 126.

<sup>200</sup> As noted previously, proposed paragraph (c)(1)(i) would prevent the use of fund assets under a 12b-1 plan to pay for non-distribution expenses. See *supra* notes 171-175 and accompanying text. Thus, a fund would not be able to pay through a 12b-1 plan any shareholder servicing costs that cannot be characterized as distribution expenses. Whether or not payments are for distribution would be a question of fact to be decided by fund directors in light of the surrounding circumstances. See *supra* note 126.

<sup>201</sup> The first sentence of rule 156(a), which concerns investment company sales literature, provides that

Under the federal securities laws, including section 17(a) of the Securities Act of 1933 (15 U.S.C.

<sup>194</sup> If the proposed amendments relating to terminology are adopted, the Commission intends to amend form N-1A under the Act to change all references to distribution charges under rule 12b-1 to refer to "asset-based sales loads."

<sup>195</sup> See *supra* note 102 and accompanying text.

<sup>196</sup> See *supra* note 55 and accompanying text. See also *supra* note 103 and accompanying text.

<sup>197</sup> The Commission's belief in this regard is reinforced by the hundreds of letters that have been received from individual fund investors who characterize 12b-1 fees and deferred sales loads as "hidden loads". Many of these investors claim to have been misled by sales literature or salesmen into thinking that a particular fund did not charge for distribution.

Continued

## 2. Applicability of Rule 12b-1 to the Separate Series of a Series Fund

Paragraph (h)(1) of the proposed amendments to rule 12b-1 would define, for purposes of the rule, the term "registered open-end management investment company" to include a separate series of such a company. There are apparently has been some confusion as to whether the separate series of a series fund should be treated as separate investment companies under the rule.<sup>202</sup> The amendments are intended to make clear that each individual series of a series fund should be treated as a separate fund.<sup>203</sup>

Each individual series of a series fund is, in effect, a separate investment company. Separate series of a single registrant typically have a wide variety of investment objectives, and shareholders of an individual series hold interests only in that series' segregated portfolio.<sup>204</sup> Moreover, the best interests of the shareholders of one series may or may not coincide with the best interests of the shareholders of another series. Consequently, treating individual series as separate funds under rule 12b-1 is the proper approach.

Under the proposed amendments, each series could finance separately the distribution of its shares by having either a 12b-1 plan, a deferred or front-end sales load, a combination of such sales charges, or no sales charges at all.<sup>205</sup> This flexibility would allow fund

directors to tailor distribution financing arrangements to the needs of each particular series and its shareholders. Decisions as to whether to implement or continue a 12b-1 plan would be made, of course, by the directors in accordance with the best interests of the individual series and its shareholders.<sup>206</sup>

### B. Proposed Amendments to Rule 17d-3

The Commission is also proposing to amend rule 17d-3 under the Act. That rule provides exemptive relief permitting funds to enter into agreements with an affiliated person, a principal underwriter, or an affiliated person of such a person or underwriter, whereby the fund makes payments in connection with the distribution of its shares (a "joint distribution agreement"). Paragraph (b) of rule 17d-3 currently prevents a fund relying on the rule from entering into such an agreement if another fund that is an affiliated person of the first fund, or an affiliated person of such a person ("affiliated fund"), is also a party to the agreement. The proposed amendments to rule 17d-3 would remove this restriction, subject to specified conditions.

Proposed paragraphs 17d-3(b) would require that, if a fund relying on rule 17d-3 enters into an agreement with one or more affiliated funds (together, "participating funds") to finance jointly activities that are primarily intended to result in the sale of shares issued by the participating funds, four conditions must be met. First, proposed paragraph (b)(1) would require that each participating fund must have in effect a 12b-1 plan, adopted and continued in accordance with that rule, that specifically allows

such joint distribution financing.<sup>207</sup> Second, proposed paragraph (b)(2) would require that the joint distribution agreement itself comply in all respects with the provisions of rule 12b-1 concerning related agreements.<sup>208</sup> Third, proposed paragraph (b)(3) would require that the joint distribution agreement specify both the distribution activities or services to be financed and the method or methods by which the amount paid or payable under the agreement are to be allocated.

The fourth requirement applicable to joint distribution agreements, as set forth in proposed paragraph 17d-3(b)(4), would place additional responsibilities on the directors of a participating fund, particularly on those directors who are not interested persons of any participating fund and who have no direct or indirect financial interest in the operation of any participating fund's 12b-1 plan or in a related agreement to such a plan (the "17d-3 directors").<sup>209</sup> Specifically, a majority of the directors of each participating fund, and a majority of the fund's 17d-3 directors, would have to conclude, in the exercise of reasonable business judgment, in light of their fiduciary duties under state law and section 36 of the Act, and based upon appropriate business estimates and projections,<sup>210</sup> that three conditions exist: (i) The allocation methods specified in the joint distribution agreement are not likely to result in payments by the fund being used to subsidize the distribution expenses of any other participating fund; (ii) the agreement is reasonably likely to result in the fund being able to finance distribution activities or services at a

77q(a) and section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b-5 thereunder (17 CFR Part 240), it is unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, to use sales literature which is materially misleading in connection with the offer or sale of securities issued by an investment company.

<sup>202</sup> The staff of the Division has, however, in the context of reviewing registration statements and amendments to registration statements filed by series funds, taken the position that the shareholder approval requirements of rule 12b-1 require the approval of a majority of the outstanding voting securities of each series of a series fund, even though the series fund as a whole may have only one 12b-1 plan applicable to all series.

<sup>203</sup> The Commission has, in other contexts, treated the separate series of a series fund as separate investment companies for purposes of applying various provisions of the Act. See, e.g., Investment Company Act Rel. No. 11676 (Mar. 10, 1961) (46 FR 17011, Mar. 17, 1981) (adopting rule 17a-7 under the Act (17 CFR 270.17a-7)); Investment Company Act Rel. No. 14036 (July 13, 1984) (49 FR 28362, July 20, 1984) (adopting rule 12d3-1 under the Act (17 CFR 270.12d3-1)).

<sup>204</sup> See generally Investment Company Act Rel. No. 7276 (Aug. 8, 1972) (37 FR 17384, Aug. 26, 1972) (adopting rule 18f-2 under the Act (17 CFR 270.18f-2)).

<sup>205</sup> Series funds are often marketed to investors as a single fund and several series may be likely to engage jointly in advertising and other distribution activities intended to market shares of all the series. Because separate series would be treated as

separate investment companies under the proposed amendments to rule 12b-1, a question arises as to the applicability of section 17(d) of the Act and rule 17d-1 thereunder to joint financing arrangements between and among the separate series of a series fund. The proposed amendments would not distinguish between joint distribution financing between separate funds that have a common investment adviser and the separate series of a series fund. Therefore, the proposed amendments to rule 17d-3 would provide exemptive relief to allow the individual series of a series fund to engage in joint distribution financing to the same extent as is permitted for separate investment companies. See *infra* note 214 and accompanying text.

<sup>206</sup> As noted above, even where section 17(d) would not be applicable to joint financing arrangements between separate funds, fund directors may not be able to make the findings required by rule 12b-1 if the methods of allocating joint distribution expenses under the arrangement would result in one fund's assets being used to subsidize the distribution of another fund's shares. See *supra* note 174. Proposed paragraph (c)(2) of rule 12b-1 would address this problem by requiring any joint distribution agreement to be entered into and continued in accordance with rule 17d-3. Since separate series would be treated as separate funds, joint distribution agreements between series of the same fund would also have to satisfy rule 17d-3.

<sup>207</sup> Under proposed paragraph (c)(2) of rule 12b-1, sales or promotional services or activities provided to a participating fund under a joint distribution agreement entered into and continued in accordance with the provisions of paragraph (b) of rule 17d-3 would be considered to be services or activities provided in connection with the distribution of that fund's shares. Therefore, such payments would be permitted under rule 12b-1, as proposed to be amended. See *supra* note 174 and accompanying text.

<sup>208</sup> The joint distribution agreement would be considered a related agreement under each participating fund's 12b-1 plan. As such, it would have to be reapproved on an annual basis by the board of directors of each participating fund. If the board of one fund terminates the agreement, such termination would not necessarily affect the validity of the agreement as to the other participating funds.

<sup>209</sup> While the concept of the 17d-3 directors is based on the disinterested director description of rule 12b-1, the description would be modified to address the additional conflicts of interest that may exist where affiliated funds jointly finance the distribution of their shares.

<sup>210</sup> The standards applicable to these director findings would be interpreted consistently with those applicable to the director findings under proposed paragraph 12b-1(b)(3).

lower cost than would otherwise be possible; and (iii) the fund's participation in the agreement is not likely to be on a basis that is different from or less advantageous than that of other participating funds. These director findings are discussed in more detail below.

#### 1. Methods of Allocating Joint Distribution Expenses

As stated above, each joint distribution agreement entered into under the proposed amendments to rule 17d-3 would be required to state specifically the method or methods by which the expenses incurred under the agreement are to be allocated among the participating funds. Additionally, when deciding whether to adopt or continue the joint distribution arrangement under rule 12b-1, a majority of the fund's directors and the 17d-3 directors would have to conclude that the specified methods of allocation are not likely to result in the fund's assets being used to subsidize the distribution of another fund's shares.<sup>211</sup>

In order for a method of allocating joint distribution expenses to be considered unlikely to result in one participating fund subsidizing the distribution expenses of another, the formula used to allocate costs among participating funds must bear a rational relationship to the benefits received by each fund from the particular activities or services financed.<sup>212</sup> For example, if a joint distribution agreement were to provide for joint advertising of fund shares, the costs of that advertising could be allocated on the basis of the resulting investor inquiries regarding each fund, the resulting sales of the shares of each fund, or by some other method calculated to relate the costs borne by a participating fund to the approximate benefits received by that fund from the advertising. If a joint distribution agreement contemplates that several types of services will be provided, the agreement may have to specify several allocation methods, each tailored to a specific type of distribution service or activity. Alternatively, the agreement could provide one allocation

method to cover several types of distribution expenses, such as allocation based on the relative gross or net sales of the shares of the participating funds during a specified period of time. Of course, the directors would have to determine that such allocation method is appropriate with respect to each type of distribution expenses to be incurred.<sup>213</sup>

#### 2. Cost of Distribution Services

In many cases, it could be beneficial to funds to finance distribution jointly, since such an arrangement could result in cost savings due to economies of scale. In other cases, however, joint distribution arrangements are not likely to result in cost savings to the participating funds, or are likely to result in higher costs. In these instances, there would be a lack of benefits to offset the potential conflicts of interest. Therefore, the proposed amendments to rule 17d-3 would require a majority of fund directors and a majority of the 17d-3 directors to determine that the joint distribution agreement is reasonably likely to result in the fund being able to finance distribution services or activities at a lower cost than would otherwise have been possible.

#### 3. Different or Less Advantageous Participation

The proposed amendments to rule 17d-3 would also require fund directors and the 17d-3 directors to conclude that a fund's participation in a joint distribution agreement is not likely to be on a basis different from or less advantageous than that of other participating funds. This requirement is derived from the standard contained in section 17(d) of the Act, which authorizes the Commission to prescribe rules for the purpose of limiting or preventing funds from participating in joint arrangements with affiliated persons or principal underwriters on a basis different from or less advantageous than other participants. The requirement is also based on rule 17d-1(b) under the Act, which states

<sup>211</sup> Another method of allocating costs among funds would be on the basis of the relative net asset value of the funds involved. However, that method would, in most cases, result in larger funds subsidizing the distribution costs of smaller funds. Therefore, that method and similar methods would generally be inappropriate under the proposed amendments to rule 17d-3. Those methods would also present problems under rule 12b-1. See *supra* note 142. The allocation formula that was discussed in the Vanguard decision was based, in part, on relative net asset value. However, that formula was justifiable on the basis of certain intangible benefits that resulted from a unique distribution arrangement that was an integral part of the internalization of fund management. See *supra* text accompanying notes 132-138.

that, in passing upon applications under section 17(d), the Commission will consider, *inter alia*, the extent to which a fund's participation in a joint enterprise, joint arrangement, or profit-sharing plan is on a basis different from or less advantageous than that of other participants.

The Commission anticipates that, in most cases, directors that have been able to reach the conclusions required by proposed rules 17d-3 (b)(4)(i) and (b)(4)(ii) will have no problem reaching the conclusion that the fund's participation in a joint distribution agreement is not likely to be on a basis different from or less advantageous than that of other participating funds. However, given the high degree of innovation that historically has been present in the area of fund distribution, this additional conclusion is intended to give fund directors, particularly the 17d-3 directors, a separate basis on which to consider a proposed joint distribution agreement.

#### 4. Treatment of Series Companies

Finally, the proposed amendments to rule 17d-3, like the proposed amendments to rule 12b-1, would state specifically that, for the purposes of the rule, the term registered open-end management investment company includes a separate series of such a company. As discussed above, the proposed amendments to rule 12b-1 would treat the separate series of a series fund as separate funds for the purposes of distribution financing under rule 12b-1.<sup>214</sup> There is no reason not to also treat these series as separate funds under rule 17d-3. Therefore, under the proposed amendments to rule 17d-3, the separate series of a series fund could enter into joint distribution agreements with each other or with other affiliated funds on the same terms and conditions as other funds.

#### Cost/Benefit of Proposed Action

The Commission believes that the proposed amendments to rules 12b-1 and 17d-3 under the Act would significantly improve the operation of those rules. With respect to the proposed amendments to rule 12b-1, the amendments would clarify the role and responsibilities of directors and other aspects of the present rule, and would increase investor understanding and awareness of the existence and impact of fund payments for distribution. The amendments would also restrict certain practices that have been developed

<sup>214</sup> See *supra* notes 205-209 and accompanying text.

since the rules were originally adopted. The proposed amendments would add to the findings that must be made under the rule and would also require funds to monitor their financing activities so that payment is made within the time limitations set forth in the proposals. However, it is anticipated that any increased costs of compliance with these provisions would be both minimal and outweighed by the benefits of increased investor awareness and enhanced investor protection.

With respect to the proposed amendments to rule 17d-3, the amendments would remove a restriction in the present rule and would permit affiliated funds to finance jointly sales and promotional activities in connection with the sale of their shares without submitting individual applications for exemptive relief. The amendments would permit funds to take advantage of operational efficiencies and realize economies of scale due to joint distribution financing. The additional costs that would be entailed by compliance with the proposed rule conditions would be minimal and outweighed by the cost savings that would be realized.

The Commission requests comment on the above assessment of the costs and benefits associated with the proposed amendments to rules 12b-1 and 17d-3. Commenters should submit estimates of any costs and benefits perceived, together with any supporting empirical evidence available.

#### Summary of Initial Regulatory Flexibility Act Analysis

The Commission has prepared an Initial Regulatory Flexibility Act Analysis ("Analysis") in accordance with 5 U.S.C. 603 regarding the proposed amendments to rules 12b-1 and 17d-3 and to form N-1A. The Analysis explains that the proposed amendments to rule 12b-1 would, among other things, modify the circumstances under which funds can adopt or continue distribution plans. The proposed amendments to rule 17d-3 would allow a fund, under certain conditions, to enter into joint distribution agreements with one or more funds that are affiliated with the fund, with affiliated persons of the fund, or with the fund's principal underwriter. The proposed amendment to form N-1A would require an additional disclosure to be made regarding the amount of a fund's 12b-1 fees. The Analysis states that the proposed amendments are intended to address the concerns that have arisen under rules 12b-1 and 17d-3. It also states that the proposed amendments contain no reporting requirements. One of the proposed

amendments to rule 12b-1 would clarify that the minutes of fund directors should contain detailed information about their decision to adopt or continue a 12b-1 plan and that such information should be preserved. Because present rule 12b-1 already contains a general recordkeeping provision, the Commission believes that the proposed clarification will not significantly increase the recordkeeping costs of small funds with 12b-1 plans. The proposed rule amendments would also add several compliance requirements, but the Commission anticipates that only a few may have an impact on small entities. Those requirements, however, will cause little, if any, additional expenses for small entities. The additional disclosure that would be required by the proposed amendment to form N-1A could be presented in either a narrative, table or graph and the additional burden on small entities will be minimal. The Analysis notes that the Commission has considered certain significant alternatives, including exempting small entities from a proposed restriction of the ability of a fund to use a 12b-1 plan to pay for services or activities that were provided more than one year prior to the date on which payment or reimbursement is made by the fund. The Analysis states, however, that the Commission does not believe that those alternatives are consistent with the statute, legislative intent, or the protection of investors. A copy of this Analysis may be obtained by contacting Rochelle G. Kauffman, Esq., Mail Stop 5-2, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

#### List of Subjects

##### 17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

##### 17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

#### Text of Proposed Amendments to Rules and Forms

Chapter II, Title 17 of the Code of Federal Regulations is proposed to be amended as follows:

#### PARTS 239 AND 274—[AMENDED]

1. The authority citation for Part 239 continues to read, in part, as follows:

Authority: The Securities Act of 1933, 15 U.S.C. 77a, *et seq.*, \* \* \*

2. The authority citation for Part 274 continues to read, in part, as follows:

Authority: The Investment Company Act of 1940, 15 U.S.C. 80-1, *et seq.*, \* \* \*

3. By proposing to amend paragraph (f) to Item 7 of Form N-1A described in §§ 239.15A and 274.11A as follows:

#### §§ 239.15A and 274.11A [Amended]

\* \* \* \* \*

Item 7. \* \* \*

(f) If the Registrant directly or indirectly pays distribution or other expenses pursuant to a plan adopted under Rule 12b-1 under the 1940 Act (17 CFR 270.12-1) (i) a brief description of the plan; (ii) a listing of the principal types of activities for which payments are or will be made; (iii) a statement of the amount of any unreimbursed expenses incurred in a previous plan year and carried over to future plan years, in terms of dollars and as a percentage of net assets of the Fund on the last day of the previous plan year; and (iv) and explanation of whether or not, and if so, under what circumstances, over the life of the investment, based on current level of payments and total distribution charges imposed, including front-end sales loads, deferred sales loads, payments under a 12b-1 plan, or a combination of the above, a fund's shareholder would pay more than the maximum sales charge that could have been imposed on fund shares at the time of purchase under the Rules of Fair Practice promulgated by the National Association of Securities Dealers. If the Registrant participates in any joint distribution activities with another fund, or, if a series of the Registrant participates in joint distribution activities with other series, disclose, if applicable, that a 12b-1 fee paid by one series or fund may be used to finance distribution of the shares of another series or fund and the method (e.g., relative net asset size, number of shareholder accounts) by which distribution costs will be allocated.

#### PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. The authority citation for Part 270 is amended by adding the following citations:

Authority: Secs. 38, 40, 54 Stat. 841, 842, 15 U.S.C. 80a-37, 80a-39; The Investment Company Act of 1940, as amended, 15 U.S.C. 80a-1 *et seq.*; unless otherwise noted. \* \* \* Section 270.12b-1 also issued under sec. 12(b) [15 U.S.C. 80a-12(b)] \* \* \* Section 270.17d-3 also issued under sec. 17(d) [15 U.S.C. 80a-17(d)]

2. By revising § 270.12b-1 including the section heading, as follows:

#### § 270.12b-1 Payment of asset-based sales loads by registered open-end management investment companies.

(a)(1) Except as provided in this section, it shall be unlawful for any registered open-end management investment company (other than a company complying with the provisions

of section 10(d) of the Act (15 U.S.C. 80a-10(d)) to act as a distributor of securities of which it is the issuer, except through an underwriter.

(2) For purposes of this section, a registered open-end management investment company ("company") will be deemed to be acting as a distributor of securities of which it is the issuer, other than through an underwriter, if the company pays an asset-based sales load, as defined in paragraph (h)(2) of this section.

(b) *Adoption and Continuation of Distribution Plans and Related Agreements.* A company may act as a distributor of securities of which it is the issuer, *Provided That* any asset-based sales load paid by the company is paid pursuant to a written plan describing all material aspects of the proposed financing of distribution ("plan") and that all agreements with any person relating to the implementation of the plan ("related agreements") are in writing, *and Provided further that:*

(1) Such plan has been approved initially and reapproved at least annually by a vote of at least a majority of the outstanding voting securities of such company;

(2) Such plan, together with any related agreements, has been approved initially and reapproved at least annually by a vote of the board of directors of such company, and of the directors who are not interested persons of the company and have no direct or indirect financial interest in the operation of the plan or in any related agreements, case in person at a meeting called for the purpose of voting on the plan or the agreements;

(3) Those directors of such company who vote in favor of implementation or continuation of the plan conclude, in the exercise of reasonable business judgment, in light of their fiduciary duties under state law and sections 36(a) and (b) of the Act (15 U.S.C. 80a-35 (a) and (b)), and based upon appropriate business estimates and projections, that

(i) There is a reasonable likelihood that the plan (including any provision thereof adopted in accordance with paragraph (b) (5)) will benefit the company, existing shareholders and future shareholders, and

(ii) Given the surrounding circumstances, the amounts payable under the plan and related agreements represent charges within the range of what would have been negotiated at arm's-length as payment for the specific sales or promotional services and activities to be financed under the plan and related agreements;

(4) In considering whether to implement or continue a plan, the

directors of such company shall have a duty to

(i) Request and evaluate, and any person who is a party to any related agreement with the company shall have a duty to furnish, such information, including appropriate business estimates and projections, as may be reasonably necessary to an informed determination of whether such plan should be implemented or continued,

(ii) Consider and give appropriate weight to all relevant factors,

(iii) Consider whether, given the level of the asset-based sales load, the level of any sales loads charged to the company's shareholders, and all of the surrounding circumstances, shareholders have paid, or are reasonably likely to pay, directly or indirectly, more for sales or promotional services or activities than the maximum sales charge that could have been imposed on company shares at the time of purchase under the Rules of Fair Practice promulgated by the National Association of Securities Dealers ("NASD Rules"). In addition, a company must disclose in that part of the company's prospectus that describes the plan whether and under what circumstances shareholders will pay more than the maximum sales charge that could have been imposed at the time of purchase under the NASD Rules.

(iv) Ensure that minutes specifically describing the factors, assumptions, estimates and projections considered, and the basis for any decision to adopt or continue the plan, are made and preserved in accordance with paragraph (g) of this section;

*Note.*—For a discussion of factors which may be relevant to a decision to implement or continue a plan under this section, see Investment Company Act Release Nos. 10862 (September 7, 1979), 11414 (October 28, 1980) and 16431 (June 13, 1988).

(5) Any plan that permits payments to be made to reimburse any person for sales or promotional expenses incurred prior to [the effective date of the amendments to this section], but not paid by the company because total distribution expenses exceeded annual payments under the company's plan, must include provisions that are designed, in light of the surrounding circumstances, to eliminate the total amount of such unreimbursed expenses within a reasonable period of time;

(6) The selection and nomination of those directors who are not interested persons of the company are committed to the discretion of such disinterested directors;

(7) Such plan and any related agreement provides, in substance, that it

shall continue in effect for a period of more than one year only so long as such continuance is specifically approved by the company's directors and, in the case of a plan, by at least a majority of the outstanding voting securities of such company, in the manner provided by this paragraph;

(8) Such plan and any related agreement provides, in substance, that any person authorized to direct the disposition of amounts paid or payable by the company pursuant to the plan or any related agreement shall provide to the company's board of directors, and the directors shall review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made; and

(9) In considering whether to continue a plan, the directors of such company shall have a duty to review, at least quarterly, whether amounts accrued to the date of such review materially exceed the amounts actually expended for the fund to that date or such amounts as may reasonably be expected to be spent in the next quarter. In the event the board of directors determines that the amounts so accrued materially exceed the expenditures made or to be made, it shall take such action as it deems appropriate to reduce the rate of accrual under the plan.

(c) *Use of Proceeds.* (1) Each plan and related agreement implemented or continued in accordance with this section shall provide that:

(i) Amounts paid or payable by the company under the plan or agreement may only be used to pay for, or reimburse payment for, specific sales or promotional services or activities, identified in the plan, that have been or will be provided in connection with the distribution of company shares, and

(ii) No amounts paid or payable by the company under the plan or agreement may be used to pay for, or reimburse payment for, sales or promotional services or activities that are provided after [the effective date of the amendments to this section] unless such payment or reimbursement takes place prior to the earliest of

(A) The last day of the one year period commencing on the last day of the calendar quarter during which the specific service or activity was performed, or

(B) The last day of the one year period commencing on the last day of the calendar quarter during which payment for the service or activity was made by a third party on behalf of the fund; and

(2) For the purposes of this paragraph, sales or promotional services or

activities provided to a participating company under a joint distribution agreement entered into and continued in accordance with the provisions of paragraph (b) of rule 17d-3 under the Act (17 CFR 270.17d-3(b)) shall be considered to be services or activities provided in connection with the distribution of the company's shares.

(d) *Amendment and Termination of Distribution Plans and Related Agreements.* Each plan and related agreement implemented or continued in accordance with this section shall provide, in substance:

(1) In the case of a plan,

(i) That it may not be amended to increase materially the amount that may be paid by the company without the approval of at least a majority of the outstanding voting securities of the company and that all material amendments must be approved in the manner set forth in paragraph (b) of this section for the implementation of a plan;

(ii) That it may be terminated at any time by a vote of a majority of the members of the board of directors of the company who are not interested persons of the company and have no direct or indirect financial interest in the operation of the plan or in any related agreements, or by a vote of a majority of the outstanding voting securities of such company, and

(iii) That, in the event the plan is terminated or otherwise discontinued, either that

(A) No further payments will be made by the company, or

(B) Further payments will be made by the company only as specifically described in the plan and only to the extent that such payments would be permitted under paragraph (c) of this section; and

(2) In the case of a related agreement,

(i) That it may be terminated at any time, without payment of any penalty, by a vote of a majority of the members of the board of directors of such company who are not interested persons of the company and have no direct or indirect financial interest in the operation of the plan or in any related agreement, or by vote of a majority of the outstanding voting securities of such company on not more than sixty days' written notice to any other party to the agreement,

(ii) For its automatic termination in the event of an assignment, and

(iii) That, in the event the agreement is terminated or otherwise discontinued, either that

(A) No further payments will be made by the company, or

(B) Further payments will be made by the company only as specifically

described in the plan and agreement, and only to the extent that such payments would be permitted under paragraph (c) of this section.

(e) *Use of No-Load Terminology.* A company may implement or continue a plan in accordance with this section only if none of the persons described herein hold the company out to the public as "no-load" or use terminology that, given the context and presentation, is likely to convey to investors the impression that the company does not impose any charges for sales or promotional expenses. This paragraph shall apply with respect to the company, any affiliated person of or principal underwriter for the company, any person who, directly or indirectly, receives any amount paid as an asset-based sales load, and any affiliated person of any of the foregoing.

(f) *Annual Payment Ceiling.* Each plan implemented or continued in accordance with this section shall specify the maximum amount that can be spent for sales or promotional services or activities annually under the plan, expressed as a stated dollar amount or as a percentage of the company's average total net assets during the year, *Provided, however,* that such ceiling must reasonably reflect the anticipated level of distribution services to be provided to the company on an annual basis, based on appropriate business estimates and projections.

(g) *Recordkeeping Requirements.* A company must preserve copies of any plan, related agreement, and report made pursuant to this section, and any information, estimates, projections, and other material that serve as the basis therefor, considered by the directors under this section, for a period of not less than six years from the date of such plan, related agreement or report, the first two years in an easily accessible place.

(h) *Definitions.* For the purposes of this section,

(1) The term "registered open-end management investment company" includes a separate series of such a company;

(2) The term "asset-based sales load" means any direct or indirect financing by a company of sales or promotional services or activities in connection with the distribution of its shares.

3. By revising § 270.17d-3 as follows:

**§ 270.17d-3 Exemption relating to certain joint enterprises or arrangements concerning payment for distribution of shares of a registered open-end management investment company.**

An affiliated person of, or principal underwriter for, a registered open-end

management investment company ("company") and an affiliated person of such a person or principal underwriter shall be exempt from section 17(d) of the Act (15 U.S.C. 80a-17(d)) and rule 17d-1 thereunder (17 CFR 270.17d-1) to the extent necessary to permit any such person or principal underwriter to enter into a written agreement with such company whereby the company will make payments in connection with the distribution of its shares, *Provided That:*

(a) The agreement is implemented and continued by the company in accordance with the provisions of rule 12b-1 under the Act (17 CFR 270.12b-1);

(b) If the company enters into an agreement with one or more other open-end management investment companies there are affiliated persons of such persons, or affiliated persons of the company's principal underwriter, whereby the company and such other companies (together, "participating companies") will jointly finance activities or services that are primarily intended to result in the sale of shares issued by the participating companies (a "joint distribution agreement");

(1) Each company that is a party to the joint distribution agreement shall have in effect a written distribution plan, adopted and continued in accordance with rule 12b-1 under the Act, that specifically permits such joint distribution financing;

(2) The joint distribution agreement shall comply in all respects with the provisions of rule 12b-1 concerning related agreements;

(3) The joint distribution agreement shall specify the sales or promotional services or activities to be provided or procured and the method or methods by which the amounts paid or payable under the agreement are to be allocated among the participating companies; and

(4) Whenever a company adopts or continues a joint distribution agreement under rule 12b-1, a majority of the directors of such company, and a majority of the directors of such company who are not interested persons of any participating company and have no direct or indirect financial interest in the operation of the distribution plan of any participating company or in any agreements related to the operation of such a plan shall conclude, in the exercise of reasonable business judgment, in light of their fiduciary duties under state law and sections 36 (a) and (b) of the Act, and based upon appropriate business estimates and projections:

(i) That the method or methods by which the amounts paid or payable under the joint distribution agreement

are to be allocated among the participating companies are not likely to result in payments by the company being used to subsidize the distribution expenses of any other participating company;

(ii) That the joint distribution agreement is reasonably likely to result in the company being able to finance sales or promotional services or activities at a lower cost than would be otherwise possible; and

(iii) That the company's participation in the joint distribution agreement is not likely to be on a basis different from or less advantageous than that of other participating companies.

(c) For the purposes of this section, the term "registered open-end management investment company" includes a separate series of such a company.

By the Commission.

Jonathan G. Katz,

Secretary.

June 13, 1988.

[FR Doc. 88-13639 Filed 6-20-88; 8:45 am]

BILLING CODE 9010-01-M

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### 30 CFR Ch. I

##### Hazard Communication

**AGENCY:** Mine Safety and Health Administration (MSHA), Labor.

**ACTION:** Advance notice of proposed rulemaking; extension of comment period.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is extending the period for public comment on its advance notice of proposed rulemaking for hazard communication in 30 CFR Ch. I.

**DATES:** Written comments on the advance notice of proposed rulemaking for hazard communication should be received on or before July 31, 1988.

**ADDRESSES:** Comments should be sent to the Mine Safety and Health Administration, Office of Standards, Regulations and Variances, Room 631, 4015 Wilson Boulevard, Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, phone (703) 235-1910.

**SUPPLEMENTARY INFORMATION:** On March 30, 1988, MSHA published an advance notice of proposed rulemaking (53 FR 10258) which would require

employers to establish hazard communication programs to transmit information on the hazards of chemicals to their employees by means of labels on containers, material safety data sheets and training programs.

On May 27, 1988, (53 FR 19314) MSHA extended the comment period to June 30, 1988 in response to requests from the public. Due to further requests from the public, MSHA is extending the comment period to July 31, 1988. All interested parties are encouraged to submit comments on or prior to that date.

Date: June 15, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-13930 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-43-M

#### 30 CFR Part 20

##### Electric Mine Lamps Other Than Standard Cap Lamps

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is extending the period for public comment regarding the Agency's proposed rule for the testing and approval of electric mine lamps, other than standard cap lamps, used in underground mines in 30 CFR Part 20. This extension is in response to requests from the mining community.

**DATE:** Written comments on the proposed rule for electric mine lamps other than standard cap lamps must be received on or before July 15, 1988.

**ADDRESS:** Send comments to the Office of Standards, Regulations, and Variances; MSHA; Room 631; Ballston Tower No. 3; 4015 Wilson Boulevard; Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** Patricia Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, phone (703) 235-1910.

**SUPPLEMENTARY INFORMATION:** On April 13, 1988, MSHA published in the *Federal Register* (53 FR 12250), a proposed rule to revise existing standards for investigation and approval of mine lamps that will meet the design, construction and test requirements set forth in Part 20 of Title 30 of the Code of Federal Regulations. Due to requests from the public, MSHA is extending the comment period for the proposed rule to July 15, 1988. All interested parties are encouraged to submit comments prior to that date.

Date: June 15, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-13927 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-43-M

#### 30 CFR Parts 75 and 77

##### Certified and Qualified Persons

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is extending the period for public comment regarding the Agency's proposed rules for the procedures concerning temporary qualification and certification of persons who work at coal mines in 30 CFR Parts 75 and 77. This extension is in response to requests from the mining community.

**DATES:** Written comments on the proposed rule for certified and qualified persons must be received on or before July 15, 1988.

**ADDRESSES:** Send comments to the Office of Standards, Regulations, and Variances; MSHA; Room 631; Ballston Tower No. 3; 4015 Wilson Boulevard; Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** Patricia Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, phone (703) 235-1910.

**SUPPLEMENTARY INFORMATION:** On April 13, 1988, MSHA published in the *Federal Register* (53 FR 12252), a proposed rule to revise existing standards for temporary qualification or certification of persons at underground and surface coal mines. Due to requests from the public, MSHA is extending the comment period for the proposed rule to July 15, 1988. All interested parties are encouraged to submit comments prior to that date.

Date: June 15, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-13928 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-43-M

#### 30 CFR Part 77

##### Mobile Equipment; Automatic Warning Devices

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is extending the period for public comment regarding the Agency's proposed rule requiring devices on mobile equipment to automatically sound an audible warning when the equipment is operated in reverse (backup alarms) in 30 CFR Part 77. This extension is in response to requests from the mining community.

**DATE:** Written comments on the proposed rule for automatic warning devices must be received on or before July 15, 1988.

**ADDRESS:** Send comments to the Office of Standards, Regulations, and Variances; MSHA; Room 631; Ballston Tower No. 3; 4015 Wilson Boulevard; Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** Patricia Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, phone (703) 235-1910.

**SUPPLEMENTARY INFORMATION:** On April 13, 1988, MSHA published in the *Federal Register* (53 FR 12253) a proposed rule to revise existing standards for requiring mobile equipment, such as front-end loaders, forklifts, tractors, and graders, when operated at surface coal mines and surface work areas of underground coal mines, to be equipped with an automatic warning device which gives an audible alarm when the equipment is operated in reverse. Due to requests from the public, MSHA is extending the comment period for the proposed rule to July 15, 1988. All interested parties are encouraged to submit comments prior to that date.

Date: June 15, 1988.

Patricia W. Silvey,  
Director, Office of Standards, Regulations  
and Variances.

FR Doc. 88-13929 Filed 6-20-88; 8:45 am]

CALLING CODE 4510-43-M

## DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation  
and Enforcement

30 CFR Part 917

Public Comment Period and  
Opportunity for Public Hearing on  
Proposed Amendment to the Kentucky  
Permanent Regulatory Program

**AGENCY:** Office of Surface Mining  
Reclamation and Enforcement (OSMRE),  
Interior.

**ACTION:** Proposed rule.

**SUMMARY:** OSMRE has received a proposed amendment and is announcing procedures for public comment period and for a public hearing on the substantive adequacy of a program amendment submitted by the Commonwealth of Kentucky as modification to the Kentucky permanent program [hereinafter referred to as the Kentucky program] under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

The amendment proposes to establish as part of the Kentucky Revised Statutes (KRS) the provisions of six bills enacted by the 1988 Kentucky General Assembly. House Bill 657 revises the bond release procedures, and removes ambiguous language in regard to permitting and bonding. House bill 673 deletes the requirement for a transportation plan in a surface mining permit. House Bill 709 deletes the term "penal" from the description of a bond and includes a provision requiring that when a bond is forfeited the entire amount of the bond be forfeited. Senate Bill 258 limits the bonded liability of operators in the case of actions by third parties beyond their control. Senate Bill 338 expands the bond pool and changes the criteria for admittance to the bond pool program. Senate Bill 377 makes the Commonwealth the sole authority for the regulation of surface mining in Kentucky.

This notice sets forth the times and location that the Kentucky program and the proposed amendment is available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed regarding the public hearing.

**DATES:** Written comments relating to Kentucky's proposed modification of its program not received on or before 4:00 p.m. on July 21, 1988, will not necessarily be considered in the decision process. A public hearing on the adequacy of the amendment will be held upon request at 10:00 a.m. on July 18, 1988 at the location shown below under "ADDRESSES". Any person interested in making an oral or written presentation at the public hearing should contact Mr. W. Hord Tipton at the Lexington Field Office by the close of business on or before July 6, 1988. If no one has contacted Mr. Tipton to express an interest in participating in the hearing by that date, the hearing will not be held. If only one person has contacted Mr. Tipton, a public meeting may be held in place of the hearing. If possible, a notice of the meeting will be posted in advance at the locations listed under "ADDRESSES".

**ADDRESSES:** Written comments and requests for a hearing should be mailed or hand-delivered to: W. Hord Tipton, Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504. Copies of the proposed amendment, the Kentucky program, the Administrative Record on the Kentucky program and a listing of any scheduled public meetings and all written comments received in response to this notice will be available for review at the OSMRE Lexington Field Office and the Offices of the Department for Surface Mining Reclamation and Enforcement listed below, Monday through Friday, 9:00 a.m. to 4:00 p.m., excluding holidays. Each requester may receive, free of charge, one copy of the proposed amendment by contacting the OSMRE LEXINGTON Field Office.

Office of Surface Mining Reclamation  
and Enforcement, Lexington Field  
Office, 340 Legion Drive, Suite 28,  
Lexington, Kentucky 40504,  
Telephone: (606) 233-7327.

Office of Surface Mining Reclamation  
and Enforcement, Administrative  
Record Office, Room 5315 A, 1100 "L"  
Street, NW., Washington, DC 20240,  
Telephone: (202) 343-5492.

Office of Surface Mining Reclamation  
and Enforcement, Eastern Field  
Operations, Ten Parkway Center,  
Pittsburgh, Pennsylvania 15220,  
Telephone: (412) 937-2828.

Office of Surface Mining Reclamation  
and Enforcement, No. 2 Hudson  
Hollow Complex, Frankfort, Kentucky  
40601, Telephone: (502) 564-6940.

If a public hearing is held, its location  
will be: The Harley Hotel, 2134 North  
Broadway, Lexington, Kentucky 40505.

### FOR FURTHER INFORMATION CONTACT:

Mr. W. Hord Tipton, Director,  
Lexington Field Office, Office of Surface  
Mining Reclamation and Enforcement,  
340 Legion Drive, Site 28, Lexington,  
Kentucky 40504; Telephone: (606) 233-  
7327.

### SUPPLEMENTARY INFORMATION:

#### I. Background

On December 30, 1981, Kentucky  
resubmitted its proposed regulatory  
program to OSMRE. On April 13, 1982,  
following a review of the proposed  
program as outlined in 30 CFR Part 732,  
the Secretary approved the program  
subject to the correction of 12 minor  
deficiencies. The approval was effective  
upon publication of the notice of  
conditional approval in the May 18,  
1982, *Federal Register* (47 FR 21404-  
21435).

Information pertinent to the general background, revisions, modifications, and amendments to the proposed program submission, as well as the Secretary's findings, the disposition of comments and a detailed explanation of the conditions approval of the Kentucky program can be found in the May 18, 1982, Federal Register notice.

Subsequent action concerning the conditions of approval and program amendments are identified in 30 CFR 917.11, 917.15, 917.16 and 917.17.

## II. Submission of Amendment

By letter dated April 21, 1988, (Administrative Record No. KY-800) Kentucky submitted a proposed amendment to OSMRE pursuant to 30 CFR 732.17. The amendment proposes to establish as a part of the Kentucky revised statutes (KAR) the provisions of six bills passed by the 1988 Kentucky General Assembly. The provisions of these bills are summarized as follows:

### 1. House Bill 657

House Bill 657 modifies sections of KRS 350.060, KRS 350.093, KRS 350.130, and KRS 350.131. It eliminates the special permitting provisions for interim permits and operations of two acres or less and clears up ambiguous language. The bill revises the requirement for ownership and control information to be supplied by an applicant for a surface coal mining permit and requires the permittee to submit updated information as changes in ownership and control occur. The bill also revises bonding, bond release, and bond forfeiture procedures. The bonding modifications include changes to the public notice procedures for bond release and provides that the Cabinet may not continue to hold bond solely for failure to pay penalties or fines. The bill gives bonding companies and financial institutions the right to perform measures necessary to secure bond release if they can demonstrate their ability to do so, and will do so in a timely fashion. The requirement for a surety bond is changed by deleting the word "penal," from the bond description, and a requirement is added that when a forfeiture occurs the total bond amount will be forfeited for that permit area or increment. The bill authorizes the return of excess funds from forfeited reclamation bonds to the party from whom they were collected and deletes from KRS 350.060 the permitting requirement for a transportation plan.

### 2. House Bill 673

House Bill 673 shifts the requirement for a transportation plan from a

permitting requirement to a requirement for a license issued by the Department for Mines and Minerals under authority of KRS 351.175. H.B. 673 removes the requirement for submission of a transportation plan with a surface coal mining permit application by amending KRS 350.060.

### 3. House Bill 709

House Bill 709 amends KRS 350.060 by deleting "penal" from the description of a bond. It adds a provision to KRS 350.151 requiring that, in the event of forfeiture, the Cabinet shall forfeit the entire amount of the bond posted for the permit area or increment. The bill amends KRS 350.064 by substituting the term "reclamation bond" for "bond".

### 4. Senate Bill 258

A new section of KRS 350.093 is created to limit the bonded liability of a permittee in the case of actions by third parties beyond the control of the permittee and for which of the permittee is not responsible under the permit.

### 5. Senate Bill 338

Senate Bill 338 modifies sections of KRS Chapter 350 relating to Kentucky's alternative bonding program. The bill modifies the criteria for membership in the bond pool and modifies bond pool administrative procedures.

### 6. Senate Bill 377

Senate Bill 377 amends KRS 350.020 pertaining to findings relative to surface coal mining. The bill makes it clear that government responsibility for regulating surface mining rests with the State government rather than with local governments.

## III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17, OSMRE is now seeking comment on whether the amendments proposed by Kentucky satisfies the requirements of 30 CFR 732.16 for the approval of State program amendments. If the amendments are deemed adequate, they will become part of the Kentucky program.

### Written Comments

Written comments should be specific, pertain only to the issues proposed in this rule making, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Lexington Field Office, Lexington, Kentucky, will not necessarily be considered in the final rule making or included in the Administrative Record.

## Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under "FOR FURTHER INFORMATION CONTACT" by the close of business on July 6, 1988. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of a written statement in advance of the hearing will allow OSMRE officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment and who wish to do so will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. A summary of the meeting will be included in the Administrative Record.

## Public Meeting

Persons wishing to meet with OSMRE representatives to discuss the proposed amendments may request a meeting at the OSMRE, Lexington Field Office listed under "ADDRESSES" by contacting the person listed under "FOR FURTHER INFORMATION CONTACT." All such meetings will be posted in advance in the Administrative Record. A written summary of each public meeting will be made a part of the Administrative Record.

## IV. Procedural Determinations

### 1. Compliance with the National Environmental Policy Act

The Secretary has determined that, pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rule making.

### 2. Executive Order No. 12291 and the Regulatory Flexibility Act

On August 28, 1981, the Office of Management and Budget (OMB) granted OSMRE an exemption from sections 3, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review

by OMB. The Department of the Interior has determined that this rule would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule would not impose any new requirement; rather, it would ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

### 3. Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

#### List of Subjects in 30 CFR Part 917

Coal mining, Intergovernmental relations, Surface mining and Underground mining.

Date: May 26, 1988.

Alfred E. Whitehouse,

Assistant Director, Eastern Field Operations.

[FR Doc. 88-13896 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-05-M

## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

#### Proposed Amendments to the Bank Secrecy Act Regulations Relating to Domestic Currency Transactions

**AGENCY:** Departmental Offices, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Two amendments are being proposed to the Bank Secrecy Act regulations, 31 CFR Part 103. The first proposal would amend 31 CFR 103.27 to clarify that a person conducting currency transactions for another person must report on the Currency Transaction Report (Form 4789) the name of the person on whose behalf the transaction was conducted. The second proposal would add a definition of "structuring" to the anti-structuring provision of 31 CFR 103.53, which prohibits a person from structuring or assisting in structuring, or attempting to structure or assist in structuring, any transaction with one or more domestic financial institutions for the purpose of evading the reporting requirements.

**DATE:** Comments due August 22, 1988.

**ADDRESS:** Send comments to Amy Rudnick, Director, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), Department of the Treasury, Room 4320, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

**FOR FURTHER INFORMATION CONTACT:** Kathleen A. Scott, Attorney Advisor,

Office of the Assistant General Counsel (Enforcement), (202) 566-9947.

**SUPPLEMENTARY INFORMATION:** The Bank Secrecy Act, Pub. L. No. 91-508 (codified at 12 U.S.C. 1829b, 12 U.S.C. 1951 *et seq.*, and 31 U.S.C. 5311-5324), authorizes the Secretary of the Treasury to require financial institutions to keep records and file reports that the Secretary determines have a high degree of usefulness in criminal, tax, or regulatory matters. Pursuant to 31 U.S.C. 5313 and the regulations thereunder, financial institutions are required to file Currency Transaction Reports with Treasury on transactions in currency in excess of \$10,000 "by, through or to such financial institutions." 31 CFR 103.22(a).

The first amendment proposed would clarify what is meant by the phrase in 31 CFR 103.27 that a financial institution shall verify the identification of "any person or entity for whose or which account" a transaction reportable under § 103.22 is to be effected. (Emphasis added). Two recent cases have held that the Bank Secrecy Act regulations and the Currency Transaction Report do not require that the name of the person for whom the transaction is being carried out be disclosed by the person conducting the transaction. In *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987), the court held that the Currency Transaction Report (Form 4789) did not impose a clear duty to disclose the identity of persons who give currency to others to conduct currency transactions for them. The case involved money launderers who established an offshore corporation in order to conceal the true source of funds given to them by undercover Internal Revenue Service agents posing as money launderers. The currency was deposited in a bank account in the name of this entity and the launderers listed it in Part II of Form 4789, which calls for the "Individual or organization for whom this transaction was completed." The Ninth Circuit sustained the dismissal of the indictment, which had charged concealment of the true source and ownership of the money from the Treasury Department, finding that the form and regulations did not require that the money launderers report the person for whom the transaction was made. Instead the form and regulations refer to any person or entity for whose "account" such transaction is done. The money launderers listed the shell organization as the account for which the transaction was effected, a plausible interpretation of the regulations according to the court. Therefore, the court held that the money launderers did not violate the Bank Secrecy Act by

failing to identify the persons who were the source of the funds.

In *United States v. Gimbel*, 632 F.Supp. 713 (E.D. Wis. 1984), the District Court held that neither the Bank Secrecy Act regulations nor Form 4789 required a lawyer depositing funds into his firm's trust account to discuss the name of the clients who gave him the funds to deposit. While the Court acknowledged that the statute, 31 U.S.C. 5313, stated, in part, that "A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made," it noted that the Act is enforced only through the promulgation of regulations and that no comparable regulation had been issued. It also noted that the Form 4789 did not "require the person conducting the transaction or the individual or organization for whom the transaction was completed to state whether this person is acting as an agent or bailee for the true owner of the currency involved." 632 F. Supp. at 722. The Court stated that the exclusion was not "mere oversight" on the part of Treasury, noting that the Customs Form 4790, the Currency and Monetary Instrument Transportation Report, does specifically ask whether the person is acting as an agent, attorney or in capacity of another. 632 F. Supp. at 723. The Court found that Treasury could have required agents and bailees to identify the person for whom transaction was being conducted, if the person is someone other than the signatory to the account through which the transaction was being made. It did not and if Treasury intended that such a requirement be implied from the present regulations and form, the Court said, then the requirement was vague as applied to defendant Gimbel. As a result, the indictment was dismissed against the lawyer, the Court holding that the plain language of the regulations and the Form 4789 did not give the lawyer sufficient notice that he was to report the names of the clients who supplied him with funds for deposit into the firm's trust account.

Treasury's use of the term "account" in the phrase "for whose or which account" in 31 CFR 103.27 is intended to be synonymous with "on behalf of." When a different use of the word "account" is intended—that is, use of the word to identify a customer relationship with a financial institution—that meaning is made clear in the particular regulation. See, e.g., 31 CFR 103.11(n), 103.24, 103.34(b)(10), and 103.35(a)(1). Treasury's use of the word "account" in the phrase "for whose or which account" refers to obtaining the

identity of the person on whose behalf the transaction is performed, as required by the Bank Secrecy Act itself, 31 U.S.C. 5313. Section 5313 states that "a participant acting for another person shall make the report as agent or bailee of the person and identify the person for whom the transaction is being made." Indeed, the court in the *Murphy* case acknowledged that "account" could mean "on whose behalf," (809 F.2d at 1430), but dismissed the indictment because if found equal validity in the interpretation of "account" in the financial sense of the term.

Therefore, in light of the *Murphy* and *Gimbel* cases, in order to clarify any lingering ambiguity in § 103.27, Treasury is proposing to change the phrase "for whose or which account" to "on whose behalf." This will make clear that the financial institution must obtain the identity and other required information of the person who is the beneficial owner of the account. This clarification also will be made on the Form 4789 at a later date.

The second proposal deals with the "anti-structuring" provision, 31 U.S.C. 5324, which prohibits any person from structuring or assisting in structuring, or attempting to structure or assist in structuring, transactions "for the purpose of evading" the currency transaction reporting requirements. The "anti-structuring" provision was added by the Money Laundering Control Act, Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 (October 27, 1986). It also prohibits a person, for the same purpose, from causing or attempting to cause a financial institution to fail to file a Form 4789 or to file a report that contains a material omission or misstatement of fact. The "anti-structuring" requirement was aimed at drug traffickers and other money launderers who routinely conduct transactions under the \$10,000 reporting threshold of § 103.22 in order to conceal currency transactions from Federal law enforcement authorities.

The enactment of section 5324 clarified that all currency transaction structuring schemes designed to evade the reporting requirements, regardless of whether the \$10,000 threshold is met at a single financial institution on a single day, are unlawful. See H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-20 (1986); S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986). For example, in one structuring scenario, a person is given currency over \$10,000, with instructions to "launder" the money. This person then goes to several banks or other financial institutions, and conducts currency transactions in amounts less than

\$10,000, alone or in conjunction with others, over one or more days, in order to get rid of the currency and at the same time avoid any reporting requirements. In a revision of the Bank Secrecy Act regulations last year, section 5324 was incorporated into the regulations at 31 CFR 103.53. See 52 FR 11436, April 8, 1987.

Since the structuring provision was enacted, there has been some concern by financial institutions that neither the statute itself nor the regulation gives a formal definition of "structure" or "structuring." In order to deal with these concerns, Treasury is proposing a definition of "structure" or "structuring" for inclusion in the Bank Secrecy Act regulations. The definition was devised in consultation with the Internal Revenue Service Criminal Investigation Division and the Justice Department. The definition provides that a person structures a transaction if: (1) acting alone, or in conjunction with, or on behalf of, other persons; (2) he conducts, attempts to conduct or assists in conducting; (3) one or more transactions in currency; (4) in any amount; (5) at one or more financial institutions; (6) on one or more days; (7) in any manner; (8) for the purpose of evading the reporting requirements of 31 CFR 103.22. The phrase "in any manner" is defined to include, but is not limited to, all schemes involving the breaking down of sums of currency larger than \$10,000 into smaller sums including sums at or below \$10,000, or through the conducting of a series of related currency transactions at or below \$10,000 at one financial institution or multiple financial institutions on one or more days. The definition also states that "[t]he transaction or transactions need not exceed the \$10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition." This makes it clear that structuring is not limited to multiple transactions done on the same day at a single financial institution.

#### Submission of Comments

Treasury requests comments from all interested persons concerning the proposed amendments. All comments received before the closing date will be carefully considered. No oral comments will be accepted unless reduced to writing. Comments received after the closing date and too late for consideration will be treated as possible suggestions for future action. The Treasury Department will not recognize any materials or comments, including the name of any person submitting comments, as confidential. Any material

not intended to be disclosed to the public should not be included in comments. All comments submitted will be available for public inspection during the hours that the Treasury Library is open to the public. The Treasury Library is located in Room 5030, 1500 Pennsylvania Avenue NW., Washington, DC 20220. Appointments must be made to view the comments. Persons wishing to view the comments submitted should contact the Office of Financial Enforcement at the number listed above.

#### Executive Order 12291

This proposed rule, if adopted as a final rule, is not a major rule for purposes of Executive Order 12291. It is not anticipated to have an annual effect on the economy of \$100 million or more. It will not result in a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. It will not have any 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 foreign markets. A Regulatory Impact Analysis therefore is not required.

#### Regulatory Flexibility Act

It is hereby certified under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, that this proposed rule, if adopted as a final rule, will not have a significant economic impact on a substantial number of small entities.

#### Drafting Information

The principal author of this document is the Office of the Assistant General Counsel (Enforcement). However, personnel from other offices participated in its development.

#### List of Subjects in 31 CFR Part 103

Authority delegations (Government agencies), Banks and banking, Currency Foreign banking, Investigations, Law Enforcement, Reporting and recordkeeping requirements, Taxes.

#### Proposed Amendment

For the reasons set forth above, 31 CFR Part 103 is proposed to be amended as set forth below:

#### PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for Part 103 would continue to read as follows:

Authority: Pub. L. 91-508, Title I, 84 Stat. 1114 (12 U.S.C. 1829b and 1951-1959); and the Currency and Foreign Transactions Reporting Act, Pub. L. 91-508, Title II, 84 Stat. 1118, as amended (31 U.S.C. 5311-5324).

#### § 103.27 [Amended]

2. It is proposed to amend the first sentence of § 103.27 by removing "for whose or which account" and adding in its place "on whose behalf".

3. It is proposed to amend § 103.11 by redesignating paragraphs (n), (o), (p), (q) and (r) as (o), (p), (q), (r) and (s) respectively, and by adding a new paragraph (n) to read as follows:

#### § 103.11 Meaning of terms.

(n) *Structure (structuring)*. For purposes of § 103.53, a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under § 103.22 of this part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding \$10,000 into smaller sums, including sums at or below \$10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below \$10,000. The transaction or transactions need not exceed the \$10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

#### § 103.53 [Amended]

4. It is proposed to amend § 103.53 by adding "(as that term is defined in § 103.11(n) of this part)" after the word "Structure" in paragraph (c).

Dated: May 18, 1988.

Francis A. Keating, II,

Assistant Secretary (Enforcement).

[FR Doc. 88-13895 Filed 6-20-88; 8:45 am]

BILLING CODE 4810-25-M

## DEPARTMENT OF THE INTERIOR

### Office of Hearings and Appeals

#### 43 CFR Part 4

#### Department Hearings and Appeals Procedures

AGENCY: Office of Hearings and Appeals, Interior.

ACTION: Proposed rule.

**SUMMARY:** This office proposes to make two amendments to its regulations concerning the probate of the estates of Indians who died possessed of property in Indian trust or restricted status. The first proposed amendment would clarify the kinds of evidence acceptable to establish death. The second proposed amendment would broaden the present regulation providing alternate devisees or legatees when an individual named in an Indian will predeceases the testator.

**DATE:** Comments must be received on or before July 21, 1988.

**ADDRESS:** Comments may be mailed to Parlen McKenna, Chief Administrative Law Judge, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** Parlen McKenna, Chief Administrative Law Judge, Office of Hearings and Appeals, Telephone: (703) 235-3800 (not toll free).

**SUPPLEMENTARY INFORMATION:** Existing Departmental regulations address proof of death and provide for alternate devisees and legatees in some instances in which the individual named in an Indian will predeceases the testator. Through working with these regulations, it has been determined that they each need amendment.

When an Indian owning property in Indian trust or restricted status dies, 43 CFR 4.210(b)(1) presently requires the Bureau of Indian Affairs to provide this office's Administrative Law Judge (Indian Probate) with "[a] copy of the death certificate or its equivalent." Problems have arisen when the Bureau has relied on an oral report of person's death and has not obtained any official evidence of death. It has happened that the Department has proceeded to probate an individual's estate, only to find that an oral report of death was erroneous. In order to prevent such possibilities, this office has determined it is necessary to clarify what evidence of death other than a death certificate is sufficient to show death.

The Department's present anti-lapse regulations found in 43 CFR 4.261, apply only when a named devisee or legatee, who predeceases the testator, is a member of the testator's immediate family. This provision is more restrictive than most state anti-lapse provisions. The proposed amendment would broaden the anti-lapse regulation to cover any lineal descendant of the testator's grandparents, thus including collateral relatives such as aunts, uncles, and close cousins.

The Department of the Interior has determined that these proposed

amendments are not major rules under E.O. 12291 and certifies that they will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the fact that the proposed amendments concern only details regarding Departmental probate of the trust or restricted estates of deceased Indians.

#### Paperwork Reduction Act

The proposed amendments do not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

The Department of the Interior has determined that the amendments do not constitute major Federal actions significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347).

Accordingly, 43 CFR Part 4, Subpart D, is proposed to be amended as shown below.

These rules were written by Paul T. Baird, Director, Office of Hearings and Appeals.

#### List of Subjects in 43 CFR Part 4

Administrative practice and procedure, Indians—lands.

Date: June 6, 1988.

Paul T. Baird,  
Director.

43 CFR Part 4, Subpart D, is proposed to be amended as follows:

#### PART 4—[AMENDED]

1. The authority citation for Part 4, Subpart D, continues to read as follows:

Authority: Secs. 1, 2, 36 Stat. 855, as amended, 856, as amended, sec. 1, 38 Stat. 586, 42 Stat. 1185, as amended, secs. 1, 2, 56 Stat. 1021, 1022; R.S. 463, 465; 5 U.S.C. 301; 25 U.S.C. secs. 2, 9, 372, 373, 374, 373a, 373b.

2. Section 4.210(b)(1) is proposed to be revised to read as follows:

#### § 4.210 Commencement of probate.

\* \* \* \* \*

(b) \* \* \*

(1) A copy of the death certificate if one exists; if there is no death certificate then another form of official written evidence of the death such as a burial or transportation of remains permit, coroner's report, or church registration of death. Secondary forms of evidence of death such as an affidavit from someone with personal knowledge concerning the fact of death or an obituary notice from a newspaper may

be used only in the absence of any official proof or evidence of death.

3. Section 4.261 is proposed to be revised to read as follows:

**§ 4.261 Anti-lapse provisions.**

When an Indian testator devises or bequeaths trust property to any of his grandparents or to the lineal descendant of a grandparent, and the devisee or legatee dies before the testator leaving lineal descendants, such descendants shall take the right, title, or interest so given by the will per stirpes. Relationship by adoption shall be equivalent to relationship by blood.

[FR Doc. 88-13902 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-79-M

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 625**

**Summer Flounder Fishery; Availability of Fishery Management Plan and Request for Comments**

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

**ACTION:** Notice of availability of a fishery management plan and request for comments.

**SUMMARY:** NOAA issues this notice that the Mid-Atlantic Fishery Management Council (Council), in cooperation with the New England and South Atlantic Fishery Management Councils, has submitted the Fishery Management Plan for the Summer Flounder Fishery (FMP) for review by the Secretary of Commerce (Secretary). Comments are invited from the public on the FMP and other documents made available, which may be obtained from the address below.

**DATE:** Comments will be accepted until August 15, 1988.

**ADDRESSES:** Send comments to Richard Roe, Regional Director, National Marine Fisheries Service, Northeast Regional Office, 14 Elm Street, Gloucester, MA 01930-3799. Mark the outside of the envelope "Comments on Summer Flounder Plan".

Copies of the FMP and supporting documents are available from John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, Federal Building, Room 2115, 300 South New Street, Dover, DE 19901-6790.

**FOR FURTHER INFORMATION CONTACT:** Jack Terrill, Resource Policy Analyst, 617-281-3600, ext. 252.

**SUPPLEMENTARY INFORMATION:** This FMP was prepared under the provisions of the Magnuson Fishery Conservation and Management Act. Upon receiving the FMP the Secretary must immediately publish a notice of its availability for public review and comment; he will consider public comments in determining whether to approve the FMP.

The FMP proposes: Minimum size limits for summer flounder and parts thereof, prohibition of retention of summer flounder by foreign fishermen, annual permitting of commercial and for-hire recreational (charter and party) vessels, support of more conservative minimum size and mesh size regulations of the States, and establishment of a mechanism to increase minimum size limits if scientific evidence warrants.

Regulations proposed by the Council and based on this FMP are scheduled to be published within 15 days.

(16 U.S.C. 1801 *et seq.*)

Dated: June 16, 1988.

**Richard H. Schaefer,**

*Director of Office of Fisheries Conservation and Management, National Marine Fisheries Service.*

[FR Doc. 88-13954 Filed 6-16-88; 5:10 pm]

BILLING CODE 3510-22-M

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# Notices

Federal Register

Vol. 53, No. 119

Tuesday, June 21, 1988

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

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[(ES-030-08-4133-09; ES-00157-015)]

#### Environmental Impact Statement; Mark Twain National Forest, Carter, Oregon and Shannon Counties, MO

**AGENCY:** Forest Service, Department of Agriculture and Bureau of Land Management (BLM), Department of the Interior.

**ACTION:** Change in final environmental impact statement availability date.

**SUMMARY:** This notice revises the Final Environmental Impact Statement availability date for the Environmental Impact Statement, Hardrock Mineral Leasing, Mark Twain National Forest, Carter, Oregon, and Shannon Counties, Missouri.

**DATES:** The Final Environmental Impact Statement will be available in November 1988, as opposed to the July 1988 date published in the December 31, 1987, *Federal Register*.

Date: June 7, 1988.

Leon E. Kridelbaugh,  
Forest Supervisor, USDA-Forest Service,  
Mark Twain National Forest.

Date: June 9, 1988.

Bert Rodgers,  
District Manager, Milwaukee District Office,  
Bureau of Land Management.

[FR Doc. 88-13966 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-GJ-M

### Forest Service

#### Black Diamond Mine Project, Angeles National Forest, Los Angeles County, CA.; Public Meeting and Extension of Comment Period for the Draft Environmental Impact Statement

The Department of Agriculture, Forest

Service has extended the comment period for the Draft Environmental Impact Statement to July 31, 1988. An additional public meeting will be held July 11, 1988 at 7 P.M. at Sulphur Springs School, 16628 West Lost Canyon Road, Canyon Country, California.

Other stipulations of the Notice of Availability of the Draft Environmental Impact Statement published in the *Federal Register* on April 20, 1988 remain in effect.

Date: June 15, 1988.

Gary E. Sayer,

Fire and Watershed Management Officer.

[FR Doc. 88-13912 Filed 6-20-88; 8:45 am]

BILLING CODE 3410-11-M

#### Routt National Forest, Proposed Rock Creek/Muddy Creek Reservoir, Routt and Grand Counties, Colorado; Revised Notice of Intent to Prepare and Environmental Impact Statement

The U.S. Department of Agriculture, Forest Service will prepare a Supplemental Draft Environmental Impact Statement (EIS) for a proposal from the Colorado River Water Conservation District (CRWCD) to construct and operate a reservoir on Rock Creek, located on the Yampa Ranger District of the Routt National Forest, with an alternative site on Muddy Creek, located on private lands and Public lands administered by the Kremmling Resource Area of the Craig District of the Bureau of Land Management.

The original Notice of Intent appear in *Federal Register*, Volume 50, Number 143 on July 25, 1985 on Page 30287. A Draft EIS (Agency Number: 02-11-87-02) was prepared and filed with the Environmental Protection Agency. The Notice of Availability of the Draft Environmental Impact State (DEIS) appeared in the *Federal Register*, Volume 52, Number 175, on September 4, 1987, on page 33636.

A Supplemental DEIS will be prepared, pursuant to the provisions of 40 CFR 1502.9(c) for the following reasons:

(1) Subsequent to filing the DEIS, the CRWCD requested that an alternative be considered increasing the size of the Muddy Creek Reservoir from 47,000 acre feet to 60,000 acre feet.

(2) The USDI Bureau of Land Management, a Cooperating Agency in

the preparation of the Draft EIS, will assume the role of Joint Lead Agency in the subsequent preparation of the Supplemental EIS and Final EIS.

(3) The Preferred Alternative, which did not appear in the Draft EIS will appear in the Supplemental Draft EIS.

(4) The permitting of the Rock Creek Alternative would require an amendment to the Routt National Forest Land and Resource Management Plan (Forest Plan) pursuant to 36 CFR 219.10(f). Notice is hereby given of the intent to amend to the Routt Forest Plan if this alternative is selected. The proposed amendment to the Routt Forest Plan would change approximately 163 acres of semi-primitive nonmotorized recreation, 953 acres of wildlife habitat, and 2,545 acres of riparian emphasis Management Areas to a rural and roaded natural recreation emphasis Management Area to accommodate recreation use at the Rock Creek Reservoir, should this reservoir be constructed. Additionally, this amendment would change the adopted visual quality objective for this area from partial retention to modification.

(5) The permitting of the Muddy Creek Alternative would require an amendment to the Kremmling Resource Area Management Plan (RMP) pursuant to 43 CFR 1610.5-5. The proposed amendment to the Kremmling Resource Management Plan would change approximately 1,740 acres to livestock grazing, 30 acres of wildlife habitat, and 1.1 miles of water quality management priorities to the recreation management priority category to accommodate recreational use at the Muddy Creek Reservoir, should this reservoir be constructed. Approximately 1,080 acres of Visual Resource Management (VRM) Class II and 400 acres of VRM Class III would be changed to VRM Class IV. The amendment would also change the visual management decision in the approved Resource Management Plan to make it consistent with current policy. The public is invited to comment on the planning criteria to be used in determining if the Kremmling Resource Management Plan should be amended. The preliminary criteria to be used included:

A. Section 501 of the Federal Land Policy and Management Act provides that rights-of-way of reservoir use may be issued for public lands when the

affected lands are found suitable for such use.

B. 43 CFR 1610.3-2 provides that amendments to Resource Management Plans shall be consistent with the plans, programs, and policies of other affected Federal, State, and local agencies to the extent that Federal laws allow.

C. Public lands will be considered suitable for reservoir use if the adverse impacts to existing uses and resources can be found to be less than the positive impacts expected to occur.

This document will be prepared and reviewed by an interdisciplinary team which includes specialists in the fields of soil science, hydrology, civil engineering, range science, wildlife, visual resource management, recreation management, economics, and other disciplines. The USDI Bureau of Reclamation and Fish and Wildlife Service, the U.S. Army Corp. of Engineers, and the Colorado Division of Wildlife are cooperating agencies in the preparation of this EIS.

Gary E. Cargill, Regional Forester, Rocky Mountain Region, USDA Forest Service is the responsible official for authorizing easements on National Forest System Lands.

Jerry E. Schmidt, Forest Supervisor, Routt National Forest, USDA Forest Service, is the responsible official for amending the Routt Forest Plan.

Neil F. Morck, Colorado State Director, USDI Bureau of Land Management is the responsible official for amending the Kremmling Area RMP. William Pulford, District Manager, USDI Bureau of Land Management, Craig District Office is the responsible official for authorizing rights-of-way on Public Lands within the Bureau of Land Management, Craig District.

The Supplemental DEIS is expected to be completed in August of 1988 and ready for public review. The Final EIS is scheduled to be completed by January of 1989.

**FOR FURTHER INFORMATION CONTACT:**  
Dave Harr, Bureau of Land Management, Kremmling Resource Area, P.O. Box 68, Kremmling, Colorado 80459, (303) 724-3437, or Ray George, Forest Service, Routt National Forest, Yampa Ranger District, P.O. Box 7, Yampa, CO 80484, (303) 638-4516.

Date: June 15, 1988.

Jerry E. Schmidt,  
Forest Supervisor.

[FR Doc. 88-13897 Filed 6-20-88; 8:45 am]

BILLING CODE 3401-11-M

### Gospel-Hump Multipurpose Resource Development Plan; Nezperce National Forest, Idaho County, ID, Completion

The Gospel Hump Multipurpose Resource Development Plan has been completed as required by the Endangered American Wilderness Act of 1978, Pub. L. 95-237. This plan was developed in compliance with the National Forest Management Act of 1976 and is an integral part of the Land and Resource Management Plan for the Nezperce National Forest in Idaho. The Record of Decision for the Land and Resource Management Plan for the Nezperce National Forest was signed on October 8, 1987. The Gospel-Hump Multipurpose Resource Development Area is identified in Chapter IV and the management direction, standards, and guidelines for the area can be found in Chapter II and Chapter III. Copies of the Land and Resource Management Plan for the Nezperce National Forest can be obtained from the Forest Supervisor, Nezperce National Forest, Route 2, Box 475, Grangeville, Idaho 83530.

Date: June 10, 1988.

John M. Hughes,  
Deputy Regional Forester.

[FR Doc. 88-13890 Filed 6-20-88; 8:45 am]

BILLING CODE 3410-11-M

### National Agricultural Statistics Service Catfish and Trout Surveys

Notice of a July survey of commercial catfish and trout producers was published in the *Federal Register* on Monday, March 14, 1988, at 53 FR 8241. Based upon comments from the notice, survey dates, States, and publication dates of the results have been revised as follows:

The survey of commercial catfish producers continues to be in July but States now included are: Alabama, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. States added are Idaho and Illinois.

The survey of commercial trout producers is changed from July to September. States involved will be California, Colorado, Georgia, Idaho, Indiana, Michigan, Missouri, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, and Wisconsin.

The results of the surveys will be

published by the Agricultural Statistics Board in the following reports: *Catfish Production*, on July 29, 1988, and *Trout Production*, on September 30, 1988.

Dated: June 16, 1988.

Charles E. Caudill,  
Administrator.

[FR Doc. 88-13960 Filed 6-20-88; 8:45 am]

BILLING CODE 3410-20-M

### Hog Program Changes

Notice is hereby given that the National Agricultural Statistics Service will make the following change to the hog estimating program effective September 1988.

Estimates of U.S. totals for hogs and pigs inventory by classes and pig crop for the previous quarter will be added to the March 1 and September 1 *Hogs and Pigs* report. Previously, the March and September reports contained only estimates for the 10 major producing States. The increase in survey coverage is the result of a new nationwide survey program which was begun in December 1986.

The first of the additional estimates will be published in the *Hogs and Pigs* report which will be issued September 30, 1988.

Dated: June 16, 1988.

Charles E. Caudill,  
Administrator.

[FR Doc. 88-13961 Filed 6-20-88; 8:45 am]

BILLING CODE 3410-20-M

## DEPARTMENT OF COMMERCE

### Bureau of Export Administration

[Case No. OEE-1-88]

#### Purchasing Pool Co.; Order Renewing Temporary Denial of Export Privileges

In the matter of: Wilfried Lange, individually and doing business as Purchasing Pool Company, Grasslfinger Str. 61, 8038 Grobenzell, West Germany, Respondents.

The Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce (Department), pursuant to the provisions of § 388.19 of the Export Administration Regulations, 15 CFR Parts 368-399 (1987) (the Regulations), issued pursuant to the Export Administration Act of 1979, as amended, 50 U.S.C. app. secs. 2401-2420 (1982 and Supp. III 1985) (the Act), has asked the Assistant Secretary for Export

Enforcement<sup>1</sup> to renew an order temporarily denying all United States export privileges to Wilfried Lange, individually and doing business as Purchasing Pool Company (hereinafter collectively referred to as respondents). The initial order was issued on April 20, 1988 (53 FR 15253, April 28, 1988).

In its renewal request dated May 27, 1988, the Department states that, as a result of an ongoing investigation, it continues to have reason to believe that, on numerous occasions since the end of 1985, respondents have reexported, without the required reexport authorizations from the Department, U.S.-origin computers, which are controlled for reasons of national security, from West Germany to Austria, Yugoslavia and Hungary. The Department is presently trying to obtain documents that will further substantiate its belief.

The Department also believes that, in connection with the Department's investigation into respondents' trade-related activities, respondents have provided the Department with false and misleading information. Specifically, based on additional documentation the Department has obtained since it made its initial request, the Department has reason to believe that respondents have provided it with false invoices in an effort to hide the fact that they have reexported certain controlled U.S.-origin commodities from West Germany without the required reexport authorizations.

The Department further states that its investigation continues to give it reason to believe that a contract for two U.S.-origin computers, which are controlled for reasons of national security, presently exists between respondents and a Czechoslovakian foreign trading firm, that respondents intend to fulfill the contract in question and that they are likely to do so without complying with the Regulations.

The Department states that, viewed as a whole, the above-described events concerning respondents' past activities demonstrate that respondents are involved in a scheme to obtain controlled U.S.-origin commodities, lawfully or otherwise, take possession of them in West Germany and then reexport them, oftentimes to proscribed destinations, without obtaining the required reexport authorizations. Accordingly, the Department believes

that respondents' activities show a clear pattern of disregard for the Act and the Regulations.

The Department continues to believe that respondents' past activities establish that the violations of the Act and the Regulations which they are suspected of having committed and which the Department is presently investigating were deliberate and covert and are likely to occur again unless appropriate action is taken to reduce the likelihood that respondents can continue to acquire U.S.-origin goods either inside or outside of the United States.

Furthermore, the Department continues to believe that, in order to reduce the likelihood that respondents will continue to engage in activities which are in violation of the Act and the Regulations, a temporary denial order naming Wilfried Lange and Purchasing Pool Company is necessary to give notice to companies in the United States and abroad that they should cease dealing with these parties in transactions involving U.S.-origin goods.

Therefore, based on the showing made by the Department and given that respondents have not opposed the Department's request for renewal, I find that an order temporarily denying export privileges to the respondents is necessary in the public interest to prevent an imminent violation of the Act and the Regulations and to give notice to companies in the United States and abroad to cease dealing with the respondents in goods and technical data subject to the Act and the Regulations in order to reduce the substantial likelihood that respondents will continue to engage in activities which are in violation of the Act and the Regulations.

Accordingly, it is hereby ordered, I. All outstanding validated export licenses in which either respondent appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of respondents' privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. Respondents Wilfried Lange and Purchasing Pool Company, both with an address at Grasslfinger Str. 61, 8038 Grobenzell, West Germany, their successors or assignees, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported or to be

exported from the United States, in whole or in part, or that are otherwise subject to the Regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (a) As a party or as a representative of a party to any export license application submitted to the Department, (b) in preparing or filing with the Department any export license application or reexport authorization, or any document to be submitted therewith, (c) in obtaining or using any validated or general export license or other export control document, (d) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported, and (e) in financing, forwarding, transporting, or other servicing of such commodities or technical data. Such denial of export privileges shall extend only to those commodities and technical data which are subject to the Act and the Regulations.

III. After notice and opportunity for comment, such denial of export privileges may be made applicable to any person, firm, corporation, or business organization with which either respondent is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

IV. No person, firm, corporation, partnership or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing shall, with respect to U.S.-origin commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with either respondent or any related party, or whereby either respondent or any related party may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly: (a) Apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for either respondent or any related party denied export privileges; or (b) order, buy, receive, use, sell,

<sup>1</sup> In accordance with Department Organization Order 50-1, dated March 23, 1988, the Assistant Secretary for Export Enforcement is now the Department official who issues temporary denial orders. Section 388.19 of the Regulations is being revised to reflect this fact.

deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any export, reexport, transshipment, or diversion of any commodity or technical data exported or to be exported from the United States.

V. In accordance with the provisions of § 388.19(e) of the Regulations, either respondent may, at any time, appeal this temporary denial order by filing with the Office of Administrative Law Judges, U.S. Department of Commerce, Room H-6716, 14th Street and Constitution Avenue NW., Washington, DC 20230, a full written statement in support of the appeal.

VI. This order shall remain in effect for 60 days.

VII. In accordance with the provisions of § 388.19(d) of the Regulations, the Department may seek renewal of this temporary denial order by filing a written request not later than 20 days before the expiration date. Either respondent may oppose a request to renew this temporary denial order by filing a written submission with the Assistant Secretary for Export Enforcement, which must be received not later than seven days before the expiration date of this order. The Regulations further provide that either respondent may request a hearing concerning this request.

A copy of this order shall be served on each respondent and this order shall be published in the *Federal Register*.

Effective Date: June 20, 1988.

G. Philip Hughes,

Assistant Secretary for Export Enforcement,  
[FR Doc. 88-13955 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-DT-M

## International Trade Administration

[A-588-704]

### Final Determination of Sales at Less Than Fair Value; Brass Sheet and Strip from Japan

**AGENCY:** Import Administration, International Trade Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** We have determined that brass sheet and strip from Japan are being, or are likely to be, sold in the United States at less than fair value. The U.S. International Trade Commission (ITC) will determine within 45 days of publication of this notice, whether these imports are materially injuring, or are threatening material injury, to a United States industry.

**EFFECTIVE DATE:** June 21, 1988.

**FOR FURTHER INFORMATION:** Contact Michael J. Ready or David J. Goldberger, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 377-2613 or 377-4136.

### SUPPLEMENTARY INFORMATION:

#### Final Determination

We have determined that brass sheet and strip from Japan are being, or are likely to be, sold in the United States at less than fair value, as provided section 735 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). The estimated weighted-average margins are shown in the "Continuation of Suspension of Liquidation" section of this notice.

#### Case History

Since our notice of an affirmative preliminary determination (53 FR 2771, February 1, 1988), the following events have occurred:

On February 4 and February 8, 1988, Nippon Mining Co. (NMC) and Sambo Cooper Alloy, Co. Ltd. (Sambo), respectively, requested a postponement of the final determination until not later than 135 days after the date of publication of the preliminary determination. On February 17, 1988, in accordance with section 735(c)(2)(A) of the Act, we postponed the final determination until June 15, 1988 (53 FR 5207, February 22, 1988).

On December 24, 1987, petitioners alleged that NMC's home market sales were being made at prices below the cost of production and requested that we initiate an investigation of the allegation. Given the timing of the filing of the allegation, we were unable to consider it for the preliminary determination. Based on analysis of home market prices and the information submitted by petitioners in support of their allegation, we initiated an investigation of sales below cost of production for NMC.

We issued a cost of production questionnaire to NMC on January 25, 1988. On February 16, 1988 NMC advised the Department it would not respond to our cost of production questionnaire.

Verification of the questionnaire response submitted by Sambo was conducted in Japan during March 1988.

On April 5, 1988, NMC advised us that it would forgo verification of its U.S. sales.

A public hearing was not requested. Final comments were submitted by the petitioners and Sambo.

### Scope of Investigation

The products covered by this investigation are brass sheet and strip, other than leaded brass and tin brass and strip, currently provided for under the *TSUSA* item numbers 612.3960, 613.3982, and 612.3986, and currently classifiable under HS item numbers 7409.21.0050, 7409.21.0075, 7409.29.0050, and 7409.29.0075.

The chemical compositions of the products covered by the investigation are currently those of the Copper Development Association (C.D.A.) 200 series or the Unified Numbering System (U.N.S.) C20000 series. Products whose chemical compositions are covered by other C.D.A. or U.N.S. series are not covered by this investigation.

The physical dimensions of the products covered by the investigation are brass sheet and strip of solid rectangular cross section greater than 0.006 inches (0.15 millimeters) but not exceeding 0.188 inches (4.8 millimeters) in finished thickness or gauge, regardless of width. Coiled, wound on reels (traverse wound) and cut-to-length products are included.

### Period of Investigation

As stated in our preliminary determination, the period of investigation is February 1, 1987 through July 31, 1987, except for Sambo, for which we extended the period of investigation back to October 1, 1986, as permitted by 19 CFR 353.38(a).

### Such or Similar Comparisons

We have determined that all of the brass sheet and strip covered by the investigation constitute the same class or kind of merchandise and differences between types of brass are not significant enough to warrant separate "such or similar" comparisons.

In order to select the most similar products, we made comparisons of merchandise based on grade (chemical composition), gauge, width, coating (tinned or nontinned), temper, surface finish, and packed form (coil, cut-to-length or traverse-wound).

For merchandise where there were no identical products with which to compare a product sold to the United States, we made adjustments for differences in the physical characteristics of the merchandise in accordance with section 773(a)(4)(C) of the Act.

### Fair Value Comparisons

To determine whether sales of brass sheet and strip from Japan to the United States were made at less than fair value we compared the United States price to

the foreign market value as specified below. Two companies, Mitsubishi Shindoh Co., Ltd. and Kobe Steel, Ltd., failed to respond to our questionnaire. When a company fails to respond, we have determined, in accordance with section 776(b) of the Act, that it is appropriate for this final determination to assign to that company the highest margin among (1) the company-specific margins in the petition, (2) the margin for the respondent with the highest margin of all respondents that supplied adequate and verified responses, or (3) the margin calculated for NMC using petitioners' constructed value information, as described below. We have applied this methodology to the companies in question.

As described above in the "Case History" section, NMC did not respond to our cost of production questionnaire. Subsequently, NMC informed us that it would not permit verification of its U.S. sales response. Because of NMC's objections, and in the absence of verified information, we used the best information available under section 776(b) of the Act, as described below.

#### United States Price

Because all sales were made directly to unrelated parties prior to importation into the United States, we based the United States price on purchase price, in accordance with section 772(b) of the Act.

#### NMC

United States price is based on best information available as reflected by information contained in NMC's responses. We made deductions for ocean freight and marine insurance.

#### Sambo

We calculated purchase price based on the packed c. & f. or c.i.f. duty unpaid prices to unrelated customers in the United States. We made deductions from purchase price, where appropriate, for foreign inland freight, export brokerage, ocean freight, and marine insurance, in accordance with section 772(d)(2) of the Act. We made an addition to purchase price for duty drawback (i.e., import duties which were not collected by reason of the transportation of the merchandise to the United States) pursuant to section 772(d)(1)(B) of the Act.

Sambo's credit expense calculation for U.S. sales was inconsistent with departmental practice. We recalculated credit expense based on the number of days from invoice date to payment date. At verification, we confirmed that the reported shipment date was the invoice date, which was on or about the bill of

lading date for ocean shipment. (See also our response to Comment 5.)

#### Foreign Market Value

##### NMC

Foreign market value is based on best information available as reflected in constructed value information submitted by petitioners. We added the cost of U.S. packing as contained in NMC's response.

##### Sambo

In accordance with section 773(a) of the Act, we calculated foreign market value based on packed delivered prices to unrelated customers in the home market. We made deductions from the home market price, where appropriate, for inland freight. In order to adjust for differences in packing between the U.S. and home markets, we deducted the home market packing cost from the foreign market value and added U.S. packing costs.

We made adjustments to the home market price, where appropriate, for differences in credit expenses, pursuant to 19 CFR 353.15. We made further adjustments to the home market price to account for differences in the physical characteristics of the merchandise in accordance with section 773(a)(4)(C) of the Act.

We calculated credit expenses based on the number of days from shipment date to payment date. (See also our response to Comment 4.)

Sambo claimed a quantity surcharge adjustment for certain home market sales. We disallowed this claim because it could not be verified.

#### Currency Conversion

We made currency conversions in accordance with 19 CFR 353.56(a)(1). All currency conversions were made at rates certified by the Federal Reserve Bank of New York.

#### Verification

As provided in section 776(a) of the Act, we verified all information used in reaching the final determination in this investigation. We used standard verification procedures including examination of all relevant accounting records and source documents.

#### Interested Party Comments

##### Comment 1

Petitioners contend that as "best information otherwise available," the Department should base its dumping margin for NMC on constructed value calculations submitted by petitioners for foreign market value, and on NMC's reported U.S. sales prices for U.S. price.

Petitioners reason that, as NMC failed to respond to the Department's cost of production questionnaire, the Department should assume that the margins calculated in the petition understate the actual extent of dumping by NMC during the period of investigation. Accordingly, sales at less than fair value calculations should be based on information submitted for the record.

Petitioners also contend that if the NMC rate using the constructed value information is higher than the rates alleged in the petition for the companies which did not respond to our questionnaire, the NMC rate should be used for them as best information available.

##### DOC Position

We have used the best information available that reflects appropriate adverse assumptions. As the Department initiated a cost of production investigation on NMC's sales to the home market, petitioners' constructed value information submitted for the record as part of their below cost sales allegation was used as "best information otherwise available" for foreign market value in light of NMC's refusal to respond to our questionnaire. For United States price, the Department utilized NMC's questionnaire response. The use of the response as best information available, where appropriate, is consistent with *Amorphous Silica Filament Fabric from Japan* (52 FR 28033, July 27, 1987).

Consistent with our approach of making adverse assumptions for nonresponding companies, we have used the NMC rate as best information available for Mitsubishi Shindoh Co., Ltd. and Kobe Steel, Ltd.

##### Comment 2

Petitioners contend that Sambo's questionnaire responses have been incomplete and inaccurate. They claim that Sambo has been nonresponsive to the Department's requests and that the verification report identified numerous errors and discrepancies. Accordingly, petitioners believe the Department should reject Sambo's response and use the best information otherwise available in the final determination.

Sambo states that the Department's verification confirmed that no discrepancies existed for the vast majority of information it submitted. The errors discovered at verification were, Sambo contends, minor and not sufficient to invalidate or discredit the response.

*DOC Position*

We agree with the respondent. Sambo responded to our information requests and its response was properly verified with no discrepancies serious enough to warrant rejection of the entire response.

*Comment 3*

Petitioners allege that Sambo has overstated its duty drawback claim by not factoring in any scrap usage. They contend that the statute allows a reduction to U.S. price only for the amount of import duties actually imposed on merchandise used as input to the exported product under investigation. While Japanese law may permit Sambo to claim a full duty drawback as if all the input material were imported virgin metal, petitioners hold that U.S. law only allows for the drawback to the extent the exempted input is used in the finished product. Therefore, Sambo's claim must be adjusted to account for the use of imported scrap, which is not dutiable under Japanese law. In the absence of a virgin to scrap materials ratio provided by Sambo, petitioners advocate reducing the duty drawback amount by a ratio reflecting U.S. industry experience.

Sambo contends that it properly reported its duty drawback claim under Japanese law, which allows for the substitution of domestic goods (including internally generated scrap) for imported goods such as virgin metal.

*DOC Position*

We agree with the respondent. Sambo demonstrated that its claim is in conformity with Japanese law and section 772(d)(1)(B) of the Act. Under the principle of substitution, as discussed in *Acrylic Film, Strips and Sheets from Taiwan* (49 FR 10968, March 23, 1984) and *Sugar and Syrups from Canada* (46 FR 27985, May 22, 1981), a company may substitute foreign dutiable inputs for domestic nondutiable inputs for drawback purposes. We note also that even under the petitioners' assumptions, most of the scrap involved in brass sheet and strip manufacture is generated during the production process and, in turn, most likely originated as imported virgin metal. Any nondutiable imported scrap used by Sambo would constitute a small percentage of its total inputs, not affecting Sambo's full drawback claim.

*Comment 4*

Petitioners challenge Sambo's home market credit claim on the basis that the Department's verification showed that Sambo's response contained the date payment was due, rather than the date Sambo actually received payment. Since

the Department cannot use its credit formula to obtain the correct credit expense, petitioners contend that Sambo's home market credit claim should be denied.

Sambo contends its home market credit claim was reported using a reasonable methodology, as allowed by Department policy, and to calculate actual payment for the thousands of home market sales would constitute an unreasonable burden to Sambo.

*DOC Position*

While the Department did not accept Sambo's method of calculating credit expenses for home market sales, we were able to recalculate this amount based on verified information. To compute the number of days credit was outstanding, we took the time between date of shipment and the date of payment reported by the respondent.

With respect to petitioners' concern, we note that the date of payment reported by Sambo would generally reflect a shorter period of time that credit was extended, and thus a lower credit claim, than if Sambo had calculated its credit claim based on the actual days that payment was outstanding.

Therefore, use of respondent's date of payment reflects a conservative calculation of home market credit expense.

*Comment 5*

Petitioners argue that the date of the merchandise actually left the factory should be used as shipment date for calculating the credit adjustment on U.S. sales, rather than the invoice date reported by Sambo in its response.

Sambo states that the invoice date is the only date which can represent a single date of shipment, since an order is produced over a period of time, shipped in segments to a bonded warehouse pending completion of an order, then invoiced and shipped to the overseas customer. Sambo contends it would be unreasonable to calculate credit from the date an initial shipment is made pursuant to an order, as this methodology would simply penalize Sambo for storing merchandise at its customs broker's off-site warehouse, rather than on Sambo's own premises.

*DOC Position*

We agree with Sambo and used invoice date as shipment date for purposes of calculating credit. We impute credit for the period that the seller has neither possession of the goods nor a claim for payment. In this case, while the manufactured goods have physically left Sambo's plant, the

broker merely acts as Sambo's contracted agent for warehousing and arranging ocean shipment of the goods. Sambo maintains responsibility for the goods and still has an obligation to supply the buyer with the ordered product. Should the goods be destroyed prior to invoicing, Sambo has no claim on the purchaser for payment and incurs the cost of replacing the warehoused goods. Under these circumstances, Sambo has maintained effective possession of the goods. Sambo's invoice date generally corresponds to bill of lading date and is usually the date the goods are removed from the bonded warehouse and loaded into the ship. It is from this point, that Sambo has claim on the purchaser for payment. See *Steel Wire Rope from Korea* (48 FR 41615, 41617, September 16, 1983).

*Comment 6*

Petitioners argue that the Department should make a circumstance of sale adjustment to Sambo's U.S. sales for warehousing expenses incurred while U.S.-bound merchandise is stored in bonded warehouses prior to shipment. Since Sambo did not provide this cost information, petitioners contend that an amount based on U.S. industry experience should be applied as best information available.

Sambo states its warehousing expenses are included as part of its F.O.B. costs, reported as the brokerage and handling charge, and therefore are already deducted from U.S. price.

*DOC Position*

We agree with the respondent. At verification, we verified that the brokerage and handling amount claimed by Sambo included warehousing expenses.

*Comment 7*

Petitioners contend that Sambo's sales of merchandise with special finishes should be included in fair market value comparisons to the extent that these sales constitute the most similar merchandise to U.S. products based on grade, gauge, width and packed form.

Sambo claims that in no instance does a "less similar" product comparison result because of a difference in surface finish.

*DOC Position*

We agree with the petitioners' methodology and agree with the respondent with its application in this case. None of the special finish products are more similar to the U.S. products than the regular mill finish products we have selected for comparison.

**Comment 8**

Sambo argues that, in calculating foreign market value, the Department should exclude small quantity and retail sales in the home market as being outside the ordinary course of trade. Sambo cites past Department practice where comparisons have been limited to comparable quantities and level of trade.

Petitioners contend that these sales are, in fact, part of Sambo's ordinary course of trade and should be included. Furthermore, petitioners allege that Sambo's claim for exclusion of retail sales constitutes an attempt to claim a level of trade adjustment for which Sambo is not entitled.

**DOC Position**

In accordance with 19 CFR 353.19, we have compared U.S. sales to home market sales at the same commercial level of trade. To the extent home market retail sales were identified by Sambo, we have excluded them from comparison. We have not excluded Sambo's small quantity sales to its usual commercial customers as these sales are made at the same level of trade as U.S. sales and are in the ordinary course of trade.

**Comment 9**

Sambo argues that in calculating foreign market value, the Department should exclude home market sales made by Sambo in cases where the merchandise was actually manufactured by an unrelated company.

Petitioners claim that Sambo has not established that the outside producer performed all manufacturing steps related to these sales. As Sambo may have performed part of the production process, the Department should determine that these sales were entirely produced by the unrelated vendor before excluding them.

**DOC Position**

We verified that Sambo did not produce this merchandise. As foreign market value is determined by the price at which such or similar merchandise is sold (19 CFR 353.4(a)), and "such or similar merchandise" is defined as, among other things, goods produced "by the same person as the merchandise which is the subject of the investigation" (section 771(16)(B)(i) of the Act), we have excluded these sales from comparison.

**Comment 10**

Sambo states that, in calculating foreign market value, the Department should either exclude home market sales for which an outside, unrelated party

performed additional slitting (i.e. cutting to width), or grant a difference in merchandise adjustment for such sales.

Petitioners contend that excluding these sales is unsupported by the statute and that an adjustment is not warranted because this outside cutting is reflected in Sambo's ultimate selling price.

**DOC Position**

We agree with the petitioners. Sambo produced the merchandise in question and simply subcontracted a small portion of the process to another company. The product remains within the purview of such or similar merchandise defined under section 771(16) of the Act. No adjustment for physical differences in merchandise is appropriate since the merchandise that results from this additional slitting is identical, with respect to width group, to the U.S. product to which it is being compared.

**Comment 11**

Petitioners argue that in calculating foreign market value, the Department should not exclude certain home market sales which Sambo alleges were cancelled, as these sales may have been reinstated later to avoid inclusion in this investigation.

**DOC Position**

From the information presented for the record and at verification, there is no indication that the cancelled home market sales reported by Sambo were cancelled to avoid scrutiny. We therefore consider it proper to exclude these sales.

**Comment 12**

Petitioners contend that the difference in merchandise adjustments for fabrication costs presented by Sambo at and subsequent to verification are untimely and not supported by the documentation submitted. Consequently, the Department should not allow these claims.

Sambo contends that its cost data were submitted in a timely manner, citing the Department's past acceptance of such information at verification.

**DOC Position**

We agree with the respondent. Sambo's cost adjustment claims, affecting less than fifteen percent of all sales, were submitted in time for the Department to analyze and verify them and for petitioners to comment on them. As most of the products compared are not affected by the claimed adjustments, Sambo's claims do not constitute a major revision of the response at verification. Therefore, we have

accepted Sambo's submission. Where the claimed adjustments were properly verified, we have used them in making our determination.

**Comment 13**

Petitioners challenge Sambo's use of a weighted-average freight cost for all home market sales under investigation. Instead, petitioners contend that Sambo should have provided this cost on a sale-by-sale basis. Since Sambo did not make these individual calculations, petitioners state that the Department should use the lowest actual cost verified as best information available for all home market sales.

Sambo argues that its use of an average freight cost is reasonable and in accordance with Department practice.

**DOC Position**

Sambo's freight calculation methodology and source documentation were examined and verified. We found the methodology reasonable in light of the alternative which would have been to calculate thousands of transactions individually. Therefore, we have accepted the respondent's claim.

**Comment 14**

Sambo contends that the Department's use of quarterly exchange rates was inappropriate. In particular, Sambo claims that the Department should have used the daily exchange rate on a date which accounts for a large number of U.S. sales transactions. Because the daily rate on this date varied by less than five percent from the quarterly rate, the Department relied on the quarterly rate for that date. Sambo argues that this action resulted in a "mechanical currency conversion" that did not reflect commercial reality at that time, and that the daily rate in effect on that date was the rate on which the sales in question were based.

Sambo cites the case of *Luciano Pisoni v. United States*, 10 CIT \_\_\_\_, 640 F. Supp. 255, for the proposition that the Department should not utilize quarterly exchange rates where a daily rate would be more realistic of the transactions involved. Sambo states further that *Luciano Pisoni and Melamine Chemicals v. United States*, 732 F. 2d. 924, make clear the need to avoid "mechanical currency conversion formulas in fair value investigations."

Petitioners hold that the quarterly rate is required by statute in this instance because the variation in the rate was less than the five percent minimum required for use of the daily rate. Moreover, petitioners challenge Sambo's assertion that a temporary exchange

rate fluctuation occurred on the date in question in view of the steady depreciation of the U.S. dollar against the yen.

#### DOC Position

As the daily rate on the date in question varied by less than five percent, the Department's policy is to use the quarterly rate in effect on that date. With regard to *Luciano Pisoni* and *Melamine*, those cases prohibit the use of exchange rates that in and of themselves produce margins. In this case, our review of the response shows that the use of a daily exchange rate, as opposed to quarterly rates, would not eliminate Sambo's margin of dumping. Therefore, the Department is not required to use daily rates.

#### Continuation of Suspension of Liquidation

In accordance with sections 733(d) and 735(c) of the Act, we are directing the U.S. Customs Service to continue to suspend liquidation of all entries of brass sheet and strip from Japan that are entered or withdrawn from warehouse, for consumption, on or after February 1, 1988, the date of publication of the preliminary determination in the *Federal Register*. The U.S. Customs Service shall require a cash deposit or posting of a bond equal to the estimated amounts by which the foreign market value of brass sheet and strip from Japan exceeds the United States price as shown below. This suspension of liquidation will remain in effect until further notice. The weighted-average margins are as follows:

Manufacturer/producer/exporter	Weighted-average margin percentage
Nippon Mining Co., Ltd.	57.98
Sambo Copper Alloy Co., Ltd.	13.30
Mitsubishi Shindoh Co., Ltd.	57.98
Kobe Steel, Ltd.	57.98
All Others	45.72

This suspension of liquidation covers imports of brass sheet and strip meeting the definition outlined in the "Scope of Investigation" section of this notice.

#### ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that such injury does exist,

the Department will issue an antidumping duty order directing Customs offices to assess an antidumping duty on brass sheet and strip from Japan, entered, or withdrawn from warehouse, for consumption after the suspension of liquidation, equal to the amount by which the foreign market value exceeds the United States price.

This determination is published pursuant to section 735(d) of the Act (19 U.S.C. 1673d(d)).

June 15, 1988.

Joseph A. Spetrini,  
Acting Assistant Secretary for Import Administration.

[FR Doc. 88-13947 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-DS-M

[A-570-801]

#### Initiation of Antidumping Duty Investigation; Certain Headwear from the People's Republic of China

**AGENCY:** Import Administration, International Trade Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating an antidumping duty investigation to determine whether imports of certain headwear from the People's Republic of China (PRC) are being, or are likely to be, sold in the United States at less than fair value. We are notifying the U.S. International Trade Commission (ITC) of this action so that it may determine whether imports of this product materially injure, or threaten material injury to, a U.S. industry. If this investigation proceeds normally, the ITC will make its preliminary determination on or before July 11, 1988. If that determination is affirmative, we will make a preliminary determination on or before November 2, 1988.

**EFFECTIVE DATE:** June 21, 1988.

**FOR FURTHER INFORMATION CONTACT:** Rick Herring, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 377-0187.

#### SUPPLEMENTARY INFORMATION:

##### The Petition

On May 26, 1988, we received a petition in proper form filed by the Headwear Institute of America on behalf of the domestic headwear industry. On June 1, 1988, we received

an amendment which clarified the scope of the petition by the addition of TSUSA items and the exclusion of parts of the subject headwear. In compliance with the filing requirements of 19 CFR 353.36, petitioner alleges that imports of certain headwear from the PRC are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports materially injure, or threaten material injury to, a U.S. industry.

#### United States Price and Foreign Market Value

United States price was based on purchase price methodology using invoice prices for sales to U.S. importers. Petitioner made no adjustments to these invoice prices.

Alleging that the PRC is a state-controlled-economy country, petitioner's estimate of foreign market value was based on prices for corresponding headwear in the Philippines, a non-state-controlled-economy country (surrogate country), in accordance with the provisions of 19 CFR 353.36(a)(8). The Department has considered the Philippines as an appropriate surrogate country in the past for the PRC.

Petitioner alleges that there is no significant Philippine domestic market for the subject merchandise; therefore, it used Philippine export prices of the subject headwear to the United States. These prices are taken from a purchaser's invoice and the average unit value of U.S. imports from the Philippines. Petitioner also calculated the foreign market value using the headwear prices of other countries which export to the United States, except the PRC. Petitioner adjusted, where appropriate, for packing costs, embroidery costs, and direct and indirect selling expenses.

Based upon a comparison of United States price and foreign market value, petitioner alleges dumping margins of between 25.1 percent and 62.7 percent.

Petitioner also alleges that "critical circumstances" exist with respect to imports of certain headwear from the People's Republic of China.

#### Initiation of Investigation

Under section 732(c) of the Act, we must determine, within 20 days after a petition is filed, whether it sets forth the allegations necessary for the initiation of an antidumping duty investigation, and whether it contains information reasonably available to the petitioner supporting the allegations.

We examined the petition on certain headwear from the PRC and found that

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703.0550,  
703.1620,  
884.0438,

it meets the requirements of section 732(b) of the Act. Therefore, in accordance with section 732 of the Act, we are initiating an antidumping duty investigation to determine whether imports of certain headwear from the PRC are being, or are likely to be, sold in the United States at less than fair value. We will also make a determination as to whether critical circumstances exist with respect to the subject merchandise.

In the course of our investigation, we will determine whether the economy of the PRC is state-controlled to an extent that sales of such or similar merchandise in the home market or to third countries do not permit determination of foreign market value. If the PRC is determined to be a state-controlled economy, we will then choose a non-state-controlled economy surrogate country for purposes of determining foreign market value. If our investigation proceeds normally, we will make our preliminary determination by November 2, 1988.

#### Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. Congress is considering legislation to convert the United States to this Harmonized System (HS). In view of this, we will be providing both the appropriate *Tariff Schedules of the United States Annotated* (TSUSA) item numbers and the appropriate HS item numbers with our product descriptions on a test basis, pending Congressional approval. As with the TSUSA, the HS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

We are requesting petitioners to include the appropriate HS item number(s) as well as the TSUSA item number(s) in all new petitions filed with the Department. A reference copy of the proposed HS schedule is available for consultation at the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. Additionally, all Customs officers have reference copies and petitioners may contact the Import Specialist at their local Customs office to consult the schedule.

The products covered by this investigation are certain headwear from the PRC currently provided for under TSUSA item numbers 702.0600, 702.0800, 702.1200, 702.1400, 702.2000, 702.3200, 703.0510, 703.0520, 703.0530, 703.0540, 703.0550, 703.0560, 703.1000, 703.1610, 703.1620, 703.1630, 703.1640, 703.1650, 384.0438, 384.0954, 384.2211, 384.2608,

384.2707, 384.2723, 384.2741, 384.2752, 384.2784, 384.2796, 384.3436, 384.5216, 384.5365, 384.5427, 384.5485, 384.5533, 384.5685, 384.5698, 384.8676, 384.9443 and currently classifiable under HS item numbers 6505.90.15, 6505.90.20, 6505.90.25, 6505.90.90, 6502.00.20, 6502.00.90, 6504.00.90, 6505.90.50, 6505.90.70, 6505.90.60, 6505.90.80, 6114.20.00, 6211.42.00, 6114.30.30, 6211.43.00, 6114.30.20, 6104.49.00, 6204.51.00, 6204.23.00, 6204.29.40, 6211.32.00, 6110.90.00, 6204.12.00, 6211.49.00.

The subject headwear includes caps, hats, and visors made from knitted or woven cloth of vegetable fibers including cotton, flax, and ramie, of man-made fibers, and/or of blends thereof, and which is cut and sewn. The subject headwear may be adorned with braid, embroidery, or other applied, printed or sewn decoration or may be plain. This investigation does not include headwear of straw, felt or wool.

#### Notification of ITC

Section 732(d) of the Act requires us to notify the ITC of this action and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonproprietary information. We will allow the ITC access to all privileged and business proprietary information in our files, provided it confirms in writing that it will not disclose such information either publicly or under administrative protective order without written consent of the Acting Assistant Secretary for Import Administration.

#### Preliminary Determination by ITC

The ITC will determine by July 11, 1988 whether there is a reasonable indication that imports of certain headwear from the PRC materially injure, or threaten material injury to, a U.S. industry. If its determination is negative, the investigation will terminate; otherwise, it will proceed according to the statutory and regulatory procedures.

This notice is published pursuant to section 732(c)(2) of the Act.

June 15, 1988.

Joseph A. Spetrini,  
Acting Assistant Secretary for Import Administration.

[FR Doc. 88-13948 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-DS-M

#### Short-Supply Review on Certain Low Carbon Rimmed Steel Wire Rod; Request for Comments

**AGENCY:** Import Administration/ International Trade Administration, Commerce.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of Commerce hereby announces its review of a request for short-supply determination under Article 8 of the U.S.-Brazil Arrangement Concerning Trade in Certain Steel Products, the U.S.-EC Arrangement Concerning Trade in Certain Steel Products, and the U.S.-Spain Arrangement Concerning Trade in Certain Steel Products with respect to certain low carbon rimmed steel wire rod.

**DATE:** Comments must be submitted on or before (July 1, 1988).

**ADDRESS:** Send all comments to Nicholas C. Tolerico, Director, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230, (202) 377-0159.

**SUPPLEMENTARY INFORMATION:** Article 8 of the U.S.-Brazil Arrangement Concerning Trade in Certain Steel Products, the U.S.-EC Arrangement Concerning Trade in Certain Steel Products, and the U.S.-Spain Arrangement Concerning Trade in Certain Steel Products provide that if the U.S. determines that because of abnormal supply or demand factors, the U.S. steel industry will be unable to meet demand in the USA for a particular product (including substantial objective evidence such as allocation, extended delivery periods, or other relevant factors), an additional tonnage shall be allowed for such product or products.

We have received a short-supply request for low carbon rimmed steel wire rods, grades C1006 and C1008, in a diameter of 7/32 inch (5.5mm).

Any party interested in commenting on this request should send written comments as soon as possible, and no later than July 1, 1988. Comments should focus on the economic factors involved in granting or denying this request.

Commerce will maintain this request and all comments in a public file.

Anyone submitting business proprietary information should clearly so label the business proprietary portion of the submission and also provide a non-proprietary submission which can be placed in the public file. The public file will be maintained in the Central Records Unit, Room B-099, Import Administration, U.S. Department of Commerce at the above address.

June 15, 1988.

Joseph A. Spetrini,  
Acting Assistant Secretary for Import Administration.

[FR Doc. 88-13949 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-DS-M

### National Oceanic and Atmospheric Administration

#### Marine Mammals; Issuance of Permit; California Department of Fish and Game (P191D)

On March 23, 1988, notice was published in the *Federal Register* (53 FR 9470) that an application had been filed by the California Department of Fish and Game, 1416 Ninth Street, Sacramento, California 95814, for a scientific research permit to incidentally harass an unspecified number of cetaceans and pinnipeds during the course of aerial and ground surveys.

Notice is hereby given that on June 14, 1988 as authorized by the provisions of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407), and the Endangered Species Act of 1973 (16 U.S.C. 1531-1543), the National Marine Fisheries Service issued a Permit for the above taking, subject to certain conditions set forth therein.

Issuance of this Permit, as required by the Endangered Species Act of 1973, is based on a finding that such Permit: (1) was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which are the subject of this Permit; (3) and will be consistent with the purposes and policies set forth in section 2 of the Endangered Species Act of 1973. This Permit was issued in accordance with and is subject to Parts 220-222 of Title 50 CFR, the National Marine Fisheries Service regulations governing endangered species permits.

This Permit is available for review in the following offices:

Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1825 Connecticut Avenue NW., Suite 805, Washington, DC 20235; and

Director, Southwest Region, National Marine Fisheries Service, 300 South

Ferry Street, Terminal Island, California 90731-7415.

Date: June 14, 1988.

Nancy Foster,  
Director, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service.

[FR Doc. 88-13918 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-22-M

### National Technical Information Service

#### Intent To Grant Exclusive Patent License; Bison Instruments, Inc.

The National Technical Information Service (NTIS), U.S. Department of Commerce, intends to grant to Bison Instruments, Inc. having a place of business at Minneapolis, Minnesota, an exclusive license in the United States and foreign countries under the rights of the United States of America to manufacture, use, and sell products embodying the inventions in the United States Patent No. 4,069,479, Application S.N. 6-663,401 and United States Patent No. 4,129,864, Application S.N. 6-848,041 both entitled "High Speed, Wide Dynamic Range Analog-To-Digital Conversion." The patent rights in these inventions have been assigned to the United States of America, as represented by the Secretary of Commerce.

The proposed exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The proposed license may be granted unless, within sixty days from the date of this published Notice, NTIS receives written evidence and argument which establishes that the grant of the intended license would not serve the public interest.

Inquiries, comments and other materials relating to the intended license must be submitted to Charles A. Bevelacqua, Office of Federal Patent Licensing, NTIS, Box 1423, Springfield, VA 22151.

Douglas J. Champion,  
Associate Director, Office of Federal Patent Licensing, National Technical Information Service, U.S. Department of Commerce.

[FR Doc. 88-13876 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-04-M

#### Intent To Grant Exclusive Patent License; Weatherford U.S., Inc.

The National Technical Information Service (NTIS), U.S. Department of Commerce, intends to grant to Weatherford U.S., Inc. having a place of business in Houston, Texas, an

exclusive license in the United States under the rights of the United States of America to manufacture, use, and sell products embodying the inventions in United States Patent No. 4,663,893, Application S.N. 6-809,651 entitled "End Deflector for Abrasive Water Jet Slot Cutter" and United States Patent No. 4,708,214, Application S.N. 6-899,266 entitled "Rotatable End Deflector for Abrasive Water Jet Drill." The patent rights in these inventions have been assigned to the United States of America, as represented by the Secretary of Commerce.

The proposed exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The proposed license may be granted unless, within sixty days from the date of this published Notice, NTIS receives written evidence and argument which establishes that the grant of the intended license would not serve the public interest.

Inquiries, comments and other materials relating to the intended license must be submitted to Charles A. Bevelacqua, Office of Federal Patent Licensing NTIS, Box 1423, Springfield, VA 22151.

Douglas J. Champion,  
Associate Director, Office of Federal Patent Licensing, National Technical Information Service, U.S. Department of Commerce.

[FR Doc. 88-13877 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-04-M

### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

#### Adjustment of Import Limits for Certain Cotton, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in India

June 16, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs adjusting limits.

**EFFECTIVE DATE:** June 17, 1988.

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

**FOR FURTHER INFORMATION CONTACT:** Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the

Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 343-6494. For information on embargoes and quota re-openings, call (202) 377-3715.

**SUPPLEMENTARY INFORMATION:** The current limits for Group II and certain categories in Groups I and II are being increased, variously, for carryforward and special allowance provided for under the agreement for 100 percent cotton garments made for handloomed fabrics.

A description of the textile categories in terms of T.S.U.S.A. numbers is available in the CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States Annotated (see Federal Register notice 52 FR 47745, dated December 11, 1987). Also see 53 FR 58, published on January 4, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the agreement, but are designed to assist only in the implementation of certain of its provisions.

**James H. Babb,**  
*Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**  
June 16, 1988.  
Commissioner of Customs,  
*Department of the Treasury, Washington, DC 20229*

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on December 30, 1987 by the Chairman, Committee for the Implementation of Textile Agreements, concerning imports of certain cotton, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in India and exported during the period which began on January 1, 1988 and extends through December 31, 1988.

Effective on June 17, 1988, the directive of December 30, 1987 is hereby amended to adjust the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and India.

Category	Adjusted twelve-month limit <sup>1</sup>
342 .....	424,308 dozen
363 .....	22,684,000 numbers
<b>Group II:</b>	
200, 201, 219-229, 239, 300, 301, 314, 317, 326, 330-334, 345, 349-359, 360-362, 369-S <sup>3</sup> , 369-0 <sup>4</sup> , 600-607, 611-635, 637-659, 665pt. <sup>5</sup> , 666-670 and 831-859, as a group.	148,281,752 square yards equivalent
<b>Sublevels in Group II:</b>	
369-S .....	887,644 pounds
640 .....	140,526 dozen
641 .....	831,388 dozen
642 .....	252,647 dozen

<sup>1</sup> The limits have not been adjusted to account for any imports exported after December 31, 1987.

<sup>2</sup> In Category 341-Y, only TSUSA numbers 384.0505., 484.0511, 384.0512, 384.4648, 384.4610, 384.4612 and 384.4783.

<sup>3</sup> In Category 369-S, only TSUSA number 366.2840.

<sup>4</sup> In Category 369-0, all TSUSA numbers except 360.200, 360.7600, 361.5420 and 366.2840.

<sup>5</sup> In Category 665pt., all TSUSA numbers except 360.7800 and 361.5426.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,  
**James H. Babb,**  
*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 88-13941 Filed 6-20-88; 8:45 am]

**BILLING CODE 3510-DR-M**

**Adjustment of Import Limits for Certain Cotton Textile Products Produced or Manufactured in India**

June 16, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs adjusting limits.

**EFFECTIVE DATE:** June 20, 1988.

**Authority:** Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

**FOR FURTHER INFORMATION CONTACT:** Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 343-6494. For information on embargoes and quota re-openings, call (202) 377-3715.

**SUPPLEMENTARY INFORMATION:** The current limit for Categories 347/348 is being increased by application of swing. The limit for Category 337 is being reduced to account for the swing applied to Categories 347/348.

A description of the textile categories in terms of T.S.U.S.A. numbers is available in the CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States Annotated (see Federal Register notice 52 FR 47745, published on December 16, 1987). Also see 53 FR 58, published on January 4, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the agreement, but are designed to assist only in the implementation of certain of its provisions.

**James H. Babb,**  
*Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**  
June 16, 1988.

Commissioner of Customs,  
*Department of the Treasury, Washington, DC 20229.*

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on December 30, 1987 by the Chairman, Committee for the Implementation of Textile Agreements, concerning imports of certain cotton, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in India and exported during the period which began on January 1, 1988 and extends through December 31, 1988.

Effective on June 20, 1988, the directive of December 30, 1987 is hereby amended to adjust the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and India.

Category	Adjusted 12-month limit <sup>1</sup> (dozen)
337 .....	83,142
347/348 .....	315,274

<sup>1</sup> The limits have not been adjusted to account for any imports exported after December 31, 1987.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,  
**James H. Babb,**  
*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 88-13942 Filed 6-20-88; 8:45 am]

**BILLING CODE 3510-DR-M**

Category	Adjusted twelve-month limit <sup>1</sup>
<b>Group I:</b>	
218 .....	8,268,000 square yards
313 .....	20,952,106 square yards
315 .....	8,421,877 square yards
335 .....	194,928 dozen
336/636 .....	484,682 dozen
337 .....	97,123 dozen
338/339/340 .....	1,262,546 dozen
341 .....	2,922,292 dozen of which not more than 1,753,375 dozen shall be in Category 341-Y <sup>2</sup>

### Announcement of Request for Bilateral Textile Consultations With the Government of Costa Rica

June 16, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Notice.

**Authority:** Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Article 3 of the Arrangement Regarding International Trade in Textiles.

**FOR FURTHER INFORMATION CONTACT:** Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on categories on which consultations have been requested, call (202) 377-3740.

**SUPPLEMENTARY INFORMATION:** On May 27, 1988, the United States Government requested the Government of Costa Rica to enter into consultations concerning exports to the United States of cotton and man-made fiber skirts in Categories 342/642, produced or manufactured in Costa Rica.

The purpose of this notice is to advise the public that, if no solution is agreed upon in consultations with Costa Rica, the Committee for the Implementation of Textile Agreements may later establish limits for the entry and withdrawal from warehouse for consumption of cotton and man-made fiber skirts in Categories 342/642, produced or manufactured in Costa Rica and exported to the United States during the twelve-month period which began on May 27, 1988 and extends through May 26, 1989, at a level of 106,934 dozen.

A summary market statement for these categories follows this notice.

Anyone wishing to comment or provide data or information regarding the treatment of Categories 342/642 or to comment on domestic production or availability of textile products included in the categories, is invited to submit such comments or information in ten copies to James H. Babb, Chairman, Committee for the Implementation of Textile Agreements, U.S. Department of Commerce, Washington, DC 20230.

Because the exact timing of the consultations is not yet certain, comments should be submitted promptly. Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, Room H3100, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC.

Further comment may be invited regarding particular comments or

information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments regarding any aspect of the agreement or the implementation thereof is not a waiver in any respect of the exemption contained in 5 U.S.C. 553(a)(1) relating to matters which constitute "a foreign affairs function of the United States."

The United States remains committed to finding a solution concerning these categories. Should such a solution be reached in consultations with the Government of Costa Rica, further notice will be published in the **Federal Register**.

A description of the textile categories in terms of T.S.U.S.A. numbers is available in the **CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States Annotated** (see **Federal Register** notice 52 FR 47745, published on December 16, 1987).

**James H. Babb,**

*Chairman, Committee for the Implementation of Textile Agreements.*

#### Costa Rica—Market Statement

*Cotton and Man-Made Fiber Skirts—  
(Category 342/642)*

May, 1988.

#### Summary and Conclusions

U.S. imports of cotton and man-made fiber skirts (Category 342/642) from Costa Rica reached 120,376 dozen during the year ending March 1988, four and one half times the 27,209 dozen imported a year earlier. Cotton and man-made fiber skirt imports from Costa Rica were 79,562 dozen in 1987 and 50,403 dozen in 1986. During the first three months of 1988, imports of cotton and man-made fiber skirts (Category 342/642) from Costa Rica reached 46,689 dozen, seven times the 5,875 dozen imported during the same period of 1987.

The U.S. market for cotton and man-made fiber skirts (Category 342/642) has been disrupted by imports. The sharp and substantial increase in imports from Costa Rica has contributed to this disruption.

#### U.S. Production and Market Share

U.S. production of cotton and man-made fiber skirts has been on the decline, dropping from 9,101 thousand dozen in 1982 to a depressed 7,940 thousand dozen average during 1984 and 1985, a decline of 13 percent. Production in 1986 recovered slightly, reaching 8,126 thousand dozen, but fell again in 1987 to a level of 8,017 thousand dozen, 12 percent below the 1982 level.

The domestic manufacturers' share of the market dropped 34 percentage points in just five years, falling from 83 percent in 1982 to 49 percent in 1987.

#### U.S. Imports and Import Penetration

U.S. imports of cotton and man-made fiber skirts (Category 342/642) have increased

steadily since 1982, increasing from 1,818 thousand dozen in 1982 to 8,285 thousand dozen in 1987, an average annual rate of 37 percent. During the first three months of 1988, imports of cotton and man-made fiber skirts (Category 342/642) reached 2,654 thousand dozen, 14 percent above the level imported during the same period of 1987. The ratio of imports to domestic production increased five times, rising from 20 percent in 1982 to 103 percent in 1987.

#### Duty-Paid Value and U.S. Producers' Price

The majority of Costa Rica's cotton and man-made fiber skirt imports enter under the following TSUSA numbers: 384.5251—women's cotton woven skirts, not of corduroy, denim or velveteen, not ornamented; 384.5146—women's cotton woven denim skirts, not ornamented; and 384.9445—women's man-made fiber woven skirts, not ornamented. These skirts entered the U.S. at landed duty-paid values below U.S. producers' prices for comparable skirts.

[FR Doc. 88-13943 Filed 6-20-88; 8:45 am]

BILLING CODE 3510-DR-M

### CONSUMER PRODUCT SAFETY COMMISSION

#### Development of Voluntary Standard for All-Terrain Vehicles; Meeting

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice of meeting.

**SUMMARY:** The major members of the all-terrain vehicle ("ATV") industry have scheduled a meeting on June 30, 1988, for further development of a voluntary safety standard for ATVs. Interested members of the public are invited to attend the meeting and observe or participate in the development of the standard. Persons wishing to attend the meeting or to be notified of future meetings of the committee should notify Paul Golde at the Specialty Vehicle Institute of America, 3151 Airway Avenue, Building K-107, Costa Mesa, California 92626, phone (714) 241-9256.

**DATE:** The meeting is scheduled for 9:30 a.m. on June 30, 1988.

**ADDRESS:** The meeting will be held at The D.C. Dulles Marriott Hotel, 333 West Service Road, Chantilly, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Carl Blechschmidt, Office of Program Management and Budget, Consumer Product Safety Commission, Washington, DC 20207, phone (301) 492-6554.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Commission for some time has been concerned with safety issues

associated with the operation of all-terrain vehicles, which are three- and four-wheeled motorized vehicles, generally characterized by large, low pressure tires, a seat designed to be straddled by the operator, and handlebars for steering and which are intended for off-road use by an individual rider on various types of unpaved terrain.

On May 31, 1985, the Commission published an advance notice of proposed rulemaking (ANPR) in the *Federal Register*. 50 FR 23139. In the ANPR, the Commission announced that it was considering a wide range of possible regulatory alternatives to address the safety concerns about ATVs and solicited comments on a number of issues.

On December 30, 1987, the Commission and the major members of the ATV industry filed preliminary consent decrees in *United States v. American Honda Motor Co., Inc. et al.*, Civil Action No. 87-3525, in the United States District Court for the District of Columbia. The preliminary consent decrees contained provisions intended to satisfy the Commission's concerns about ATVs and provided that the parties would file proposed final consent decrees, which were filed on March 14, 1988. Both the preliminary consent decrees and the final consent decrees, which were approved by the Court on April 28, 1988, provide that the industry members will attempt in good faith to reach agreement on voluntary standards satisfactory to the Commission, within four months of the Court's approval of the final consent decrees.

Plenary standard development meetings pursuant to the consent decree were held on May 4 and June 2, 1988, and technical working group meetings were held on May 19-20 and June 15-16. The result of the June 15-16 working group meetings will be reported to the June 30 plenary meeting of the industry representatives, who will make the decisions on the content of proposals for inclusion in the standard.

Commission policy requires that all voluntary standards meetings attended by CPSC staff be open to the public and that interested members of the public have an opportunity to contribute to the development of the standard. Thus, the meeting is open to all members of the public who wish to attend or participate. In order to ensure that the meeting facilities are adequate to accommodate all attendees, persons wishing to attend the meeting should notify Paul Golde at the Specialty Vehicle Institute of America, 3151 Airway Avenue, Building K-107, Costa Mesa, California 92626,

phone (714) 241-9256. In addition, persons who wish to participate in the development of the standard should notify Mr. Golde of that fact, so they can receive notice of additional meetings, etc., as they are scheduled.

The goal of the four-month period provided in the consent decrees for the development of a standard by the industry is to develop at least a general consensus on a standard within that time. Work on some aspects of a standard may continue after that period. Because of the need for the industry to develop the standard within four months, it may not be practical to announce all subsequent meetings of the voluntary standard development committee in the *Federal Register*. However, all persons who indicate a desire to participate in the development of the standard will be notified of such meetings, and other parties may contact the Commission's Office of the Secretary, at (301) 492-6800, to determine when standards development meetings are placed on the Commission's Public Calendar.

The Commission expects that most of the subsequent plenary meetings will be in the Washington, DC., metropolitan area. However, some meetings may be in California for the convenience of participants who are located on the west coast or in Japan.

In order to ensure that the meeting proceeds on schedule, it may be necessary for the Chairperson to limit the time and manner allowed for the presentation of comments by each participant and to restrict duplicative comments.

Dated: June 16, 1988.

Sadye E. Dunn,

Secretary of the Commission.

[FR Doc. 88-13971 Filed 6-20-88; 8:45 am]

BILLING CODE 6355-01-M

## DEPARTMENT OF DEFENSE

### Department of the Air Force

#### USAF Scientific Advisory Board; Human Systems Division Advisory Group Meeting

June 10, 1988.

The USAF Scientific Advisory Board Human Systems Division (HSD) Advisory Group will meet on 6-7 July 1988 from 8:00 a.m. to 5:00 p.m. at Brooks AFB, TX

The purpose of the meeting will be discussions on selected programs and projects relating to the mission of the Human Systems Division. This meeting will involve discussions of classified

defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (202) 697-4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 88-13878 Filed 6-20-88; 8:45 am]

BILLING CODE 3910-01-M

## DEPARTMENT OF ENERGY

### Voluntary Agreement and Plan of Action to Implement the International Energy Program; Meeting

In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(i)), the following meeting notice is provided:

A meeting of the International Energy Agency (IEA) Group of U.S. Reporting Companies will be held on June 28 and June 29, 1988, at the U.S. Department of Energy, Forrestal Building, Room 6E-069, 1000 Independence Avenue SW., Washington, DC, starting at 9:30 a.m. This meeting is being held to permit attendance by representatives of U.S. Reporting Companies at the Allocation Systems Test-6 (AST-6) Briefing Sessions for North American and Far East National Emergency Sharing Organizations (NESOs) and Reporting Companies.

The agenda for the meeting is under the control of the IEA. It is expected that the following draft agenda will be followed:

1. Overview: Emergency Sharing System
  2. Test Guide
    - a. Objectives and Scope
    - b. New Features
    - c. Timetable
    - d. Organization and Responsibilities
    - e. Data Base and Allocation Calculation
  3. Instructions for Questionnaire A/Questionnaire B Preparation and Submission
  4. Industry Supply Advisory Group and its Functions
  5. Voluntary Offer Process and Random Non-Implementation Procedures
  6. Appraisal Reports
  7. Legal Aspects
  8. General NESO Briefings
  9. Question and Answer Session
- As provided in section 252(c)(1)(A)(ii) of the Energy Policy Conservation Act, the meeting of the IEA Group of

Reporting Companies is open only to representatives of members of the IEA Group of Reporting Companies, their counsel, representatives of the Departments of Energy, Justice, State, the Federal Trade Commission, and the General Accounting Office, representatives of Committees of Congress, representatives of the IEA, representatives of the Commission of the European Communities, representatives of the North American and Far East NESOs, and invitees of the IEA, the Group of Reporting Companies, or the North American and Far East NESOs.

Issued in Washington, DC, June 17, 1988.

Eric J. Fygi,

Acting General Counsel.

[FR Doc. 88-14088 Filed 6-20-88; 8:45 am]

BILLING CODE 6450-01-M

### Economic Regulatory Administration

[ERA Docket No. 88-05-LNG]

#### Distrigas Corp.; Order Modifying an Amended Authorization To Import Algerian Liquefied Natural Gas

**AGENCY:** Economic Regulatory Administration; DOE.

**ACTION:** Notice of order modifying an amended authorization to import Algerian liquefied natural gas.

**SUMMARY:** The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) gives notice that it has issued an order modifying Distrigas Corporation's (Distrigas) amended authorization, granted in DOE/ERA Opinion and Order No. 228, issued on March 4, 1988, under which Distrigas was authorized to import up to five cargoes of liquefied natural gas (LNG) from Algeria prior to May 15, 1988, at specific prices per MMBtu. The order, issued in ERA Docket No. 88-05-LNG, authorizes Distrigas to import the remaining cargoes of LNG after May 15, 1988, at negotiated prices, until Distrigas has filed and the ERA has approved Distrigas' long-term import arrangement for Algerian LNG.

A copy of this order is available in the Natural Gas Division Docket Room, GA-076, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20505, (202) 586-9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except holidays.

Issued in Washington, DC, on June 16, 1988.

Constance L. Buckley,

Acting Director, Office of Fuels Programs,  
Economic Regulatory Administration.

[FR Doc. 88-13936 Filed 6-20-88; 8:45 am]

BILLING CODE 6450-01-M

### Energy Information Administration

#### Agency Information Collections Under Review by the Office of Management and Budget

**AGENCY:** Energy Information Administration, DOE.

**ACTION:** Notice of requests submitted for review by the Office of Management and Budget.

**SUMMARY:** The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The listing does not contain information collection requirements contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commission (FERC)); (2) collection number(s); (3) current OMB docket number (if applicable); (4) collection title; (5) type of request, e.g., new, revision, or extension; (6) frequency of collection; (7) response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) affected public; (9) an estimate of the number of respondents per report period; (10) an estimate of the number of responses annually; (11) an estimate of the average hours per response; (12) the estimated total annual respondent burden, and (13) a brief abstract describing the proposed collection and the respondents.

**DATES:** Comments must be filed on or before July 21, 1988.

**ADDRESS:** Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards, at the address below.)

**FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT:**

Carole Patton, Office of Statistical

Standards (EI-70), Energy Information Administration, M.S. 1H-023, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-2222.

**SUPPLEMENTARY INFORMATION:** If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this Notice, you should advise the OMB DOE Desk Officer of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395-3084.

The energy information collection submitted to OMB for review was:

1. Economic Regulatory Administration (ERA).
2. ERA-781R.
3. 1903-0080.
4. Annual Report of International Electric Export/Import Data.
5. Extension.
6. Annually.
7. Mandatory.
8. Businesses or other for profit.
9. 34 respondents annually.
10. 34 responses annually.
11. 10 hours per response (average).
12. 340 hours annually.
13. The regulations (10 CFR 205.320 *et seq.*) require any person, firm, cooperative, corporation or other entity to obtain a Presidential Permit for the operation of electric power transmission or distribution facilities crossing the border of the United States. Entities which have such Permits are required specifically by the regulations to provide information regarding the project, the transmission lines covered by the Permit, and the environmental factors and impacts associated with all the transmission facilities and line routing alternatives.

Presidential Permit holders also are required to file an annual report with ERA detailing by category the kilowatt hours of energy received or delivered and the associated cost and revenue for each month of the preceding calendar year. This is accomplished by the filing of the ERA-781R.

**Statutory Authority:** Secs. 5(a), 5(b), 13(b), and 52, Pub. L. 93-275, Federal Energy Administration Act of 1974, 15 U.S.C. 764(a), 764(b), 772(b), and 790a.

Issued in Washington, DC, June 15, 1988.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 88-13937 Filed 6-20-88; 8:45 am]

BILLING CODE 6450-01-M

**Office of Energy Research****Magnetic Fusion Advisory Committee; Renewal**

Pursuant to section 14(a)(2)(A) of the Federal Advisory Committee Act (FACA), (Pub. L. 92-463) and 41 CFR Part 101-6, Final Rule on Federal Advisory Committee Management and following consultation with the Committee Management Secretariat, General Services Administration (GSA), notice is hereby given that the Magnetic Fusion Advisory Committee has been renewed for a 2-year period ending May 25, 1990.

The renewal of the Magnetic Fusion Advisory Committee has been determined necessary and in the public interest in connection with the performance of duties imposed upon the Department of Energy by law. The Committee will continue to operate in accordance with the provisions of the FACA, the Department of Energy Organization Act (Pub. L. 95-91), the GSA Final Rule on Federal Advisory Committee Management, and other directives and instructions issued in implementation of those acts.

Further information regarding this advisory committee may be obtained from J. Robert Franklin at (202) 586-6804.

Issued at Washington, DC, on June 15, 1988.

Howard H. Raiken,

*Advisory Committee Management Officer.*

[FR Doc. 88-13938 Filed 6-20-88; 8:45 am]

BILLING CODE 6450-01-M

**Office of Hearings and Appeals****Implementation of Special Refund Procedures**

**AGENCY:** Office of Hearings and Appeals, DOE.

**ACTION:** Notice of implementation of special refund procedures.

**SUMMARY:** The Office of Hearings and Appeals of the Department of Energy solicits comments concerning the appropriate procedures to be followed in refunding to adversely affected parties \$50,000 obtained as a result of a Remedial Order which the DOE issued to Butler Fuel Corporation, a retailer of refined petroleum products located in Oxford, Massachusetts. The money is being held in escrow following the settlement of enforcement proceedings brought by the DOE's Economic Regulatory Administration.

**DATE AND ADDRESS:** Comments must be filed on or before July 21, 1988, and should be addressed to the Office of Hearings and Appeals, Department of

Energy, 1000 Independence Avenue SW., Washington, DC 20585. All comments should conspicuously display a reference to case number KEF-0094.

**FOR FURTHER INFORMATION CONTACT:** Matthew Paul, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-6602.

**SUPPLEMENTARY INFORMATION:** In accordance with § 205.282(b) of the procedural regulations of the Department of Energy, 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision sets forth procedures and standards that the DOE has tentatively formulated to distribute \$50,000 plus accrued interest to adversely affected parties. The funds were obtained by the DOE pursuant to a Remedial Order issued to Butler Fuel Corporation in connection with the firm's sales of kerosene and No. 2 heating oil (covered products) during the period November 1, 1973 through April 30, 1974.

OHA has tentatively determined that a portion of the remedial order funds should be distributed to Butler's retail customers during the remedial order period. In order to obtain a refund, each claimant generally will be required to submit a schedule of its monthly purchases of covered products from Butler. Residual funds in the Butler escrow account will be distributed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, Title III.

Applications for Refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized.

Any member of the public may submit written comments regarding the proposed refund procedures. Such parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of publication of this notice. All comments received in this proceeding will be available for public inspection between 1:00 and 5:00 p.m., Monday through Friday, except federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in Room 1E-234, 1000 Independence Avenue SW., Washington, DC 20585.

Dated: June 14, 1988.

Richard W. Dugan,

*Acting Director, Office of Hearings and Appeals.*

**Proposed Decision and Order of the Department of Energy****Implementation of Special Refund Procedures**

June 14, 1988.

*Name of Firm:* Butler Fuel Corporation.

*Date of Filing:* June 1, 1987.

*Case Number:* KEF-0094.

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special procedures to distribute funds received as a result of an enforcement proceeding in order to remedy the effects of actual or alleged violations of the DOE regulations. See 10 CFR Part 205, Subpart V. On June 1, 1987, ERA filed a Petition for the Implementation of Special Refund Procedures in connection with a Remedial Order issued to the Butler Fuel Corporation (Butler).

**I. Background**

Butler is a "retailer" of refined petroleum products as that term was defined in 10 CFR 212.31, and is located in Oxford, Massachusetts. On March 6, 1978, the DOE issued a Proposed Remedial Order (PRO) to Butler alleging that the firm violated the Mandatory Petroleum Price Regulations by overcharging its retail customers in its sales of kerosene and No. 2 heating oil (covered products) between November 1, 1973 and April 30, 1974. See 10 CFR Part 212 Subpart F. The PRO ordered Butler to refund the full amount of the alleged violations, \$36,553.55, plus interest, to its retail customers through price rollbacks.

Butler did not contest the PRO, and on October 24, 1978, OHA issued the PRO as a final Remedial Order. *Butler Fuel Company*, No. DRW-0004 (October 24, 1978). Butler failed to comply with the provisions of the Remedial Order calling for price rollbacks, so the ERA petitioned OHA for a modification of the Order. In an April 12, 1984 Decision, OHA granted the ERA's Application for Modification and ordered Butler to remit the sum of \$36,553.55, plus accrued interest, directly to the DOE. The monies were to be deposited into an interest-bearing escrow account pending ultimate distribution through a special refund proceeding. *ERA/Butler Fuel Corp.*, 12 DOE ¶ 82,506 (1984).

Butler then failed to comply with the terms of the modified Remedial Order, and the case was referred to the Department of Justice for judicial

enforcement. See November 13, 1984 Memorandum to David J. Anderson, Civil Division, Department of Justice, from Robert G. Heiss, Assistant General Counsel for Enforcement, DOE. Under the terms of a March 27, 1987 Release executed by the Department of Justice, Butler paid the DOE \$50,000 in full and final settlement of the issues raised in the 1978 PRO. This Decision concerns the distribution of those funds. Comments are solicited on these proposed procedures.

## II. Proposed Refund Procedures

The procedural regulations of the DOE set forth general guidelines to be used by OHA in formulating and implementing a plan of distribution for funds received as a result of an enforcement proceeding. 10 CFR Part 205, Subpart V. The Subpart V process may be used in situations where the DOE is unable to identify readily those persons who may have been injured by alleged regulatory violations or to determine the amount of such injuries. A more detailed discussion of Subpart V and the authority of OHA to fashion procedures to distribute refunds is set forth in the cases of *Office of Enforcement*, 9 DOE ¶ 82,508 (1981), and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981) (*Vickers*).

In keeping with the goals of Subpart V regulations, we will attempt to provide refunds to claimants who demonstrate that they were injured by Butler's overcharges during the November 1, 1973 through April 30, 1974 remedial order period. Because the Remedial Order underlying this proceeding covered only Butler's overcharges to its retail customers of kerosene and No. 2 heating oil, only those customers will be eligible for a refund in this proceeding. Residual funds in the Butler escrow account are to be distributed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), Pub. L. 99-509, Title III. See 51 FR 43964 (December 5, 1986).

**A. Calculation of Refund Amounts.** The first step in the refund process is the calculation of an applicant's potential refund. To accomplish this, we propose adopting a volumetric refund presumption. This presumption assumes that Butler's overcharges were spread equally over all gallons of covered products that the firm sold during the remedial order period.

Under the volumetric presumption, the potential refund for a claimant will be calculated by multiplying the number of gallons of covered products that it

purchased from Butler during the remedial order period by a volumetric factor of \$0.571 per gallon.<sup>1</sup> In addition, successful claimants will receive proportionate shares of the interest that has accrued on the Butler escrow account.

The volumetric refund presumption is rebuttable. Because we realize that the impact on an individual claimant may have been greater than its potential volumetric refund, a claimant may submit evidence detailing the specific overcharge that it allegedly incurred in order to be eligible for a larger refund. See *Standard Oil Co. (Indiana)/Army and Air Force Exchange Service*, 12 DOE ¶ 85,015 (1984).

As in previous cases, only claims for at least \$15 in principal will be processed. This minimum has been adopted because the cost of processing claims for refunds of less than \$15 outweighs the benefits of restitution in those situations. See, e.g., *Urban Oil Co.*, 9 DOE ¶ 82,541 (1982). See also 10 CFR 205.286(b). Accordingly, an applicant must have purchased at least 254 gallons of covered products from Butler in order for its claim to be considered.

**B. Determination of Injury.** Once a claimant's potential refund has been calculated, we must determine whether it was injured by its purchases, i.e., whether it was forced to absorb the alleged overcharges. To facilitate this process, we generally adopt presumptions of injury in Subpart V proceedings. Injury presumptions are designed to allow claimants to participate in the refund process without incurring inordinate expenses and to enable OHA to consider the refund applications in the most efficient way possible. Because retail purchasers of Butler covered products are the only class of purchasers eligible for refunds in this proceeding, we propose adopting only one injury presumption, the end-user presumption.

We will presume that end-users of Butler covered products, i.e., ultimate consumers of the products whose businesses are unrelated to the petroleum industry, were injured by the firm's overcharges.

Unlike regulated firms in the petroleum industry, members of this group generally were not subject to price controls during the consent order period,

<sup>1</sup> This figure is computed by dividing the \$50,000 received from Butler by the 875,000 gallons of covered products sold by the firm during the remedial order period. See January 7, 1988 Memorandum of Telephone conversation between James Butler, President of Butler, and Jon F. Leyens, OHA Staff Analyst.

and were not required to keep records which justified selling price increases by reference to cost increases.

Consequently, analysis of the impact of the alleged overcharges on the final prices of goods and services produced by members of this group would be beyond the scope of a special refund proceeding. See *Marion Corporation*, 12 DOE ¶ 85,014 (1984) and cases cited therein. Therefore, end users need only document their purchase volumes of Butler covered products during the remedial order period to demonstrate that they were injured by the overcharges.

## III. Applications for Refund

In order to solicit comments regarding this Proposed Decision, we will publish it in the *Federal Register*. At this time, we are not accepting Applications for Refund. Applications will be accepted only after this Proposed Decision is issued as a Final Decision and Order.

All comments must be filed within 30 days of the publication of this Proposed Decision in the *Federal Register*. Comments should be sent to: Butler Fuel Corporation Refund Proceeding, Case No. KEF-0094, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

It is therefore ordered that: The refund amount remitted to the Department of Energy by Butler Fuel Corporation pursuant to a Release issued by the United States Department of Justice on March 23, 1987 will be distributed in accordance with the foregoing decision.

[FR Doc. 88-13939 Filed 6-20-88; 8:45 am]

BILLING CODE 6450-01-M

## FEDERAL COMMUNICATIONS COMMISSION

[Report No. W-42]

### Window Notice for the Filing of FM Broadcast Applications

Release: June 3, 1988.

Notice is hereby given that applications for vacant FM broadcast allotments listed below may be submitted for filing during the period beginning June 3, 1988 and ending July 14, 1988 inclusive. Selection of a permittee from a group of acceptable applicants will be by the Comparative Hearing process.

#### Channel—249A

Byesville..... OH  
Redfield..... SD

## Channel—293A

Bay Minette.....	AL
Vernon.....	AL
Horseshoe Bend.....	AR
Lucerne Valley.....	CA
Orland.....	CA
Ledyard.....	CT
Pocomoke City.....	MD
Plattsmouth.....	NE
Farmington.....	NH
Delta.....	OH
Holdenville.....	OK
Rogersville.....	TN
Muenster.....	TX

Channel<sup>1</sup>—293 C2

Bella Vista.....	AR
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## Channel—228A

Earlimart.....	CA
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## Channel—285A

Lenwood.....	CA
South Oroville.....	CA

## H. Walker Feaster III,

Acting Secretary, Federal Communications Commission.

[FR Doc. 88-13570 Filed 6-20-88; 8:45 am]

BILLING CODE 6712-01-M

## FEDERAL DEPOSIT INSURANCE CORPORATION

## Privacy Act of 1974; Proposed Addition of a Routine Use of a System of Records

AGENCY: Federal Deposit Insurance Corporation ("FDIC").

ACTION: Notice of proposed addition of a routine use to a System of Records: "Insured Bank Liquidation Records."

SUMMARY: On April 13, 1988, the Board of Directors of the FDIC established a new system of records, entitled "Insured Bank Liquidation Records," pursuant to the Privacy Act of 1974. The system is to become effective on October 1, 1988. A routine use was inadvertently omitted from the system. This notice corrects that omission by adding the routine use.

DATE: Comments must be submitted by July 21, 1988. The new routine use will be effective October 1, 1988, along with the remainder of the system, unless a superseding notice to the contrary is published.

SUPPLEMENTARY INFORMATION: The FDIC established, effective October 1, 1988, see 53 FR 12815 (Apr. 19, 1988), a new system of records, pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, concerning records of individuals who had obligations with FDIC-insured institutions that have failed or that were provided open-bank assistance by the

FDIC and for which the FDIC is acting in its corporate capacity or in its receivership capacity as liquidator of certain of the institutions' assets. An essential routine use was inadvertently omitted from the notice of the system. It is necessary that the FDIC provide files of certain debtors of failed and assisted FDIC-insured institutions to underwriters of fidelity bonds and directors and officers liability insurance policies, outside counsel and other consultants hired by such carriers, former directors and officers and their counsel, auditors of the institutions, and the insurance carriers of such auditors. Supplying these documents facilitates attempts by the FDIC, as the holder of claims against those parties, to settle the claims amicably during the course of pre-trial or pre-litigation negotiations. The routine use that would permit such important negotiations to take place is herewith being added in order to correct its omission.

Accordingly, the Board of Directors of the FDIC proposes to revise the Insured Bank Liquidation Records system to read as follows:

## FDIC 30-64-0013

## SYSTEM NAME:

Insured Bank Liquidation Records.

(Complete text appears at 53 FR 12815 (Apr. 19, 1988)

## ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USE:

A new paragraph 11 is added to read as follows:

(11) To the parties, the parties' counsel or other representatives, the parties' insurance carriers or underwriters of bankers blanket bonds or financial institutions bonds for failed or assisted FDIC-insured banks in conjunction with claims made by the FDIC or litigation instituted by the FDIC or others on behalf of the FDIC against former officers, directors, accountants, lawyers, consultants, appraisers, or underwriters of bankers blanket bonds or financial institutions bonds of a failed or assisted FDIC-insured institution.

By direction of the Board of Directors.

Dated at Washington, DC, this 13th day of June, 1988.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 88-13913 Filed 6-20-88; 8:45 am]

BILLING CODE 6714-01-M

## FEDERAL MARITIME COMMISSION

## Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

## Agreement No.: 224-010903-001

Title: Maryland Port Administration Terminal Agreement.

## Parties:

Maryland Port Administration  
Atlantic Container Line, Ltd. (ACL)

Synopsis: The agreement amendment provides ACL a \$50 discount from port charges for loaded containers moving by rail between Baltimore and Louisville, Kentucky; Chicago, Illinois; or Detroit Michigan.

By Order to the Federal Maritime Commission.

Dated: June 18, 1988.

Joseph C. Polking,

Secretary.

[FR Doc. 88-13891 Filed 6-20-88; 8:45 am]

BILLING CODE 6730-01-M

## Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the

<sup>1</sup> Channel upgraded to C2 per MM Docket No. 86-219.

Commission regarding a pending agreement.

**Agreement No.: 224-200127**

*Title:* Virginia International Terminals Inc., Terminal Agreement

*Parties:*

Virginia International Terminals, Inc.  
Yang Ming Marine Line

*Synopsis:* The agreement provides Yang Ming the nonexclusive use of marine terminal facilities at Norfolk International Terminals at rates based on tonnage throughput guarantees.

**Agreement No.: 224-004166-004**

*Title:* Port of Oakland Terminal Agreement

*Parties:*

Port of Oakland (Port)  
Pasha Properties, Inc. (Pasha)

*Synopsis:* The agreement provides for (1) an additional six percent retention by Pasha of the dockage, wharfage, wharf demurrage and wharf storage charges arising from its operations because of terminal limitations; (2) the possibility of Pasha's handling of certain cargo operations of the assigned premises at another Port facility because of the physical limitations of its assigned Outer Harbor Terminal facility; and (3) application of the Agreement's compensation factors with certain modifications to the handling of said cargo and vessels at another of the Port's terminal facilities.

**Agreement No.: 224-011067-001**

*Title:* City of Long Beach Terminal Agreement

*Parties:*

City of Long Beach  
Long Beach Container Terminal, Inc.

*Synopsis:* The agreement amendment established an expiration date, June 30, 2011, for the basic preferential assignment agreement for the use of cranes at the Port of Long Beach, California.

**Agreement No.: 224-010736-002**

*Title:* Port of Long Beach Preferential Assignment Agreement

*Parties:*

City of Long Beach  
Long Beach Container Terminal, Inc.

*Synopsis:* The agreement (1) reflects the commencement and expiration dates of the term of the basic agreement; and (2) restates and clarifies the compensation provisions.

By Order of the Federal Maritime Commission.

Dated: June 16, 1988.

Joseph C. Polking,  
Secretary.

[FR Doc. 88-13940 Filed 6-20-88; 8:45 am]

BILLING CODE 6730-01-M

### Ocean Freight Forwarder License Revocations; Sesko International, Inc., et al.

Notice is hereby given that the following ocean freight forwarder licenses have been revoked by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of ocean freight forwarders, 46 CFR 510.

**License Number: 1171**

*Name:* Sesko International, Inc.  
*Address:* 4515 NW. 72nd Avenue, Miami, FL 33166.

*Date Revoked:* March 16, 1988.

*Reason:* Failed to maintain a valid surety bond.

**License Number: 3023**

*Name:* Uni-Trans Illinois Consolidated, Inc.  
*Address:* 10400 W. Higgins Road, #110, Rosemont, IL 60018.

*Date Revoked:* April 30, 1988.

*Reason:* Failed to maintain a valid surety bond.

**License Number: 2501**

*Name:* American Forwarding Company.  
*Address:* 1451 Wycliff Avenue, Dallas, TX 75207.

*Date Revoked:* May 7, 1988.

*Reason:* Failed to maintain a valid surety bond.

**License Number: 3013**

*Name:* IMCM (USA), Inc.  
*Address:* 574 Summit Avenue, 4th Floor, Jersey City, NJ 07306.

*Date Revoked:* May 8, 1988.

*Reason:* Failed to maintain a valid surety bond.

**License Number: 2897**

*Name:* G&A Freight Forwarding Corp.  
*Address:* 8154 NW. 67th Street, Miami, FL 33166.

*Date Revoked:* May 29, 1988.

*Reason:* Failed to maintain a valid surety bond.

Robert G. Drew,

Director, Bureau of Domestic Regulation.  
[FR Doc. 88-13892 Filed 6-20-88; 8:45 am]

BILLING CODE 6730-01-M

### Ocean Freight Forwarder; Reissuance of License; World Express Lines, Inc.

Notice is hereby given that the following ocean freight forwarder license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of ocean freight forwarders, 46 CFR Part 510.

License No.	Name/Address	Date Reissued
2670R .....	World Express Lines, Inc., 1755 W. Walnut Parkway, Compton, CA 90220.	May 31, 1988.

Robert G. Drew,

Director, Bureau of Domestic Regulation.  
[FR Doc. 88-13893 Filed 6-20-88; 8:45 am]

BILLING CODE 6730-01-M

### FEDERAL RESERVE SYSTEM

#### R.L. Cato et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than July 6, 1988.

**A. Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *R.L. Cato*, Lyons, Georgia; to acquire an additional 2.33 percent of the voting shares of Altamaha Bancshares, Inc., Uvalda, Georgia, and thereby indirectly acquire Altamaha Bank and Trust Company, Uvalda, Georgia.

2. *Ben M. Robertson*, Maryville, Tennessee; to retain 10.8 percent and acquire an additional 9.2 percent of the

voting shares of Twin Cities Financial Services, Inc., Maryville, Tennessee, and thereby indirectly acquire Citizens Bank of Blount County, Maryville, Tennessee.

Board of Governors of the Federal Reserve System, June 15, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88-13879 Filed 6-20-88; 8:45 am]

BILLING CODE 6210-01-M

**First Virginia Banks, Inc., et al.,  
Formations of; Acquisition by; and  
Mergers of Bank Holding Companies**

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than July 13, 1988.

**A. Federal Reserve Bank of Richmond**  
(Lloyd W. Bostian, Jr., Vice President)  
701 East Byrd Street, Richmond, Virginia  
23261:

1. *First Virginia Banks, Inc.*, Falls Church, Virginia; to merge with Monroe Bancshares, Inc., of Madisonville, Tennessee, and thereby indirectly acquire Bank of Madisonville, Madisonville, Tennessee.

**B. Federal Reserve Bank of St. Louis**  
(Randall C. Sumner, Vice President) 411  
Locust Street, St. Louis, Missouri, 63166:

1. *Union Planters Corporation*, Memphis, Tennessee; to acquire an additional 20 percent of the voting shares of The Citizens Bank, Collierville, Tennessee.

Board of Governors of the Federal Reserve System, June 15, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88-13880 Filed 6-20-88; 8:45 am]

BILLING CODE 6210-01-M

**Old Kent Financial Services Corp., et  
al.; Acquisitions of Companies  
Engaged in Permissible Nonbanking  
Activities**

The organizations listed in this notice have applied under § 225.23 (a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23 (a)(2) or (f) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than July 8, 1988.

**A. Federal Reserve Bank of Chicago**  
(David S. Epstein, Vice President) 230  
South LaSalle Street, Chicago, Illinois  
60690:

1. *Old Kent Financial Services Corp.*, Grand Rapids, Michigan; to acquire

Vanguard Financial Services Corp., Lombard, Illinois, and thereby engage in providing finance leasing of office equipment such as office furniture, mailing, and facsimile machines, mini computers and word processors pursuant to § 225.25(b)(5) of the Board's Regulation Y.

**B. Federal Reserve Bank of Kansas City** (Thomas M. Hoening, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *First Morrill Company*, Omaha, Nebraska; to acquire Morrill Insurance Services, Inc., Morrill, Nebraska, and thereby engage in insurance activities pursuant to § 225.25(b)(8)(iii) of the Board's Regulation Y. These activities will be conducted within a 15 mile radius around Morrill, Nebraska.

Board of Governors of the Federal Reserve System, June 15, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88-13881 Filed 6-20-88; 8:45 am]

BILLING CODE 6210-01-M

**United Jersey Banks, et al.;  
Applications To Engage de Novo in  
Permissible Nonbanking Activities**

The company listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the

reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than July 8, 1988.

**A. Federal Reserve Bank of New York** (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. *United Jersey Banks*, Princeton, New Jersey; to engage *de novo* through its subsidiary, *Trico Mortgage Company, Inc.*, Laurence Harbor, New Jersey, in making, acquiring, selling and servicing commercial loans, as well as acting as agent, broker or advisor with respect to commercial loans and other extensions of credit pursuant to § 225.25(b)(1) of the Board's Regulation Y. Comments on this application must be received by July 5, 1988.

**B. Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Farmers and Merchants Bancshares, Inc.*, Crescent, Oklahoma; to engage *de novo* in insurance activities pursuant to § 225.25(b)(8)(iii) of the Board's Regulation Y. These activities will be conducted within a 12-15 mile radius from the city of Crescent.

Board of Governors of the Federal Reserve System, June 15, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88-13882 Filed 6-20-88; 8:45 am]

BILLING CODE 6210-01-M

## FEDERAL TRADE COMMISSION

### Consumer Protection; Used Car Trade Regulation Rule; Information Collection Requirement

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of application to OMB under the Paperwork Reduction Act, 44 U.S.C. 3507 (1982), for an extension for three years of the clearance of information collection requirements contained in the Used Car Trade Regulation Rule, 16 CFR Part 455. The existing clearance is OMB control No. 3084-0079.

**SUMMARY:** On November 19, 1984, the Federal Trade Commission promulgated a revised final trade regulation rule

which requires used car dealers to disclose, on a window sticker or "Buyers' Guide" posted on used cars offered for sale to consumers, information about the warranty coverage offered, the meaning of an "as is" sale, and other related information. 16 CFR Part 455 ("Used Car Rule" or "Rule"). In April 1985 the Commission requested OMB review of the information collection requirements contained in the Rule.

On June 4, 1985, OMB approved that Request, assigning control no. 3084-0079, for use through June 30, 1988. This Request for OMB Review seeks an extension of that clearance for a three-year period. The Supporting Statement for this Request includes an adjusted estimate of the paperwork burden (as defined) by 5 CFR Part 1320) associated with the information disclosures required by the Used Car Rule. The Rule's requirements and the reasons for its promulgation have not changed since the previous submission. The Commission's Statement of Basis and Purpose and Regulatory Analysis for the Rule was published at 49 FR 45692, *et seq.* (November 14, 1984).

### Estimate of Information Collection Burden

#### (i) Calculation of Burden.

It will take used car dealers in the aggregate not more than an estimated 918,000 hours per year to comply with the disclosure requirements of this Rule. The basis for this estimate is described in detail in the Supporting Statement. The calculations from which the estimate is derived are summarized in the table below.

Information in the rulemaking record indicates that there were approximately 57,000 sellers offering used motor vehicles in the United States in 1981. The 1985 Supporting Statement was based on an estimate of 77,000 dealers. Current information suggests that the number of used car dealers may be as high as 88,000. In 1986 (the most recent period for which data is available) 16.5 million used cars were sold. According to a report published by Hertz Corporation, of those 16.5 million transactions, 45% were sold by new car dealer and 11% by used car only dealers. The remainder were private transactions between individuals not covered by the Rule. Thus, 9.2 million used car sales are subject to the Rule's requirements. This produces an average of 105 sales per dealer.

Summary of burden calculation	Burden hours
• Ordering forms, 1.0 hour per dealer..	88,000
• Entering data on buyers' guides, 2.5 min. per vehicle.....	383,000
• Posting data on vehicles, 1.75 min. per vehicle.....	268,000
• Revision of disclosures, 4 min. per vehicle in 2% of sales.....	12,000
• Reposting buyers' guides, 1.75 min. each for 50% of vehicles.....	134,000
• Completing and posting new buyers' guides, 4.25 min. each for 5% of vehicles.....	33,000
Total.....	918,000

For further information about this estimate, refer to the Supporting Statement.

**DATES:** Comments on this Request for OMB Review must be submitted on or before July 21, 1988.

**ADDRESS:** Send comments to Mr. Don Arbuckle, FTC Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3228, Washington, DC 20503. Copies of the Request for OMB Review may be obtained from Public Reference Branch, Room 130, Federal Trade Commission Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Christian S. White, Assistant General Counsel, Federal Trade Commission, Washington, DC 20580, (202) 376-2476.

Robert D. Paul,

General Counsel.

[FR Doc. 88-13894 Filed 6-20-88; 8:45 am]

BILLING CODE 6750-01-M.

## GENERAL SERVICES ADMINISTRATION

### Agency Information Collection Activities Order OMB Review

**AGENCY:** Contract Policy Division, GSA.

**SUMMARY:** GSA is requesting that the Office of Management and Budget (OMB) renew recently expired information collection 3090-0060, Building Service Contractor Work Report, which requires guard contractors to submit sign-in, sign-out logs as evidence of the hours that employees have worked.

**ADDRESSES:** Send comments to Bruce McConnell, GSA Desk Officer, Room 3235, NEOB, Washington, DC, 20503, and to Mary L. Cunningham, GSA Clearance Officer, General Services Administration (CAIR), F Street at 18th, NW., Washington, DC 20405.

Annual Reporting Burden: Firms responding, 220; responses, 52 per firm

per year; average hours per response, .5; burden hours, 5720.

**FOR FURTHER INFORMATION CONTACT:**

Jewell Wilson 202-566-1811.  
 Copy of Proposal: Readers may obtain a copy of the proposal by writing the Information Collection Management Branch (CAIR), Room 3014, GS Bldg., Washington, DC 20405, or by telephoning 202-535-7074.

Dated: June 14, 1988.

Emily C. Karam,  
 Director, Information Management Division (CAI).

[FR Doc. 88-13965 Filed 6-20-88; 8:45 am]

BILLING CODE 6820-23-M

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Disease Control**

**AIDS Surveillance and Prevention Projects; Meeting**

**ACTION:** Notice of Meeting-The Centers for Disease Control (CDC) will convene a meeting to discuss the Fiscal Year 1989 draft application instructions for minority AIDS initiatives to be supported within the AIDS Surveillance and Prevention Projects.

*Time and Date:* 9 a.m.—2:00 p.m., June 30, 1988.

*Place:* Center for Prevention Services Conference Room, CDC Freeway Office Park, 1600 Tullie Circle, NE., Atlanta, Georgia 30329.

*Status:* Open to the public, limited only by the space available.

*Contact Person for More Information:* Mr. John Lehnerr, Resource Analysis, Office of the Director, Center for Prevention Services, Centers for Disease Control, Atlanta, GA 30333, Telephone: Commercial: (404) 639-1823. FTS: 236-1823.

Dated: June 16, 1988.

Elvin Hilyer,  
 Associate Director for Policy Coordination Centers for Disease Control.

[FR Doc. 88-14057 Filed 6-20-88; 8:45 am]

BILLING CODE 4160-18-M

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**Office of Administration**

[Docket No. N-88-1815]

**Submission of Proposed Information Collection to OMB**

**AGENCY:** Office of Administration, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**ADDRESS:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

**SUPPLEMENTARY INFORMATION:** The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information

submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

**Authority:** Sec. 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; sec. 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: June 15, 1988.

John T. Murphy,

Director, Information Policy and Management Division.

**Notice of Submission of Proposed Information Collection to OMB**

*Proposal:* Management Review Report for Unsubsidized Multifamily Housing Programs and Management Review Worksheet.

*Office:* Housing.

*Description of the Need for the Information and its Proposed Use:* This information is used by coinsuring lenders to evaluate the adequacy of management at projects that apply for coinsured loans. The information is needed to periodically monitor and evaluate ongoing management operations and procedures at coinsured projects with regard to maintenance and security; financial management; leasing and occupancy; tenant management relations; and general management practices.

*Form Number:* HUD-9838.

*Respondents:* Businesses or Other For-Profit and Small Business or Organizations.

*Frequency of Submission:* On Occasion.

**REPORTING BURDEN**

	Number of respondents	X	Frequency of response	X	Hours per response	=	Burden hours
Management Review Worksheet.....	450		1		7		3,150
Management Review Report.....	450		1		1		450

*Total Estimated Burden Hours:* 3,600.  
*Status:* Reinstatement.

*Contact:* Matthew C. Andrea, Jr., HUD, (202) 755-4956, John Allison, OMB, (202) 395-6880.

*Date:* June 9, 1988.  
 [FR Doc. 88-13951 Filed 6-20-88; 8:45 am]  
 BILLING CODE 4210-01-M

## DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

Lakeview District Multiple Use  
Advisory Council Meeting

[OR-010-08-4410-12:GP8-149]

AGENCY: Bureau of Land Management,  
Interior.ACTION: Notice of a meeting of the  
Lakeview District Multiple Use  
Advisory Council.

**SUMMARY:** The Lakeview District Multiple Use Advisory Council will meet Thursday, July 28, 1988. The meeting is open to the public and will begin at 10:00 a.m. in the Lakeview District Conference Room at 1000 South Ninth Street, Lakeview, Oregon.

The purpose of this meeting is to discuss information relating to the Warner Lake Plan Amendment for Wetlands and Associated Uplands.

DATE: July 28, 1988.

## FOR FURTHER INFORMATION CONTACT:

Renee Snyder, Environmental  
Coordinator, Telephone: (503) 947-2177.

Judy Nelson,

District Manager.

[FR Doc. 88-13883 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-33-M

[ID-030-07-4212-12]

Realty Action; Exchange of Public  
Lands in Bingham County, IDAGENCY: Bureau of Land Management,  
Interior.ACTION: Notice of realty action;  
exchange of public lands in Bingham  
County.

**SUMMARY:** The following described public lands have been determined to be suitable for disposal by exchange under section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716:

- T. 1 N., R. 32 E., B.M.,  
Sec. 23: E $\frac{1}{2}$ W $\frac{1}{2}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 26: NE $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 34: SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;  
Sec. 35: E $\frac{1}{2}$ , SW $\frac{1}{4}$ .
- T. 1 S., R. 32 E., B.M.,  
Sec. 1: Lots 1, 2, N $\frac{1}{2}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;  
Sec. 2: Lots 1, 2;  
Sec. 12: NE $\frac{1}{4}$ NE $\frac{1}{4}$ ;  
Sec. 13: S $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ .
- T. 1 N., R. 33 E., B.M.,  
Sec. 33: All;  
Sec. 34: N $\frac{1}{2}$ , SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ .
- T. 1 S., R. 33 E., B.M.,  
Sec. 1: Lots 1, 2, 3, NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ ;  
Sec. 2: Lot 4, W $\frac{1}{2}$ SW $\frac{1}{4}$ ;  
Sec. 3: Lots 1, 2, 3, 4, S $\frac{1}{2}$ ;  
Sec. 4: Lots 1, 2, 3, 4, E $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ ;  
Sec. 5: Lots 1, 2, 3, 4, N $\frac{1}{2}$ SE $\frac{1}{4}$ ;

- Sec. 6: Lots 1, 2, 3, 4, 5, 6, E $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ ;  
Sec. 7: Lots 1, 2, 3, 4, E $\frac{1}{2}$ , E $\frac{1}{2}$ W $\frac{1}{2}$ ;  
Sec. 8: All;  
Sec. 9: E $\frac{1}{2}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ ;  
Sec. 10: NW $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ ,  
NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ ,  
NW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ ,  
S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ NW $\frac{1}{4}$ , W $\frac{1}{2}$ SW $\frac{1}{4}$ ;  
Sec. 18: Lots 1, 2, 3, 4, N $\frac{1}{2}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ W $\frac{1}{2}$ ;  
Sec. 19: Lots 1, 2, 3, 4, SW $\frac{1}{4}$ NE $\frac{1}{4}$ ,  
E $\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ .

- T. 1 S., R. 34 E., B.M.,  
Sec. 2: Lots 1, 2;  
Sec. 3: Lots 1, 2, 3, 4, S $\frac{1}{2}$ ;  
Sec. 4: Lots 1, 2, 3, 4;  
Sec. 5: Lots 1, 2, 3, 4;  
Sec. 6: Lots 1, 2, 3, 4, 5, 6, N $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 7: SE $\frac{1}{4}$ NW $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ ;  
Sec. 8: All;  
Sec. 9: All;  
Sec. 11: NW $\frac{1}{4}$ , N $\frac{1}{2}$ S $\frac{1}{2}$ ;  
Sec. 13: SW $\frac{1}{4}$ ;  
Sec. 14: S $\frac{1}{2}$ ;  
Sec. 15: All;  
Sec. 17: All;  
Sec. 18: Lot 1, NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 20: All;  
Sec. 21: N $\frac{1}{2}$ ;  
Sec. 22: N $\frac{1}{2}$ , E $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 23: All;  
Sec. 24: SW $\frac{1}{4}$ NW $\frac{1}{4}$ ;  
Sec. 26: N $\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ ;  
Sec. 27: NE $\frac{1}{4}$ NE $\frac{1}{4}$ ;  
Sec. 29: NW $\frac{1}{4}$ NW $\frac{1}{4}$ ;  
Sec. 30: N $\frac{1}{2}$ NE $\frac{1}{4}$ .
- Containing 14,232.52 acres.

In exchange for these lands, the Federal Government will acquire scattered sections of non-Federal lands in Butte, Bingham, Blaine, Clark, Bonneville and Power counties from the State of Idaho, described as follows:

- T. 4 N., R. 24 E., B.M.,  
Sec. 36: All.
- T. 3 S., R. 27 E., B.M.,  
Sec. 36: All.
- T. 4 S., R. 27 E., B.M.,  
Sec. 16: All;  
Sec. 36: All.
- T. 5 S., R. 27 E., B.M.,  
Sec. 16: All.
- T. 1 S., R. 28 E., B.M.,  
Sec. 36: All.
- T. 2 S., R. 28 E., B.M.,  
Sec. 36: All.
- T. 5 S., R. 28 E., B.M.,  
Sec. 36: All.
- T. 2 S., R. 29 E., B.M.,  
Sec. 16: All;  
Sec. 36: All.
- T. 3 S., R. 29 E., B.M.,  
Sec. 16: All.
- T. 9 N., R. 29 E., B.M.,  
Sec. 36: All.
- T. 10 N., R. 29 E., B.M.,  
Sec. 16: All.
- T. 2 S., R. 30 E., B.M.,  
Sec. 16: All;  
Sec. 36: All.
- T. 6 N., R. 30 E., B.M.,  
Sec. 16: All.
- T. 7 N., R. 30 E., B.M.,  
Sec. 16: E $\frac{1}{2}$ .
- T. 8 N., R. 30 E., B.M.,

- Sec. 16: All.
- T. 9 N., R. 30 E., B.M.,  
Sec. 36: All.
- T. 8 N., R. 31 E., B.M.,  
Sec. 16: Lots 1, 2, 3, 4, 5, 6, 7, NE $\frac{1}{4}$ ,  
E $\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ .
- T. 9 N., R. 31 E., B.M.,  
Sec. 36: Lots 1, 2, 3, 4, N $\frac{1}{2}$ , N $\frac{1}{2}$ S $\frac{1}{2}$ .
- T. 1 N., R. 34 E., B.M.,  
Sec. 36: All.
- T. 2 N., R. 34 E., B.M.,  
Sec. 16: All;  
Sec. 36: All.
- T. 1 S., R. 35 E., B.M.,  
Sec. 36: E $\frac{1}{2}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ .
- T. 1 N., R. 35 E., B.M.,  
Sec. 16: W $\frac{1}{2}$ .
- T. 2 N., R. 35 E., B.M.,  
Sec. 16: All;  
Sec. 36: All.
- T. 1 N., R. 36 E., B.M.,  
Sec. 16: N $\frac{1}{2}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ ,  
SE $\frac{1}{4}$ SE $\frac{1}{4}$ .
- T. 1 S., R. 36 E., B.M.,  
Sec. 16: W $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , S $\frac{1}{2}$ .
- Containing 18,055.80 acres.

The purpose of the exchange is to dispose of scattered, difficult to manage public land parcels while acquiring State-owned lands which would compliment the Bureau's land management pattern. The exchange would also allow the Bureau to acquire certain State lands containing important wildlife and recreation values. The exchange is consistent with the Bureau's land use planning. The concept of land exchange has been generally discussed with Federal, State and local governmental agencies, public land user groups, and individuals through participation in the Bureau's land use planning process. The exchange will include both surface and mineral estates.

The value of the lands to be exchanged is approximately equal, and the acreage will be adjusted to equalize the values upon completion of the final appraisal of the lands.

The terms and conditions applicable to the public lands are:

1. A reservation to the United States of a right-of-way for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. A reservation to the United States of a right-of-way for a Federal Aid Highway for the Idaho Department of Transportation, Act of November 9, 1921 (23 U.S.C. 317), I-02100.

3. Those rights for powerline purposes as granted to Idaho Power Company, I-6741, I-12870, I-20136, I-13, I-08237 and I-06975.

4. Rights for road purposes as granted under the Act of October 21, 1976 to Bingham County (I-20136), and pursuant to revised Statute 2477 (I-25881).

The State lands, when conveyed to the United States, will be subject to such terms and conditions as are necessary to protect the permittees and lessees. The permittee/lessee will be able to either continue his/her use under the existing terms of the State's authorization or may be issued a new authorization by the Bureau of Land Management.

The publication of this notice in the Federal Register will segregate the public lands described above to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. As provided by the regulations of 43 CFR 22-01.1(b), any subsequently tendered application, allowance of which is discretionary, shall not be accepted, shall not be considered as filed, and shall be returned to the applicant.

The non-Federal lands described above are subject to prior Federal reserved minerals. The prior Federal interests are hereby segregated to the extent that such interests will not be subject to appropriation under the mining laws until a notice pursuant to 43 CFR 2200.3(a) is issued.

The Desert Land Entry applications of Paul Olsen (I-14783), Cheryl J. Olsen (I-15009), Max Ranson (I-16249), Marilyn R. Clement (I-21926), and Zane Clement (I-21925) on the public land to be exchanged will be rejected when this realty action becomes the final determination of the Department of Interior.

Detailed information concerning the exchange, including the land use plan supporting this exchange and environmental analysis, is available for review at the Idaho Falls District Office, 940 Lincoln Road, Idaho Falls, Idaho 83401.

For a period of 45 days interested parties may submit comments to the Idaho Falls District Manager at the following address: District Manager, Idaho Falls District Office, 940 Lincoln Road, Idaho Falls, ID 83401.

Dated: June 13, 1988.

Lloyd H. Ferguson,

District Manager.

[FR Doc. 88-13885 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-GG-M

[NV-930-08-4212-13; N-48171]

### Realty Action; Nevada

June 8, 1988.

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice; Issuance of Land Exchange Conveyance Document and

### Order Providing for Opening of Public Lands, Nevada.

**SUMMARY:** This notice identifies Federal and non-Federal lands involved in a recently completed exchange transaction. The purpose of the exchange was to acquire non-Federal lands within the Toiyabe National Forest having high public values. The mineral estates in the Federal and non-Federal lands were also conveyed.

**EFFECTIVE DATE:** July 21, 1988.

**FOR FURTHER INFORMATION CONTACT:** Forest Supervisor, Toiyabe National Forest, 1200 Franklin Way, Sparks, NV 89431, 702-355-592.

**SUPPLEMENTARY INFORMATION:** The United States issued Patent No. 27-88-0010 to The Trust for Public Land on June 3, 1988, for the following described lands pursuant to section 206 of the Act of October 21, 1976 (43 U.S.C. 1716):

Mount Diablo Meridian, Nevada

T. 11 N., R. 23 E.,  
Sec. 1, S $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 12, W $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ .

The area described contains 320 acres in Lyon County, Nevada.

In exchange for these lands, the United States acquired the following described lands from The Trust for Public Land:

Mount Diablo Meridian, Nevada

T. 15 N., R. 19 E.,  
Sec. 3, Lot 1 of the NW $\frac{1}{4}$ , SW $\frac{1}{4}$ .

The area described contains 240 acres in Carson City County, Nevada. Title to the non-Federal lands was accepted on June 3, 1988.

The values of the Federal lands and the non-Federal lands in this exchange were appraised at \$112,000.00 and \$114,000.00, respectively. In order to equalize values, the United States Forest Service, Toiyabe National Forest, paid the proponent \$2,000.00.

In accordance with 43 CFR 2200-3(c), the lands acquired by the United States are hereby transferred to the Secretary of Agriculture as part of the Toiyabe National Forest and are subject to all the laws, rules, and regulations applicable thereto.

At 10:00 a.m., on July 21, 1988, said lands shall be open to such forms of disposition as may be made of national forest lands, including location and entry under the United States mining laws. Appropriation of said lands under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. section 38, shall vest no rights against the United States. Acts required to

establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

At 10:00 a.m., on July 21, 1988, the lands acquired by the United States in this exchange will also be opened to applications and offers under the mineral leasing laws.

Fred Wolf,

Associate State Director, Nevada.

[FR Doc. 88-13884 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-HC-M

### National Park Service

#### Concession Contract Negotiations; Circle Line-Statue of Liberty Ferry, Inc.

**AGENCY:** National Park Service, Interior.  
**ACTION:** Public notice.

**SUMMARY:** Public notice is hereby given that the National Park Service proposes to negotiate a concession contract with Circle Line-Statue of Liberty Ferry, Inc., authorizing it to continue to provide passenger ferry transportation services for the public at Statue of Liberty National Monument, New York, for a period of fifteen (15) years.

**EFFECTIVE DATE:** The Fact Sheet describing this opportunity will be released to the public in the near future, and ninety (90) days will be allowed from the date of release for responses to be received.

**ADDRESS:** Interested parties should contact the Regional Director, North Atlantic Region, Boston, Massachusetts 02109, for information as to the requirements of the proposed contract.

**SUPPLEMENTARY INFORMATION:** This contract 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 contract which will expire by limitation of time on March 31, 1992, and therefore, pursuant to the provisions of section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), 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 ninetieth (90th) day following the release date shown on the cover of the Fact Sheet to be considered and evaluated.

Herbert S. Cables, Jr.,

Regional Director, North Atlantic Region.

Date: May 31, 1988.

[FR Doc. 88-13921 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-70-M

### Acadia National Park Advisory Commission; Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. App. 1 Sec. 10), that a meeting of the Acadia National Park Advisory Commission will be held on Monday, July 18, 1988.

The Commission was established pursuant to Pub. L. 99-420, section 103. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, on matters relating to the management and development of the Park, including but not limited to the acquisition of lands and interests in lands (including conservation easements on islands) and termination of rights of use and occupancy.

The meeting will convene at the Mount Desert Island High School, Eagle Lake Road, Rt. 233, Bar Harbor, Maine, at 7:00 p.m. to consider the following agenda:

1. Accept public comments on the Acadia National Park General Management Plan.

2. Old business:

A. Easement located on Duck Cove Brook, Town of Tremont, owned by Maurianne Adams.

B. Easement located on Hogg Island in Frenchman's Bay, Town of Gouldsboro, owned by Montgomery S. Bradley.

C. Easement located on Sutton's Island, Town of Cranberry Isles, owned by Rebecca Nussdorfer.

3. New business: General Management Plan status report.

4. Proposed agenda and date of next Commission meeting.

The committee meeting is open to the public. Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made to the official listed below at least seven days prior to the meeting.

Further information concerning this meeting may be obtained from the

Superintendent, Acadia National Park,  
P.O. Box 177, Bar Harbor, Maine 04609.

Herbert S. Cables, Jr.,

Regional Director.

Date: June 14, 1988.

[FR Doc. 88-13922 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-70-M

### National Register of Historic Places; Notification of Pending Nominations; Colorado, et al.

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before June 11, 1988. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, U.S. Department of the Interior, Washington, DC 20243. Written comments should be submitted by July 6, 1988.

Carol D. Shull,

Chief of Registration, National Register.

#### COLORADO

##### El Paso County

Ramah, *First Presbyterian Church of Ramah*,  
113 S. Commercial St.

##### Montrose County

Montrose, *Lathrop, J. V., House*, 718 Main St.

#### KENTUCKY

##### Caldwell County

Princeton, *Princeton Downtown Commercial District*, Roughly along Main St., E. and W. Court Sq. Sts.

#### MARYLAND

##### Harford County

Darlington vicinity, *Berkley School*, Castleton Rd., MD 623

#### MONTANA

##### Wheatland County

Harlowton vicinity, *Milwaukee Road Historic District*, S end of Central Ave.

#### NEW JERSEY

##### Sussex County

Sparta, *White Deer Plaza & Boardwalk District*, White Deer Plaza, Winona Pkwy., and W. Shore Trail.

#### NEW YORK

##### Broome County

Deposit, *State Theater*, 148 Front St.

##### Monroe County

Honeoye Falls, *St. John's Episcopal Church*,  
11 Episcopal Ave.

#### Suffolk County

East Hampton, *Briar Patch Road Historic District (Village of East Hampton MRA)*,  
End of Briar Patch Rd. along Georgica Pond

East Hampton, *Buell's Lane Historic District (Village of East Hampton MRA)*, 47-114 Buell's La.

East Hampton, *East Hampton Village Historic District (Boundary Increase)*

(*Village of East Hampton MRA*), Northeastward along Main St. to Newton La. and Southwestward along Ocean and Lee Aves. and Pond La. to Hedges La.

East Hampton, *Egypt Lane Historic District (Village of East Hampton MRA)*, 111, 117, and 129 Egypt La.

East Hampton, *Jericho Historic District (Village of East Hampton MRA)*, Montauk Hwy.

East Hampton, *Jones Road Historic District (Village of East Hampton MRA)*, Along Jones Rd. from Apaquogue Rd. to Lilly Pond La.

East Hampton, *North Main Street Historic District (Village of East Hampton MRA)*, N. Main St.

East Hampton, *Pantigo Road Historic District (Village of East Hampton MRA)*, Along Pantigo Rd. from Egypt La. and Accabonac Rd. to Amy's La.

Farmingville, *Bald Hill Schoolhouse*, Horseblock Rd.

#### Tompkins County

Ithaca, *Clinton Hall*, 108-114 N. Cayuga St.

#### TENNESSEE

##### Giles County

Pulaski vicinity, *Whitefield, Copeland, House*, Bee Line Hwy.

##### Haywood County

Brownsville, *Hutchison, Joshua K., House*,  
124 N. Church Ave.

##### Montgomery County

Clarksville, *Drane—Foust House*, 319 Home Ave.

#### VIRGINIA

##### Halifax County

Providence, *Old Providence Presbyterian Church*, VA 624.

[FR Doc. 88-13923 Filed 6-20-88; 8:45 am]

BILLING CODE 4310-70-M

### INTERSTATE COMMERCE COMMISSION

[Docket No. AB-290 (Sub-No. 8)]

#### Southern Railway Co.; Abandonment; Dillsboro to Murphy, NC; Findings

The Commission has issued a Decision and Certificate of Interim Trail Use or Abandonment authorizing Southern Railway Company either to discontinue service (if an Interim Trail Use Agreement is reached) and abandon (when the Interim Trail Use Agreement terminates) or to abandon (if an Interim

Trail Use Agreement is not reached) its 66.2-mile rail line between Dillsboro (milepost T-48.0) and Murphy, NC (milepost T-114.2), in Jackson, Swain, Graham and Cherokee Counties, NC. In addition to environmental conditions, the Commission also imposed interim trail use and public use conditions. The Decision and Certificate will become effective 30 days after this publication unless the Commission also finds that: (1) A financially responsible person has offered financial assistance (through subsidy or purchase) to enable the rail service to be continued; and (2) it is likely that the assistance would fully compensate the railroad.

Any financial assistance offer must be filed with the Commission and served on the applicant no later than 10 days from publication of this notice. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Rail Section, AB-OFA." Any offer previously made must be remade within this 10-day period.

Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR 1152.27.

Decided: June 14, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley.

Noreta R. McGee,

Secretary.

[FR Doc. 88-13905 Filed 6-20-88; 8:45 am]

BILLING CODE 7035-01-M

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance; Arvin Supreme, Inc., et al.

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued during the period June 6, 1988-June 10, 1988.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

#### Negative Determinations

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-20, 583; *Arvin/Supreme, Inc., Princeton, KY*

TA-W-20, 575; *Amstar Sugar Corp., Bunker Hill Refinery, Charlestown, MA*

TA-W-20, 607; *Chris Craft, Industrial Products, Trenton, NJ*

In the following cases the investigation revealed that criterion (3) has not been met for the reasons specified.

TA-W-20, 606; *Blue Diamond Coal Co., Justus Mines, Stearns, KY*

U.S. imports of coal are negligible.

TA-W-20, 506; *Haven-Busch Co., Grandville, MI*

U.S. imports of fabricated structural steel declined absolutely and relative to domestic shipments in 1987 compared to 1986.

TA-W-20, 587; *Centerline Metal Products, Roseville, MI*

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-20, 624; *Island Creek Coal Co., Gauley Div., Craigsville, WV*

U.S. imports of steam coal and metallurgical coal are negligible.

TA-W-20, 678; *Red Fork Drilling, Inc., Seminole, OK*

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-20, 639; *Elite Wireline, Inc., Skiatook, OK*

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-20, 622; *Complete Auto Transit, Inc., Cincinnati, OH*

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-20, 626; *Kitt Energy Corp., Fredericktown, PA*

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

#### Affirmative Determinations

TA-W-20, 657; *General Electric Co., Cathode Ray Tube Operations, Syracuse, NY*

A certification was issued covering all workers separated on or after June 2, 1987 and before December 31, 1988.

TA-W-20, 584; *Brake Systems, Inc., Stratford, CT*

A certification was issued covering all workers separated on or after March 21, 1987.

TA-W-20, 615; *Maxus Exploration Company, Mid Continent Div., Amarillo, TX*

A certification was issued covering all workers separated on or after April 4, 1987.

TA-W-20, 615A; *Maxus Exploration Company, Mid Continent Div., Canadian, TX*

A certification was issued covering all workers separated on or after April 4, 1987.

TA-W-20, 615B; *Maxus Exploration Company, Mid Continent Div., Sunray, TX*

A certification was issued covering all workers separated on or after April 4, 1987.

TA-W-20, 615C; *Maxus Exploration Company, Mid Continent Div., Pampa, TX*

A certification was issued covering all workers separated on or after April 4, 1987.

TA-W-20, 615D; *Maxus Exploration Company, Mid Continent Div., Spearman, TX*

A certification was issued covering all workers separated on or after April 4, 1987.

TA-W-20, 615E; *Maxus Exploration Company, Mid Continent Div., Fort Smith, AR*

A certification was issued covering all workers separated on or after April 4, 1987.

TA-W-20, 615F; *Maxus Exploration Company, Mid Continent Div., Plains, KS*

A certification was issued covering all workers separated on or after April 4, 1987.

I hereby certify that the aforementioned determinations were issued during the period June 6, 1988-

June 10, 1988. Copies of these determinations are available for inspection in Room 6434, U.S. Department of Labor, 601 D Street NW., Washington, DC 20213 during normal business hours or will be mailed to persons who write to the above address.

Dated: June 14, 1988.

**Marvin M. Fooks,**

*Director, Office of Trade Adjustment Assistance.*

[FR Doc. 88-13871 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-30-M

### Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance; Bill Hill and Associates, et al.

Petitions have been filed with the Secretary of Labor under section 221(a)

of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such

request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than July 1, 1988.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than July 1, 1988.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street NW., Washington, DC 20213.

Signed at Washington, DC, this 13th day of June 1988.

**Marvin M. Fooks,**

*Director, Office of Trade Adjustment Assistance.*

### APPENDIX

Petitioner: Union/Workers/Firm	Location	Date received	Date of petition	Petition No.	Articles produced
Bill Hill & Associates (Workers).....	Longview, TX.....	6/13/88	6/1/88	20,720	Crude oil.
Clearwater Printing & Finishing Co. (MPEA).....	Clearwater, SC.....	6/13/88	6/2/88	20,721	Printing cloth.
Eaton Corporation (USWA).....	Gallatin, TN.....	6/13/88	6/2/88	20,722	Brake and axle units.
Emerson Contract Div. (UAW).....	Mt. Sterling, KY.....	6/13/88	5/31/88	20,723	Dishwashers and trash compactors.
Federal Steel & Wire Corporation (Company).....	Cleveland, OH.....	6/13/88	6/2/88	20,724	Railroad bolts, nuts and spikes.
Ideal Basic Industries, Inc. (Company).....	Ada, OK.....	6/13/88	5/20/88	20,725	Portland cement.
Lipe Corporation (USWA).....	Syracuse, NY.....	6/13/88	6/2/88	20,726	Heavy duty clutches for trucks.
London Fog (ACTWU).....	Powell, TN.....	6/13/88	6/6/88	20,727	Warmers and jackets.
NL Acme Tool Oilfield, Inc. (Workers).....	Houston, TX.....	6/13/88	6/1/88	20,728	Downhole drilling equipment.
Ownes-Illinois-TV Products (GMPP).....	Columbus, OH.....	6/13/88	6/1/88	20,729	TV picture tube glass.
Z. Sportswear Limited (ILGWU).....	Boston, MA.....	6/13/88	6/2/88	20,730	Ladies' skirts.

[FR Doc. 88-73872 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-30-M

### Occupational Safety and Health Administration

#### Federal Advisory Council on Occupational Safety and Health; Meeting

Notice is hereby given that the Federal Advisory Council on Occupational Safety and Health, established under section 1-5 of Executive Order 12196 of February 26, 1980, published in the *Federal Register*, February 27, 1980 (45 FR 1279), will meet on July 13, 1988, starting at 10:00 a.m. in Room S4215 ABC, of the Frances Perkins Department of Labor Building, 200 Constitution Avenue NW., Washington, DC. The meeting will be open to the public.

The agenda provides for:

I. Call to Order

II. Approval of Minutes of January 13, 1988 Meeting

III. Appointments to FACOSH

IV. Election of Vice Chairman

V. Subcommittee on Federal Accident

Reporting System's (FARS) Proposed Presidential Injury/Illness Reduction Goal After FY 1988

VI. Update on the Federal Hazard Communication Program

VII. Preliminary Program—Forty-third Annual Federal Safety and Health Conference

VIII. Update on the Office of Workers' Compensation Programs' (OWCP) Reporting Changes—"First Aid Cases"

IX. New Business

X. Adjournment

The Council welcomes written data, views or comments concerning safety and health programs for Federal employees, including comments on the agenda items. All such submissions received by close of business July 6, 1988, will be provided to the members of the Council and included in the record of the meeting.

The Council will consider oral presentations relating to agenda items.

Persons wishing to orally address the Council at the meeting should submit a written request to be heard by close of business July 6, 1988. The request must include the name and address of the person wishing to appear, the capacity in which appearance will be made, a short summary of the intended presentation and an estimate of the amount of time needed.

All communications regarding this Advisory Council should be addressed to John E. Plummer, Director, Office of Federal Agency Programs, Department of Labor, OSHA, Frances Perkins Building, 200 Constitution Avenue NW., Room N3112, Washington, DC 20210, telephone (202) 523-9329.

Signed at Washington, DC, this 15th day of June 1988.

**John A. Pendergrass,**

*Assistant Secretary.*

[FR Doc. 88-13874 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-26-M

## Pension and Welfare Benefits Administration

### Advisory Council on Employee Welfare and Pension Benefits Plans; Meeting

Pursuant to section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, a meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans will be held on Tuesday, July 12, 1988, Room N-5437B, U.S. Department of Labor Building, Third and Constitution Avenue NW., Washington, DC.

The purpose of the meeting, which will begin at 9:30 a.m., is to consider items listed below and to invite public comment on any aspect of the administration of ERISA.

1. General Business of the Advisory Council.
2. Status report of the Access to Health Work Group.
3. Status report of the Retiree Health Work Group.
4. Status report of the 415 Limit Committee.
5. Discussion of draft report of the Reporting and Disclosure Work Group.
6. Open Discussion of Special Issues:
  - (a) National Retirement Income Policy.
  - (b) Other.
7. Statements from the Public.

Members of the public are encouraged to file a written statement pertaining to any topic concerning ERISA by submitting 20 copies on or before July 7, 1988, to William E. Morrow, Deputy Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N-5677, 200 Constitution Avenue NW., Washington, DC 20210. Individuals wishing to address the Advisory Council should forward their request to the Deputy Executive Secretary or telephone (202/523-8753). Oral presentations will be limited to ten minutes, but an extended statement may be submitted for the record.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statements should be sent to the Deputy Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before July 7, 1988.

Signed at Washington, DC, this 16th day of June 1988.

David M. Walker,  
CPA, Assistant Secretary for Pension and Welfare Benefit Administration.

[FR Doc. 88-13956 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-29-M

## Wage and Hour Division

### Ellen Delva, Sony Constant, Sauvener Dorce, Renold Mahotiere, and Roger Celestin, Petitioners; Proceedings To Determine Fair Value or Reasonable Cost of Facilities Furnished to Employees

Pursuant to authority in section 3(m) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(m)), Reorganization Plan 6 of 1950 (3 CFR 1949-53 Comp., p. 1004), Secretary's Order 16-75 (40 FR 55913), Employment Standards Order No. 78-1 (43 FR 51469), Secretary's Order 1-81 (46 FR 28048), and 29 CFR 531.4 and 531.5, the Administrator of the Wage and Hour Division, on the petition of Legal Aid Bureau, Inc. on behalf of five migrant farmworkers, proposes to determine the "fair value" or "reasonable cost" of the housing and other facilities customarily furnished to the employees of: Otamot, Inc., L & E Farms, Inc., Charles Fisher, and Elmo Dryden.

The Administrator has decided that a hearing at which all interested parties will have the opportunity to present pertinent information is appropriate.

Opportunity will be provided for interested persons to make oral presentations of data, views, or arguments before an Administrative Law Judge appointed under 5 U.S.C. 3105, at the Government Office Building, Room 106, Route 50 and North Division Streets, Salisbury, Maryland, at 10:00 a.m., July 18, 1988. Participants should report directly to the above-specified location at the designated time.

Pertinent data relate to the cost of furnishing lodging and other facilities to the employees. Data relating to lodging should include in an organized form such information as the operating expense of the lodging furnished to the employees (gas, electric, sewage, water, etc.), the annual depreciation claimed for tax purposes, real estate taxes paid and how assessed, invoices from maintenance expenditures, numbers of employees engaged in maintenance of the lodging, and number and types of vehicles used to maintain the lodging.

Notice of intention to appear should be filed with the Office of Administrative Law Judges, U.S. Department of Labor, 1111 20th Street NW., Washington, DC 20036, not later than July 11, 1988, with copies served on Legal Aid Bureau, Inc., Lower Eastern Shore Office, 111 High Street, P.O. Box 4116, Salisbury, Maryland 21801, and the Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

Interested persons may submit written data, views, or arguments pertinent to this question by mail to the Office of Administrative Law Judges, U.S. Department of Labor, 1111 20th Street NW., Washington, DC 20036. Such materials must be received not later than July 11, 1988.

All persons making oral presentations shall be subject to cross examination by counsel for Legal Aid Bureau, Inc., counsel for the above-named employers, and counsel for the Secretary of Labor. The Administrative Law Judge shall govern the course of the proceeding, limit presentations to relevant matters, govern the content of the record, have disciplinary power to exclude persons from the room where oral presentations are made, and see that the proceedings are stenographically reported and transcripts made available to persons participating upon payment of fees therefore. The Administrative Law Judge shall certify the record, together with his/her recommended findings, to the Administrator for consideration of all relevant matters presented and resolution of the issues.

So that all parties will have an opportunity to present their arguments before the Determination is issued, exceptions to the recommended decision of the Administrative Law Judge should be filed with Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, within 30 calendar days of the Judge's decision. Responses to the exceptions may be submitted within 45 days of the date of the Judge's recommended decision.

Upon publication of this notice each of the above-named employers shall notify their employees of the place, date, and purpose of the hearing hereby announced, by posting a copy of this notice in a conspicuous place on the premises of each of the facilities in which their employees are housed.

Signed at Washington, DC this 14th day of June, 1988.

Paula V. Smith,

Administrator.

[FR Doc. 88-13875 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-27-M

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration, Office of Records Administration.

**ACTION:** Notice of availability of proposed records schedules; request for comments.

**SUMMARY:** The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Records schedules identify records of sufficient value to warrant preservation in the National Archives of the United States. Schedules also authorize agencies after a specified period to dispose of records lacking administrative, legal, research, or other value. Notice is published for records schedules that (1) propose the destruction of records not previously authorized for disposal, or (2) reduce the retention period for records already authorized for disposal. NARA invites public comments on such schedules, as required by 44 U.S.C. 3303a(a).

**DATE:** Requests for copies must be received in writing on or before August 5, 1988. Once the appraisal of the records is completed, NARA will send a copy of the schedule. The requester will be given 30 days to submit comments.

**ADDRESS:** Address requests for single copies of schedules identified in this notice to the Records Appraisal and Disposition Division (NIR), National Archives and Records Administration, Washington, DC 20408. Requesters must cite the control number assigned to each schedule when requesting a copy. The control number appears in parentheses immediately after the name of the requesting agency.

**SUPPLEMENTARY INFORMATION:** Each year U.S. Government agencies create billions of records on paper, film, magnetic tape, and other media. In order to control this accumulation, agency records managers prepare records schedules specifying when the agency no longer needs the records and what happens to the records after this period. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. These comprehensive schedules provide for the eventual transfer to the National Archives of historically valuable records and authorize the disposal of all other records. Most schedules, however, cover records of only one office or program or a few series of records, and many are updates of previously approved schedules. Such schedules also may include records that are designated for permanent retention.

Destruction of records requires the approval of the Archivist of the United States. This approval is granted after a thorough study of the records that takes

into account their administrative use by the agency of origin, the rights and interests of the Government and of private persons directly affected by the Government's activities, and historical or other value.

This public notice identifies the Federal agencies and their subdivisions requesting disposition authority, includes the control number assigned to each schedule, and briefly describes the records proposed for disposal. The records schedule contains additional information about the records and their disposition. Further information about the disposition process will be furnished to each requester.

#### Schedules Pending

1. Department of the Army, U.S. Army Intelligence and Security Command (N1-AU-88-05). Records related to personnel in the Military Intelligence Excepted Career Program.

2. Department of the Navy (N1-71-88-1). Housekeeping records of the Bureau of Yards and Docks, ca. 1945-50 (files dealing with historically significant policies and programs are permanent).

3. United States Coast Guard (N1-26-88-3). Child care centers administrative records.

4. Farm Credit Administration, Records and Projects Division (N1-103-88-5). Files of personnel actions relating to chief executive officers of Farm Credit System institutions.

5. National Center for Health Services Research (NCHSR), Public Health Service (PHS) (N1-90-88-3). Input forms, working files, documentation, and data bases for the National Medical Expenditure Survey (NMES) (schedule provides for permanent retention of the documentation and public use data base).

6. United States Information Agency (N1-306-88-2). Facilitative records relating to the International Marketing Institute.

Dated: June 14, 1988.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 88-13904 Filed 6-20-88; 8:45 am]

BILLING CODE 7515-01-M

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[88-62]

#### NASA Advisory Council (NAC), 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.

Date and Time: July 13, 1988, 8 a.m. to 5 p.m.

**ADDRESS:** National Aeronautics and Space Administration, Room 625, Federal Office Building 10B, Washington, DC 20546.

**FOR FURTHER INFORMATION CONTACT:** Ms. Joanne Teague, Office of Aeronautics and Space Technology, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-2775.

**SUPPLEMENTARY INFORMATION:** The NAC Aeronautics Advisory Committee (AAC) was established to provide overall guidance to the Office of Aeronautics and Space Technology (OAST) on aeronautics research and technology activities. The Committee, chaired by Mr. Robert B. Ormsby, is comprised of 23 members. The meeting will be open to the public up to the seating capacity of the room (approximately 40 persons including the committee members and other participants).

Type of Meeting: Open.

#### Agenda

July 13, 1988

8 a.m.—Opening Remarks.

8:30 a.m.—Fiscal Year 90 Proposed Budget and New Initiatives.

10:30 p.m.—Committee Discussion.

1 p.m.—Ad Hoc Review Team Status Reports.

2 p.m.—Discussion of Manpower Requirements Study.

3 p.m.—Discussion of New Study Topics.

3:45 p.m.—Discussion of November 1988 AAC/Aerospace Research and Technology Subcommittee Meeting.

4:30 p.m.—Summary Discussions.

5 p.m.—Adjourn.

Ann Bradley,

Advisory Committee Management Officer,  
National Aeronautics and Space Administration.

June 15, 1988.

[FR Doc. 88-13916 Filed 6-20-88; 8:45 am]

BILLING CODE 7510-01-M

**NATIONAL SCIENCE FOUNDATION****Permit Applications Received Under the Antarctic Conservation Act of 1978****AGENCY:** National Science Foundation.**ACTION:** Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978, Pub. L. 95-541.

**SUMMARY:** The National Science Foundation (NSF) is required to publish notice of applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act of 1978 at Title 45, Part 670 of the Code of Federal Regulations.

**DATES:** Interested parties are invited to submit written data, comments, or view with respect to these permit applications by July 18, 1988. Permit applications may be inspected by interested parties at the Permit Office, address below.

**ADDRESS:** Comments should be addressed to Permit Office, Room 627, Division of Polar Programs, National Science Foundation, Washington, DC 20550.

**FOR FURTHER INFORMATION CONTACT:** Charles E. Myers at the above address or (202) 357-7934.

**SUPPLEMENTARY INFORMATION:** The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95-541), has developed regulations that implement the "Agreed Measures for the Conservation of Antarctic Fauna and Flora" for all United States citizens. The Agreed Measures, developed in 1964 by the Antarctic Treaty Consultative Parties, recommended establishment of a permit system for various activities in Antarctica and designation of certain mammals and certain geographic areas as requiring special protection. The regulations establish such a permit system and designate Specially Protected Areas and Sites of Special Scientific Interest. The regulations may be found at Title 45, Part 670 of the Code of Federal Regulations. Copies are available from the National Science Foundation.

The purpose of the regulations is to conserve and protect the mammals, birds, and plants of Antarctica and the ecosystem upon which they depend. To that end, unless the following activities are specifically authorized by permit, it is unlawful:

- To take any mammal or bird native to Antarctica (note that "take" means "to remove, harass, molest, harm, pursue, hunt, shoot, wound, kill, trap, capture, restrain, or tag" any native

mammal or bird or to attempt to engage in such conduct)

- To collect any plant native to Antarctica in specially protected areas
- To enter any Specially Protected Area or certain Sites of Special Scientific Interest
- To import into or export from the United States any mammal or bird native to Antarctica or any plant collected in a Specially Protected Area
- To introduce to Antarctica any non-indigenous plant or animal.

The Antarctic Conservation Act of 1978 mandates civil and criminal penalties for noncompliance with the regulations.

All mammals and birds normally found in Antarctica, excluding whales regulated by the International Whaling Commission, are designated as native mammals or native birds. Activities involving these mammals or birds require a permit. Areas of outstanding ecological interest are designated as Specially Protected Areas. No one may enter these areas or collect any native plants in these areas without a permit. Areas of unique scientific value that need protection from interference are designated as Sites of Special Scientific Interest. Entry into certain of these areas without a permit is prohibited.

The permit system is described in the regulations. To obtain a permit, each applicant must provide the scientific names and numbers of native mammals or birds to be taken, including age, size, sex, and condition (e.g., pregnant or nursing) or the scientific names and numbers of native plants to be collected in a Specially Protected Area. Each applicant must include a complete description of the location, the time period, and the manner of taking or collecting specimens. If the specimens are to be imported into the United States, the applicant must also indicate the ultimate disposition of the materials.

Permits for taking or collecting mammals, birds, or plants will be issued by the Director of the National Science Foundation or his designated representative. Each permit will be evaluated in terms of the objectives of the Antarctic Conservation Act, that is, the conservation and protection of antarctic flora and fauna and the antarctic ecosystem. Permits issued under these regulations (or copies of them) must be held in the possession of those authorized to engage in a permitted action. The permits must be displayed upon request to any person responsible for enforcing the regulations.

Anyone who knowingly commits an act prohibited by the Antarctic Conservation Act of 1978 is liable to a

civil penalty of up to \$10,000 for each violation. If the violation was committed without knowledge of the regulations, the fine will not exceed \$5,000. Criminal penalties for willful violation of the regulations may involve a fine of up to \$10,000 and/or imprisonment for not more than 1 year.

The Antarctic Conservation Act of 1978 does not supersede the Marine Mammal Protection Act, the Endangered Species Act, or the Migratory Bird Treaty Act. Permit applications involving native mammals or native birds covered by these acts will be forwarded by NSF to the agencies that administer them. If a proposed activity involves approval under more than one law, then the activity must satisfy the conditions of all applicable laws or a permit cannot be granted. Even if a permit is approved by other appropriate agencies, the Director of the National Science Foundation still must decide whether to issue a permit according to the requirements of the Antarctic Conservation Act of 1978.

The applications received by the National Science Foundation are as follows:

**1. Applicant**

Wayne Z. Trivelpiece, Point Reyes Bird Observatory, 4990 Shoreline Highway, Stinson Beach, California 94970.

**A. Activity for Which Permit Requested**

Taking; Import into U.S.A.; Enter Site of Special Scientific Interest. The applicant is conducting a study of the behavioral ecology and population biology of Adelie, Gentoo and Chinstrap penguins and the interactions among these species and their principal avian predators: skuas, gulls, sheathbills, and Giant Petrels. The applicant proposes to band up to 500 to 2,000 of each penguin species. All birds will be released unharmed after capture. The applicant proposes to salvage dead specimens of penguins and other birds and import them to the U.S. for educational and scientific study. The study site is within Site of Special Scientific Interest No. 8, Western Shore of Admiralty Bay, King George Island, Antarctica.

**B. Location**

Antarctic Peninsula area, King George Island.

**C. Dates**

October 1988-March 1989.

**2. Applicant**

J. Ward Testa, Institute of Marine Science, University of Alaska, Fairbanks, Alaska 99708.

**A. Activity for Which Permit Requested**

Taking, Import into U.S.A. The applicant is conducting a study of the population dynamics of Weddell Seals. The applicant proposes to capture, tag, and release up to 500 Weddell seal adults and 500 pups. It is also proposed to salvage dead specimens. The applicant also proposes to approach Leopard, Ross and Crabeater Seals, if these are encountered, to determine condition, age and sex. Dead specimens of these seals would be salvaged.

**B. Location**

Western Ross Sea area and McMurdo Sound, Antarctica.

**C. Dates**

July 1988–June 1989.

**3. Applicant**

Gary D. Miller, Biology Department, University of New Mexico, Albuquerque, New Mexico 87131.

**A. Activity for Which Permit Requested**

Taking; Enter Site of Special Scientific Interest. The applicant proposes to track Adelie penguins from three Ross Island rookeries using the ARGOS satellite tracking system. Twenty-four specimens will be instrumented with a transmitter. All transmitters will be removed at the end of the season. In addition, other penguins will be captured, marked and released as part of a study of nest site selection. In a related study, up to 50 South Polar Skuas will be banded.

**B. Location**

Cape Bird, Cape Royds and Cape Crozier, Antarctica.

**C. Dates**

October 1988–March 1989.

**4. Applicant**

Douglas Wartzok, Department of Biological Sciences, Purdue University, Fort Wayne, Indiana 46805.

**A. Activity for Which Permit Requested**

Taking; Enter Site of Special Scientific Interest. The applicant is conducting a study of the sensory components involved in underice navigation of Weddell Seals. The applicant proposes to capture up to 20 Weddell seals, attach instrumentation (acoustic pinger underwater recorders). At the conclusion of each experiment, the instruments will be removed and the seals will be released at the capture site.

An additional 10 Weddell seals will be captured to obtain 10 ml blood samples to be used in a study of the properties of seal blood. At the conclusion of the experiment, each seal will be released at the capture site. The applicant proposes one visit to White Island, Site of Special Scientific Interest, to assess the potential of this site for future studies on Weddell seals.

**B. Location**

East side of McMurdo Sound, Antarctica.

**C. Dates**

October–December 1988.

**5. Applicant**

Paul K. Dayton, Scripps Institution of Oceanography, La Jolla, California 92093.

**A. Activity for Which Permit Requested**

Enter Site of Special Scientific Interest. The applicant proposes to enter Cape Crozier, Site of Special Scientific Interest, to deploy oceanographic material and conduct diving operations. No specimens will be taken.

**B. Location**

Cape Crozier, Ross Island, Antarctica.

**C. Dates**

January 1989.

**6. Applicant**

Zoe A. Eppley and Albert D. Bennett, Developmental and Cell Biology, University of California, Irvine, California 92717.

**A. Activity for Which Permit Requested**

Taking; Import into U.S.A. The applicants are conducting a study of the behavioral and physiological adaptations of breeding in cold. Permission is requested to collect:

South Polar Skuas...	75 eggs, 40 chicks, 5 adults
Southern Black-backed Gull...	75 eggs, 40 chicks, 5 adults
Greater Sheathbill.....	5 chicks
Adelie Penguin.....	5 chicks
Antarctic Tern.....	5 chicks
Blue-eyed Shag.....	5 chicks
Chinstrap Penguin.....	5 chicks
Centoo Penguin.....	5 chicks
Giant Petrel.....	5 chicks
Brown Skua.....	5 chicks
Wilson's Storm Petrel.....	5 chicks

**B. Location**

Antarctic Peninsula area, Palmer Station vicinity, South Shetland Island areas accessible from R/V POLAR DUKE.

**C. Dates**

November 1988–June 1989.

Charles E. Myers,  
Permit Office.

[FR Doc. 88-13886 Filed 6-20-88; 8:45 am]

BILLING CODE 7555-01-M

**NUCLEAR REGULATORY COMMISSION****Sacramento Municipal Utility District, et al.; Environmental Assessment and Finding of No Significant Impact**

[Docket No. 50-312]

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from the scheduler requirements of 10 CFR 50.71(e)(4) of the Sacramento Municipal Utility District (SMUD) for the Rancho Seco Nuclear Generating Station located in Sacramento County, California.

**Environmental Assessment****Identification of Proposed Action**

The proposed action would grant an exemption from the requirements of 10 CFR 50.71(e)(4) to annually update the Rancho Seco Updated Safety Analysis Report (USAR). By letter dated April 22, 1988, SMUD requested a six month extension for submitting the next revision to the USAR. The next revision, Amendment 6, is due no later than July 22, 1988. The SMUD request would extend the due date to not later than January 22, 1989. Subsequent revisions would be due to an annual schedule beginning on January 22, 1989.

**The Need for the Proposed Action**

The request for extension of the submittal date for the USAR revision is based on the timing of a major Rancho Seco systems modification outage which ended on March 30, 1988. Most of the systems modified during the outage are addressed by the USAR. Under the existing USAR revision schedule, a licensee submittal is required no later than July 22, 1988. Plant modifications, in place six months prior to the due date, are required to be addressed in the submittal. As a result, a revised USAR submittal on July 22, 1988, would include a plant description and safety analysis which is current through January 22, 1988. The first three months of 1988 were a period of extensive system changes at Rancho Seco and a USAR version current through January 1988 would describe a transient system status at the plant. A USAR, current through January 1988, would not be useful as a document

to describe plant systems nor as a comprehensive safety evaluation of plant changes.

#### *Environmental Impact of the Proposed Action*

The proposed exemption affects only the required date for submitting the USAR revision and does not affect the risk of facility accidents. Plant modifications completed during the period which would have been encompassed by the normal submittal schedule were evaluated independently by the utility and reviewed by the NRC staff. The evaluation of these changes is included in NUREG-1286, the Rancho Seco Restart Safety Evaluation Report. The post-accident radiological releases will not differ from those determined previously, and the proposed exemption does not otherwise affect facility radiological effluents, or any significant occupational exposures. With regard to potential non-radiological impacts, the proposed exemption does not affect plant non-radiological effluents and has no other environmental impact. Therefore, the Commission concludes there are no measurable radiological or non-radiological environmental impacts associated with the proposed exemption.

Since the Commission has concluded there is no measurable environmental impact associated with the proposed exemption, any alternatives either will have no environmental impact or will have a greater environmental impact. The principal alternative to the exemption would be to require an earlier date for submittal of the USAR. Such an action would not enhance the protection of the environment and would result in unnecessary drain of licensee and Commission resources.

#### *Alternate Use of Resources*

This action does not involve the use of resources not considered previously in the Final Environmental Statement for the Rancho Seco Nuclear Generating Station.

#### *Agencies and Persons Consulted*

The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

#### *Finding of No Significant Impact*

The Commission has determined not to prepare an environmental impact statement for the proposed exemption. Based upon the environmental assessment, the NRC staff concludes that the proposed action will not have a significant effect on the quality of the human environment.

Dated at Rockville, Maryland, this 8th day of June, 1988.

For the Nuclear Regulatory Commission.

**Charles M. Trammell,**

*Acting Director, Project Directorate V,  
Division of Reactor Projects—III, IV, V and  
Special Projects, Office of Nuclear Reactor  
Regulation.*

[FR Doc. 88-13906 Filed 6-20-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-528, 50-529, 50-530]

#### **Arizona Public Service Corp.; (Palo Verde Nuclear Generating Station, Unit Nos 1, 2, and 3) Director's Decision**

Notice is hereby given that the Director, Office of Enforcement, has denied in part a petition under 10 CFR 2.206 filed by Ms. Barbara S. Bush, Ms. Lyn McKay, and Mr. Myron L. Scott on behalf of the Coalition for Responsible Energy Education (CREE or Petitioner). In its petition, CREE asked the Nuclear Regulatory Commission (NRC) to provide relief by (1) imposing a stringent civil penalty on Arizona Public Service Corporation (APS); (2) requiring APS to post notices to employees advising them of protection afforded under 10 CFR 50.7 and the Energy Reorganization Act; (3) requiring the posting of notices of public apology by APS for alleged violations of 10 CFR 50.7 and the Energy Reorganization Act; and (4) deny or revoke all Palo Verde licenses.

As grounds for its request, CREE asserts that APS discriminated against certain employees by requiring them to submit to polygraph testing as a means of discouraging them from reporting unsafe conditions at the Palo Verde Nuclear Generating Station.

The CREE request, with the exception of the request to have notices posted has been denied. The reasons for this decision are fully described in the "Director's Decision Under 10 CFR 2.206," issued on this date, which is available for public inspection in the Commission's Public Document Room, 1717 H Street NW., Washington, DC 20555, and in the local public document room for Palo Verde located at the Phoenix Public Library, Business, Science and Technology Department, 12 East McDowell Road, Phoenix, Arizona 85004.

Dated at Rockville, Maryland this 15th day of June 1988.

For the Nuclear Regulatory Commission.

**James Lieberman,**

*Director, Office of Enforcement.*

[FR Doc. 88-13907 Filed 6-20-88; 8:45 am]

BILLING CODE 7590-01-M

#### **Regulatory Guides; Issuance, Availability**

The Nuclear Regulatory Commission has issued revisions to three guides in its Regulatory Guide Series. 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 for permits and licenses.

Regulatory Guide 1.84, Revision 25, "Design and Fabrication Code Case Acceptability, ASME Section III, Division 1," and Regulatory Guide 1.85, Revision 25, "Materials Code Case Acceptability, ASME Section III, Division 1," list those code cases that are generally acceptable to the NRC staff for implementation in the licensing of light-water-cooled nuclear power plants. Revision 6 to Regulatory Guide 1.147, "Inservice Inspection Code Case Acceptability, ASME Section XI, Division 1," lists those code cases that are generally acceptable to the NRC staff for implementation in the inservice inspection of light-water-cooled nuclear power plants. These three guides are periodically revised to update the listings of acceptable code cases and to include the results of public comment and additional staff review.

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. 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.

Regulatory guides are available for inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC. Copies of issued guides may be purchased from the Government Printing Office at the current GPO price. Information on current GPO prices may be obtained by contacting the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013-7082, telephone (202) 275-2060 or (202) 275-2171. Issued guides may also be purchased from the National Technical Information Service on a standing order basis. Details on this service may be obtained by writing NTIS, 5285 Port Royal Road, Springfield, VA 22161.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland this 14th day of June 1988.

For the Nuclear Regulatory Commission.

Eric S. Beckjord,

Director, Office of Nuclear Regulatory Research.

[FR Doc. 88-13908 Filed 6-20-88; 8:45 am]

BILLING CODE 7590-01-M

**Carolina Power & Light Co.;  
Consideration of Issuance of  
Amendment to Facility Operating  
License and Proposed No Significant  
Hazards Consideration Determination  
and Opportunity for Hearing**

[Docket No. 50-400]

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-63, issued to Carolina Power & Light Company (the licensee), for operation of the Shearon Harris Nuclear Power Plant, located in Wake and Chatham Counties, North Carolina.

The amendment would revise the operability requirements of Technical Specification 3.3.3.7, Chlorine Detection Systems. The current specification requires that two independent chlorine detector trains be operable in all modes with each train consisting of a detector at each control room area ventilation system intake (both normal and emergency) and a detector at the chlorine storage area. The proposed change will require the detectors at the chlorine storage area to be operable only when there is liquidified chlorine in amounts in excess of 20 pounds stored at the chlorine storage area. The operability requirements for the chlorine detectors located in the control room intakes are not affected by the proposed amendment.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this

proposed determination is provided below.

Operation in accordance with the proposed amendment involves no significant hazards consideration because the changes will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated because the only change is that the chlorine detectors located at the chlorine storage area are not required to be operable when 20 pounds or less of liquidified chlorine is stored at the chlorine storage area. Moreover, the inoperability, per se, of the chlorine detectors cannot increase the probability of previously analyzed accidents. Currently, Regulatory Guide 1.95 exempts from consideration those circumstances where liquidified chlorine in amounts not to exceed 20 pounds are located at the plant. Consequently, storage of up to 20 pounds of liquidified chlorine, without the requirement for chlorine detectors, at various locations throughout the plant site is currently allowed. Thus, there is no significant increase in the consequences of any accident previously evaluated. Therefore, the proposed change does not involve a significant increase in the probability or consequences of any accidents previously evaluated;

(2) Create the possibility of a new or different kind of accident from any accident previously evaluated because currently the storage of liquidified chlorine in quantities of 20 pounds or less at various locations at the plant site is permitted without the requirement for attendant chlorine detection systems. Thus, the accident scenarios associated with the proposed amendment would be the same as those associated with the other similar smaller liquidified chlorine sources at the plant site. In addition, the chlorine detectors are still required to be operable when liquidified chlorine in amounts greater than 20 pounds are stored at the chlorine storage area; or

(3) Involve a significant reduction in the margin of safety because previously, it was anticipated that liquidified chlorine far in excess of 20 pounds would be stored at the chlorine storage area. Therefore, in accordance with Regulatory guide 1.95, chlorine detectors were required to be installed to isolate the control room in the event of an accident release from the chlorine storage area. This protective function is unaffected by this proposed change, i.e., the chlorine detectors will be required to be operable whenever liquidified chlorine is stored in quantities greater than 20 pounds at the chlorine storage area. The proposed amendment would not require the subject chlorine detectors to be operable whenever liquidified chlorine in

the amount of 20 pounds or less is stored at the chlorine storage area. The effect of the accidental release of 20 pounds or less of chlorine from the chlorine storage is comparable to that from the release of the same amount of chlorine that may be stored at the plant site without any chlorine detectors. Thus, with the requirement that the chlorine detectors be operable whenever liquidified chlorine in excess of 20 pounds is stored at the chlorine storage area to isolate the control room, if required, the proposed amendment would not involve a significant reduction in the margin of safety.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Rules and Procedures Branch, Division of Rules and Records, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of the **Federal Register** notice. Written 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 written comments received may be examined at the NRC Public Document Room, 1717 H Street NW., Washington, DC. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By July 21, 1988, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing

Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing

held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1 (800) 325-6000 (in Missouri 1 (800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Elinor G. Adensam: Petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Mr. R. E. Jones, Carolina Power & Light Company, P.O. Box 1551, Raleigh, North Carolina 27602, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petitioner has made a substantial showing of good cause for

the granting of a late petition and/or request. That determination will be based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated May 10, 1988, which is available for public inspection 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.

Dated at Rockville, Maryland, this 16th day of June 1988.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Director, Project Directorate II-1, Division of Reactor Projects I/II.

[FR Doc. 88-13909 Filed 6-20-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 30-08748 and 30-13045, License Nos. 20-15215-01 and 20-15215-02MD, EA 87-243]

**Gamma Diagnostic Laboratories, Inc.;  
Order Imposing a Civil Monetary  
Penalty**

I

Gamma Diagnostic Laboratories, Attleboro Falls, Massachusetts 02763 (the "licensee") is the holder of Byproduct Material Licenses Nos. 20-15215-01 and 20-15215-02MD (the "licenses") issued by the Nuclear Regulatory Commission (the "Commission" or "NRC") which authorize the licensee to conduct certain research and development activities using licensed material and distribute licensed material to authorized persons. The licenses originally issued on July 18, 1972 and March 26, 1979, respectively, were most recently renewed on March 17, 1988 and November 30, 1984, and are due to expire on March 31, 1993 and October 31, 1989.

II

An NRC safety inspection of the licensee's activities under the licenses was conducted on November 19-20, 1987. During the inspection, the NRC staff determined that the licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty was served upon the licensee by letter dated February 11, 1988. The Notice stated the nature of the violation, the provision of the NRC's requirements that the licensee had violated, and the amount of the civil penalty proposed for

the violation. The licensee responded to the Notice of Violation and Proposed Imposition of Civil Penalty by letters dated March 11, 1988 and April 13, 1988. In its response, the licensee did not deny the violation but seriously question whether it occurred.

### III

After consideration of the licensee's response and the statements of fact, explanations, and argument for mitigation contained therein, the staff has determined, as set forth in the Appendix to this Order, that the violation occurred as stated and was appropriately classified as Severity Level III, but, given the current financial condition of the Company the penalty proposed for the violation described in the Notice of Violation and Proposed Imposition of Civil Penalty should be reduced to \$2,500 and the licensee should be allowed to pay the imposed penalty in twenty-four monthly installments.

### IV

In view of the foregoing, and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2282, Pub. L. 96-295), and 10 CFR 2.205, it is hereby ordered that:

The licensee pay a civil penalty, either:

a. In the full amount of Two Thousand Five Hundred Dollars (\$2,500), within 30 days of the date of this Order, by check, draft, or money order, payable to the Treasurer of the United States, and mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555; or,

b. In twenty-three equal monthly installments of \$112.50 each, and a twenty-fourth installment of \$112.48 by check, draft, or money order payable to the Treasurer of the United States, which includes interest accruing from July 1, 1988 at the rate of 7.5 percent per year, as described in the schedule of monthly installments provided with the enclosed "Promissory Note in Payment of Preexisting Debt," which the licensee must provide with the first payment to the Director, Division of Accounting and Finance, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, within thirty days of the date of the Order. The licensee's signature of the "Promissory Note in Payment of Preexisting Debt" constitutes a waiver of a right to request a hearing as provided below, to contest the amount of the civil penalty and the underlying violation, and empowers the United States to obtain a judgment against it

without a hearing in the event it fails to make a required payment.

### V

The licensee may request a hearing within 30 days of the date of this Order. A request for a hearing shall be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555, with a copy to the Regional Administrator, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the licensee fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

(a) Whether the licensee was in violation of the Commission requirements as set forth in the Notice of Violation and Proposed Imposition of Civil Penalty as referenced in section II above; and

(b) Whether, on the basis of such violation, this Order should be sustained.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland this 15th day of June 1988.

James Lieberman,

Director, Office of Enforcement.

### Appendix—Evaluation and Conclusion

In two letters dated March 11 and April 13, 1988, respectively, the licensee provides its response to the Notice of Violation and Proposed Imposition of Civil Penalty dated February 11, 1988. The Notice was based on a violation involving an exposure in excess of regulatory limits to the hand of a laboratory supervisor. The licensee does not specifically deny the violation set forth in the Notice, but seriously questions whether the overexposure occurred. Further, the licensee requests a reduction in the severity level of the violation and mitigation of the civil penalty, for reasons summarized herein. Provided below is a restatement of the violation; a summary of the licensee's response in support of each of their requests; the NRC evaluation of each licensee's request; and the overall NRC conclusion regarding the licensee's response.

### I. Restatement of Violation

10 CFR 20.101(a) requires that no licensee possess, use, or transfer licensed material in such a manner as to cause any individual in a restricted area to receive in any period of one calendar quarter, a total exposure to the hands and forearms in excess of 18.75 rems.

Contrary to the above, during the third quarter of 1987, a laboratory supervisor working in the hot cell and sterile boxes located in a restricted area received a cumulative radiation exposure to the left hand of 20.29 rems.

This is a Severity Level III violation. (Supplement IV) Civil Penalty—\$5,000

### II. Summary of Licensee Claim That the Overexposure May Not Have Occurred

The licensee, in its responses, does not specifically deny the violation, but does seriously question whether the overexposure occurred. The licensee indicates that (1) the apparent overexposure could simply have been the result of a contaminated TLD; (2) there were no unusual incidents during the period the overexposure occurred; (3) the alleged overexposure was reported as being in excess of regulatory limits by 8.2%, which is well within the 10-25% statistical error of the TLD, and therefore, it is statistically possible that the overexposure did not occur; and (4) the individual had an excellent exposure history, was continually aware of the safety concerns, and met frequently with the RSO.

### NRC Evaluation

While the NRC acknowledges that a contaminated badge could lead to such a TLD reading, the licensee has not provided evidence that such a contamination actually was the cause of the high reading. Further, although it is possible that the reported exposure was less than 18.75 rems, given the statistical error in the TLD, is equally possible that the actual exposure was higher than the reported amount of 20.29 rems. Therefore, neither of these arguments would support a contention that the overexposure did not occur. Furthermore, the fact that there were no apparent unusual incidents during the quarter, or the fact that the individual had an excellent exposure history and was aware of safety concerns, does not preclude that fact that the overexposure could have occurred. Therefore, the NRC finds that the licensee has not provided a sufficient basis for withdrawal of the violation.

**III. Summary of Licensee Request That the Severity Level of the Violation Be Reduced From Level III to Level IV**

The licensee claims that sections C.9 and D.1 and Supplement IV of the enforcement policy permits a reduction in Severity Level from Level III to Level IV if a worker's exposure above regulatory limits is an isolated incident rather than a programmatic concern. The licensee maintains that since this was the only overexposure at the facility in fifteen years, it constitutes an isolated incident rather than a programmatic concern, and therefore, the severity level of the violation should be reduced.

**NRC Evaluation**

Section C.9 of Supplement IV of the enforcement policy clearly states that when a cumulative exposure reflects a programmatic, rather than isolated weakness, in radiation protection, the violation should be classified at Severity Level III. The NRC acknowledges that this was the first overexposure that occurred at the licensee's facility. However, the underlying NRC concern, namely, inadequate oversight by the RSO, as evidenced by passive rather than aggressive management of the radiation safety program, is a programmatic issue since a similar lack of oversight contributed to other violations identified by the NRC is August 1986, which formed the basis for a \$5,000 civil penalty issued to this licensee on December 4, 1986. Therefore, an adequate basis was not provided for reduction of the Severity Level of the violation.

**IV. Summary of Licensees Response in Request for Mitigation of the Civil Penalty**

The licensee claims that the violations should be mitigated on the basis of their (1) reporting of the exposure to the NRC, (2) their immediate corrective actions (which included temporarily removing the affected person from further work, rescheduling the performance of production activities by using more personnel, and assigning redundant monitoring devices to the affected individual for more frequent evaluation), and (3) their prior enforcement history. The licensee also indicates that their financial condition is currently strained because they were unfairly forced to suspend operations for twenty weeks by the United States Food and Drug Administration. In this regard, the licensee requests that the NRC consider their ability to pay in assessing the civil penalties.

**NRC Evaluation**

Although the licensee identified and reported the event to the NRC, the exposure could have been identified sooner had the RSQ been more aggressive. Moreover, the report of the overexposure was not viewed as unusually prompt since it was not made until the last possible day allowed by 10 CFR 20.405. Further, although the corrective actions taken in response to this event were adequate, they were not viewed as unusually prompt and extensive in that the culpability of management, including the RSO, was not addressed. Further, the enforcement history is not considered good in light of the civil penalty issued in December 1986. Therefore, these licensee arguments do not provide a basis for mitigation of the civil penalty.

However, the NRC Enforcement Policy recognizes that a licensee's ability to pay is a proper consideration in determining the amount of a civil penalty. The licensee's financial information submitted in its April 13, 1988 letter demonstrates that imposition of a civil penalty in the amount proposed would create a severe financial burden. Recognizing the current financial situation, the penalty is being reduced by 50 percent. The NRC also finds, consistent with its Enforcement Policy, that the imposition of the reduced civil penalty will not result in economic termination of the licensee's business or financial hindrance of the licensee's ability to safely conduct licensed activities. However, the NRC has concluded that given the economic position of the company, the licensee should be allowed to pay the reduced penalty in twenty-four monthly installments.

**V. NRC Conclusion**

A civil penalty in the amount of \$2,500 should be imposed. However, given the current financial condition of the Company, the licensee may pay the civil penalty in twenty-four monthly installments.

**Promissory Note in Repayment of Preexisting Debt**

[License Nos. 20-15215; 20-15215-02MD EA 87-243]

**1. Obligation**

For value received, Gamma Diagnostic Laboratories, Inc. (hereinafter referred to as the Maker) promises to pay to the order of the Treasurer of the United States the principal sum of \$2,500 dollars, with interest accruing from July 1, 1988, at the rate of 7.5 percent per year. This note is

being given for the purpose of refinancing and paying off an amount which constitutes the sum of the principal due and all unpaid interest and other charges owed to the United States on the civil penalty debt which has been assigned the control number captioned above. The Maker further acknowledges and admits the validity and amount of the preexisting debt, which the principal sum stated in this note is intended to repay. The Maker further acknowledges that execution of this note constitutes a waiver of the right to contest the amount of the civil penalty and the underlying violations on which it is based under section 234c of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2282c.

**2. Installments**

This note is to be paid in twenty-three monthly installments of \$112.50 each, and a twenty-fourth installment of \$112.48 payable to the order of the Treasurer of the United States on or before the first day of the month, beginning on August 1, 1988 and continuing until either the principal sum and all interest and other charges assessed under the provisions of this note have been fully paid, or this note is considered to be in default. Payments will be mailed to the following address: U.S. Nuclear Regulatory Commission, ATTN: Division of Accounting and Finance, Mail Stop MNBB 11104, Washington, DC 20555.

Following is an amortization schedule exclusive of administrative charges and late-payment penalties:

Due date	Principal	Interest	Total installment
Aug. 1, 1988.....	96.87	15.63	2,403.13
Sept. 1, 1988.....	97.48	15.02	2,305.65
Oct. 1, 1988.....	98.9	14.41	2,207.56
Nov. 1, 1988.....	98.70	13.80	2,108.86
Dec. 1, 1988.....	99.32	13.18	2,009.54
Jan. 1, 1989.....	99.94	12.56	1,909.60
Feb. 1, 1989.....	100.56	11.94	1,809.04
Mar. 1, 1989.....	101.19	11.31	1,707.85
Apr. 1, 1989.....	101.83	10.67	1,606.02
May 1, 1989.....	102.46	10.04	1,503.56
June 1, 1989.....	103.10	9.40	1,400.46
July 1, 1989.....	103.75	8.75	1,296.71
Aug. 1, 1989.....	104.40	8.10	1,192.31
Sept. 1, 1989.....	105.05	7.45	1,087.26
Oct. 1, 1989.....	105.70	6.80	981.56
Nov. 1, 1989.....	106.37	6.13	875.19
Dec. 1, 1989.....	107.03	5.47	768.16
Jan. 1, 1990.....	107.70	4.80	660.46
Feb. 1, 1990.....	108.37	4.13	552.09
Mar. 1, 1990.....	109.05	3.45	443.04
Apr. 1, 1990.....	109.73	2.77	333.31
May 1, 1990.....	110.42	2.08	222.89
June 1, 1990.....	111.11	1.39	111.78
July 1, 1990.....	111.78	0.70	0

### 3. Administrative Charges

Administrative charges to cover the costs incurred by the United States in handling and processing past-due amounts will be assessed at the rate of \$12.00 for each payment more than thirty (30) days past due; an additional \$15.00 for each payment more than sixty (60) days past due; and an additional \$18.00 for each payment more than ninety (90) days past due.

### 4. Late Payment Penalties

Late payment penalties will be assessed on any amount more than ninety (90) days past due, at the rate of six (6) percent per year.

### 5. Payment Crediting

The payment that the Maker makes under this note will be credited as of the date received by the U.S. Nuclear Regulatory Commission first to outstanding penalties and administrative charges; second to accrued interest; and third to the outstanding principal sum. Any payments that the Maker made to the United States on this debt during the period from the date from which interest accrues under this note (as specified in paragraph 1) until the effective date of this note (as specified in paragraph 11) shall be applied to the principal sum, interest, and other charges accruing under this note in accordance with the provisions of this paragraph.

### 6. Default, Acceleration, and Other Remedies

If any installment shall remain unpaid for a period of thirty (30) days or more, this note shall, at the option of the United States, be considered to be in default. In the event of default, the full amount of the principal sum, together with any accrued interest and other charges assessed under this note, less any payments actually received by the United States from the Maker, shall be due and payable in full immediately, without the need for further demands or notices to the Maker. Furthermore, in that event, the Maker agrees that the United States may exercise any collection options legally available to it, including, but not limited to, taking administrative offset, hiring a private debt collection agency, filing adverse credit reports to local and national credit bureaus, referring the Maker's account for legal action, and suspending or revoking any licenses or other privilege which the U.S. Nuclear Regulatory Commission has granted to the Maker.

### 7. Default Costs and Fees

In the event of default, the Maker agrees to pay all reasonable collection costs, court costs, and attorney's fees incurred by the United States as a result of the default and any appropriate collection actions taken by the United States.

### 8. Confess Judgment Provision

The Maker, if permitted by Controlling Law (as specified in paragraph 9), does hereby authorize and empower a United States Attorney, any of his assistants, or any attorney of any court of record, State or federal, to appear for the Maker and to enter and confess judgment against the Maker for the entire amount of this obligation, with interest, less payments actually made, at any time after same becomes due and payable, as herein provided, in any court of record, Federal or state; to waive the issuance and service of process upon the Maker in any suit on the obligation; to waive any venue requirement in such suit; to release all errors which may intervene in entering upon such judgment or in issuing any execution thereon; and to consent to immediate execution and said judgment. The Maker does hereby ratify and confirm all that said attorney may do by virtue hereof.

### 9. Controlling Law

Except where controlled by Federal law, all disputes concerning this note shall be controlled by the law of the jurisdiction in which the Maker is incorporated at the time this note is signed.

### 10. Changes

The provision of this note may not be changed except by a written agreement which specifies the agreed-upon changes and which is signed by the Maker and an authorized representative of the United States.

### 11. Legal Effect

This note shall not be effective or legally binding upon the Maker or the United States until the date it is signed by an authorized official of the Maker.

### 12. Signatures and Certification

I, as an official of the Maker, do hereby certify that I have read and understood the terms of this note.

Signed: This \_\_\_\_\_ day of \_\_\_\_\_, 1988

Signature \_\_\_\_\_  
Printed Name \_\_\_\_\_  
Address \_\_\_\_\_

I am an authorizing official of the Maker and do certify that the Maker is incorporated in the Commonwealth of Massachusetts at the time this note is

signed and that the signature above is that of an individual authorized to enter into a promissory note for the Maker.

Signed:

Signature \_\_\_\_\_  
Printed Name \_\_\_\_\_  
Address \_\_\_\_\_

[FR Doc. 88-13910 Filed 6-20-88; 8:45 am]

BILLING CODE 7590-01-M

## Washington Public Power Supply System; Issuance of Amendment to Facility Operating License

[Docket No. 50-307]

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 60 to Facility Operating License No. NPF-21, issued to Washington Public Power Supply System (the licensee), which revised the Technical Specifications for operation of the Nuclear Project No. 2, located in Benton County, Washington.

The amendment was effective as of the date of issuance.

The amendment modified the license to allow an additional year of operation without the neutron flux monitoring instrumentation fully meeting the environmental qualification requirements of Regulatory Guide 1.97.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter 1, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the Federal Register on April 5, 1988 (53 FR 11154). No request for a hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment related to the action and has determined that an environmental impact statement will not be prepared and that issuance of this amendment will not have a significant effect on the quality of the human environment.

For further details with respect to the action see: (1) The application for amendment dated December 23, 1987, as supplemented January 15, 1988, (2) Amendment No. 60 to License No. NPF-21, (3) the Commission's related Safety Evaluation and (4) the Commission's Environmental Assessment. All of these items are available for public inspection at the Commission's Public Document

Room, 1717 H Street NW., Washington, DC 20555, and at the Richland City Library, Swift and Northgate Streets, Richland, Washington 99352. A copy of items (2), (3) and (4) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, attention: Director, Division of Reactor Projects III, IV, V and Special Projects.

Dated at Rockville, Maryland this 10th day of June, 1988.

For the Nuclear Regulatory Commission.

**Robert B. Samworth,**

Senior Project Manager, Project Directorate V, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 88-13911 Filed 6-20-88; 8:45 am]

BILLING CODE 7590-01-M

## POSTAL RATE COMMISSION

[Order No. 788; Docket No. A88-3]

### Order Accepting Appeal and Establishing Procedural Schedule; Willow Island, WV

Issued June 14, 1988.

Before Commissioners: Janet D. Steiger, Chairman; Patti Birge Tyson, Vice-Chairman; John W. Crutcher; Henry R. Folsom; W.H. "Trey" LeBlanc III.

In the matter of: Willow Island, West Virginia 26190 (Gerald A. Willey, Petitioner).

Docket Number: A88-3.

Name of Affected Post Office: Willow Island, West Virginia 26190.

Name(s) of Petitioner(s): Gerald A. Willey.

Type of Determination: Closing.

Date of Filing of Appeal Papers: June 9, 1988.

Categories of Issues Apparently Raised:

1. Effect on postal services (39 U.S.C. sec. 404(b)(2)(C))

Other legal issues may be disclosed by the record when it is filed; or, conversely, the determination made by the Postal Service may be found to dispose of one or more of these issues.

In the interest of expedition, in light of the 120-day decision schedule (39 U.S.C. sec. 404(b)(5)), the Commission reserves the right to request of the Postal Service memoranda of law on any appropriate issue. If requested, such memoranda will be due 20 days from the issuance of the request; a copy shall be served on the petitioner. In a brief or motion to dismiss or affirm, the Postal Service may incorporate by reference any such memoranda previously filed.

The Commission orders:

(A) The record in this appeal shall be filed on or before June 24, 1988.

(B) The Secretary shall publish this Notice and Order and Procedural Schedule in the **Federal Register**.

By the Commission.

**Charles L. Clapp,**

Secretary.

## Appendix

June 9, 1988—Filing of Petition

June 14, 1988—Notice and Order of Filing of Appeal

July 5, 1988—Last day of filing of petitions to intervene (see 39 CFR 3001.111(b))

July 14, 1988—Petitioner's Participant Statement or Initial Brief (see 39 CFR 3001.115 (a) and (b))

August 3, 1988—Postal Service Answering Brief (see 39 CFR 3001.115(c))

August 18, 1988—Petitioner's Reply Brief should petitioner choose to file one (see 39 CFR 3001.115(d))

August 25, 1988—Deadline for motions by any party requesting oral argument. The Commission will schedule oral argument only when it is a necessary addition to the written filings (see 39 CFR 3001.116)

October 6, 1988—Expiration of 120-day decisional schedule (see 39 U.S.C. 404(b)(5))

[FR Doc. 88-13887 Filed 6-20-88; 8:45 am]

BILLING CODE 7715-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-16437/812-6938]

### Dreyfus A Bonds, Inc., et al.; Application

June 14, 1988.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for exemption under the Investment Company Act of 1940 (the "1940 Act").

*Applicants:* Dreyfus A Bonds Plus, Inc., Dreyfus California Tax Exempt Bond Fund, Inc., Dreyfus California Tax Exempt Money Market Fund, Dreyfus Cash Management, Dreyfus Cash Management Plus, Inc., Dreyfus Connecticut Tax Exempt Bond Fund, Inc., The Dreyfus Convertible Securities Fund, Inc., Dreyfus Dollar International Fund, Inc., Dreyfus GNMA Fund, Inc., Dreyfus Government Cash Management, Dreyfus Growth Opportunity Fund, Inc., Dreyfus Institutional Money Market Fund, Dreyfus Insured Tax Exempt Bond Fund, Inc., Dreyfus Intermediate Tax Exempt Bond Fund, Inc., Dreyfus Liquid Assets, Inc., Dreyfus Massachusetts Tax Exempt Bond Fund, Dreyfus Money

Market Instruments, Inc., Dreyfus New Jersey Tax Exempt Bond Fund, Inc., Dreyfus New Jersey Tax Exempt Bond Fund, L.P., Dreyfus New Jersey Tax Exempt Money Market Fund, Inc., Dreyfus New Leaders Fund, Inc., Dreyfus New York Insured Tax Exempt Bond Fund, Dreyfus New York Tax Exempt Bond Fund, Inc., Dreyfus New York Tax Exempt Intermediate Bond Fund, Dreyfus New York Tax Exempt Money Market Fund, Dreyfus Short-Intermediate Government Fund, Dreyfus Short-Intermediate Tax Exempt Bond Fund, Dreyfus Tax Exempt Bond Fund, Inc., Dreyfus Tax Exempt Cash Management, Dreyfus Tax Exempt Money Market Fund, Inc., The Dreyfus Third Century Fund, Inc., Dreyfus Treasury Cash Management, Dreyfus U.S. Government Bond Fund, L.P., Dreyfus U.S. Government Intermediate Securities, L.P., Dreyfus U.S. Guaranteed Money Market Account, L.P., First Lakeshore Diversified Asset Fund, First Lakeshore Money Market Fund, First Lakeshore Tax Exempt Money Market Fund, General Aggressive Growth Fund, Inc., General California Tax Exempt Money Market Fund, General Government Securities Money Market Fund, Inc., Genreal Money Market Fund, Inc., General New York Tax Exempt Money Market Fund, General Tax Exempt Bond Fund, Inc., General New York Tax Exempt Intermediate Bond Fund, Inc., General Tax Exempt Money Market Fund, Inc., McDonald Money Market Fund, Inc., and McDonald Tax Exempt Money Market Fund, Inc. (collectively, the "No-Loan Funds"), Dreyfus Foreign Investors GNMA Fund, L.P. and Dreyfus Foreign Investors U.S. Government Bond Fund, L.P. (collectively, the "Foreign Investors Load Funds"), Premier California Tax Exempt Bond Fund, Premier GNMA Fund, Premier Income Fund, Premier New York Tax Exempt Bond Fund, Premier State Tax Exempt Bond Fund and Premier Tax Exempt Bond Fund (collectively, the "Premier Load Funds"), Dreyfus Strategic Income, Dreyfus Strategic Investing, and Dreyfus Strategic World Income (collectively, the "Strategic Load Funds"), Dreyfus Strategic Aggressive Investing, L.P., Dreyfus strategic World Investing, L.P. and Dreyfus Strategic World Revenues, L.P. (collectively, the "Strategic L.P. Load Funds"), First Lakeshore Tax Exempt Bond Fund, Inc. ("Lakeshore"), The Dreyfus Fund Incorporated ("TDFI"), The Dreyfus Leverage Fund, Inc. ("Leverage") and Dreyfus Capital Value Fund, Inc. ("Capital Value," together with the Foreign Investors Load Funds, the Premier Load Funds, the

Strategic Load Funds, the Strategic L.P. Load Funds, TDFI, Lakeshore and Leverage, the "Load Funds"), the investment companies which currently do not have an exchange program as described below, but may adopt such in the future, which are Daiwa Money Fund Inc., Dreyfus Corporate Cash Trust, Dreyfus Index Fund, FN Network Tax Free Money Market Fund, Inc. and The Westwood Fund (together with the No-Load Funds and the Load Funds, the "Funds" and each individually a "Fund"), The Dreyfus Corporation ("Dreyfus"), and Dreyfus Service Corporation (the "Distributor") and each future investment company for which Dreyfus (or any subsidiary or affiliate) serves as investment adviser, sub-investment adviser or administrator or for which the Distributor (or any subsidiary or affiliate) services as a distributor of such investment company's shares, which such future investment companies would have sales load structures and exchange programs substantially identical to those investment companies currently in existence.

**Relevant 1940 Act Section:** Order requested under section 11(a).

**Summary of Application:** Applicants seek an order approving proposed offers of exchange of shares among certain of the Funds on a basis other than their respective net asset value per share at the time of exchange.

**Filing Dates:** The Application was filed on December 21, 1987 and amended on June 15, 1988.

**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 July 5, 1988. 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 Fifth Street, NW., Washington, DC 20549; the Funds, 666 Old Country Road, Garden City, New York 11530; Dreyfus, 767 Fifth Avenue, New York, New York 10153; the Distributor, 600 Madison Avenue, New York, New York 10022.

**FOR FURTHER INFORMATION CONTACT:** Staff Attorney, Fran Pollack-Matz, (202) 272-3024 or Branch Chief Karen L.

Skidmore, (202) 272-3023, Office of Investment Company Regulation.

**SUPPLEMENTARY INFORMATION:** The 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) 253-4300).

#### Applicants' Representations

1. Each Fund is an open-end management investment registered under that Act. Dreyfus either serves as adviser, sub-investment adviser or administrator, or the Distributor serves as the distributor of the shares, of each Fund.

2. The Applicants seek the flexibility to allow shareholders of any No-Load Fund and any Load Fund to exchange all or a portion of their shares (including shares acquired through the reinvestment of dividends and capital gains distributions) for shares of certain other Funds for which Dreyfus serves as investment adviser, sub-investment adviser or administrator or for which the Distributor serves as principal underwriter as specified in the application. Any future investment companies sold with a sales load which offer an exchange privilege and which seek to utilize the exemption provided hereby will have sales load structures or exchange privileges substantially identical to one or more of the other investment companies included herein and will be subject to the representations and conditions included herein. All funds included within an exchange privilege will have the same investment adviser or principal underwriter (as each term is defined in the 1940 Act).

3. Shares of the No-Load Funds are sold at their relative net asset value without a sales charge. Shares of the Foreign Investors Load Funds, Lakeshore, Leverage, the Strategic Load Funds, the Premier Load Funds and Capital Value are offered at their relative net asset value, plus a maximum sales load of 4.50% of the public offering price per share. Shares of the Strategic L.P. Load Funds are offered at their net asset value, plus a maximum sales load of 3.00% of the public offering price per share. Shares of TDFI are offered at their relative net asset value, plus a maximum sales load of 7.75% of the public offering price for certain purchases of under \$500 and without a sales load for purchases in excess of this amount.

4. The applicants seek an Order explicitly permitting on a prospective basis the following transactions:

(i) The exchange of shares of any Funds without a sales load for shares of the Funds that are offered without a sales load.

(ii) The exchange of shares of any Funds purchased without a sales load for shares of any of the other Funds sold with a sales load, with the applicable sales load being deducted.

(iii) The exchange without a sales load of shares of any Funds purchased with a sales load for shares of any other Funds sold without a sales load.

(iv) The exchange of shares of any Funds previously purchased with a sales load, shares of any Funds acquired by a previous exchange of shares purchased with a sales load, and additional shares acquired through reinvestment of dividends or distributions of any such Funds (collectively referred to herein as the "Purchased Shares") for shares of any other Funds sold with a sales load (referred to herein as the "Offered Shares"). If the sales load applicable to the Offered Shares exceeds the maximum sales load that could have been imposed in connection with the Purchased Shares (at the time the Purchased Shares were acquired), without giving effect to any reduced sales loads, the difference would be deducted.

5. If a sales load is imposed on an exchange, any rights of accumulation as described in the Funds' prospectuses allowing for reduced sales loads will be considered in determining the sales load applicable to the exchange. If a shareholder has executed a Letter of Intent whereby he immediately qualifies for a reduced sales load upon the purchase of shares and effects an exchange prior to completing the Letter of Intent, his account will be charged the sales load in the appropriate amount in connection with the exchange. All waivers of sales loads set forth in the prospectuses for the Load Funds will apply in connection with the program described above. Also, each exchange will be subject to the minimum investment requirements of the Fund's shares which are to be acquired. Exchanging shareholders will receive a prospectus of the Fund into which they have purchased shares under the exchange program.

6. The Applicants are concerned that the exchange privilege not provide an opportunity for dealers, acting ostensibly on behalf of their clients, to initiate exchanges for the dealer's benefit. The Distributor will not by telephone actively solicit exchanges or notify shareholders of the exchange privilege. In addition, dealers who distribute the Fund's shares will not

receive any greater commission, and in many instances will receive a lesser commission, from an exchange transaction rather than a direct purchase. In an attempt to foreclose the possibility of dealers "churning" or making exchanges for the dealer's benefit rather than the shareholder's benefit, the exchange privilege provides that once any load has been paid on Purchased Shares, such Purchased Shares will be deemed to have been purchased with the maximum sales load that could have been imposed for purposes of an exchange. In addition, the Distributor offers shares only to dealers with which it has entered into dealer agreements which require that the dealers affirm that they will abide by applicable law. The Distributor and Dreyfus' legal staff will diligently pursue customer complaints and are alert to abuses that might occur.

**Applicants' Legal Conclusions**

1. If exchanges were always made at their relative net asset values without the imposition of any sales load, the distribution system of the Load Funds would be disrupted because an investor could easily avoid the sales load by acquiring No-Load Fund shares and immediately exchanging the shares so acquired for Load Fund shares. The exchange program would avoid these problems, would be equitable to all shareholders and would benefit exchanging shareholders by crediting them for sales loads previously paid.

2. The exemption requested is appropriate and in the public interest, and is consistent with the protection of investors, and is consistent with the purposes fairly intended by the policy and provisions of the 1940 Act.

**Applicants' Conditions**

Applicants agree that the following may be made conditions to the proposed relief:

(1) The exchange offers must be within the same family of funds of investment companies, which includes any two or more registered open-end investment companies that have the same investment adviser or principal underwriter (as each term is defined in the 1940 Act) and hold themselves out to investors as related companies for purposes of investment and investor services.

(2) Any sales load charged with respect to an acquired security may be no greater than the excess of the sales load applicable to that security in the absence of an exchange over any sales load previously paid on the exchanged security.

(3) No redemption fee may be imposed with respect to the exchanged security.

(4) The prospectuses of the Funds must disclose any administrative fees that in the future may be imposed on an exchange transaction. The Funds do not currently charge any administrative fee, however, the Funds reserve the right to charge a nominal administrative fee (\$5.00 or less or such greater amount as the Commission or the staff may permit) in the future without seeking amendment to the order and reserve the right to discontinue the administrative charge without amendment to the relief requested hereby. Any such administrative charge will be uniformly applied.

(5) If any Fund were to modify or terminate the exchange privilege, such Fund would provide shareholders a minimum of 60 days written notice and such modification (but not termination) would be described in an amendment of the exemptive order.

(6) Any sales literature or advertising that describes the exchange offer must disclose the administrative fee if any is imposed.

(7) Any securities exchanged which were acquired through dividend reinvestment or capital gains distributions of the Load Funds must be considered to have been sold with a sales load equal to the sales load previously paid on the shares on which the dividend was paid or distribution made.

(8) The Applicants will comply with the provisions of Rule 11a-3 under the 1940 Act, as it may be modified, if and when it is adopted.

(9) Reductions in the sales load of any of the Load Funds will be in accordance with the provisions of Rule 22d-1 under the 1940 Act.

For the Commission, by the Division of Investment Management, under delegated authority.

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 88-13914 Filed 6-20-88; 8:45 am]

**BILLING CODE 8010-01-M**

**SMALL BUSINESS ADMINISTRATION**

**Precapital Corp., Application for a License to Operate as a Small Business Investment Company**

[License Application No. 04/04-5244]

An application for a license to operate as a small business investment company (SBIC) under the provisions of section 301(d) of the Small Business Investment Act of 1958, as amended (the Act), (15 U.S.C. 661 *et seq.*), has been filed by

Precapital Corp., 3326 NE. 33rd Street, Fort Lauderdale, Florida 33308, with the Small Business Administration (SBA), pursuant to 13 CFR 107.102 (1988).

The officers, directors and sole shareholder of the Applicant are as follows:

Name and address	Title of relationship	Percentage of ownership
John D. Chang, 1610 Northwest 90th Way, Pembroke Pines, FL 33024.	President, Treasurer, General Manager, Director.	.....
Linett L. Patterson, Unit II, 371 W. Park Drive, Miami, FL 33172.	Secretary, Director.	.....
Denis Albert George Tomlinson 198-52 Pompeii Avenue, Holliswood, NY 14423.	Vice President, Director.	.....
Preferred Financial Services, Inc., Suite 202, 3326 Northeast 33rd Street, Fort Lauderdale, FL 33308.	.....	100%

The 10-or-more percent shareholders of Preferred Financial Services, Inc. are:

Reicland & Vivienne Anderson, 9260 N.W. 15th Court, Pembroke Pines, FL 33024.	.....	12.7%
John D. Chang	.....	23.6%
Monica C. Weaver, 12614 Kernwood Lane, Bowie, MD 20715.	.....	14.6%

The Applicant, a Florida corporation, will begin operations with a capitalization of \$1,000,000, and will conduct its operations principally in the State of Florida.

As an SBIC licensed to operate under section 301(d) of the Act, the Applicant will provide financial and managerial assistance solely to small business concerns which will contribute to a well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Matters involved in SBA's consideration of the Application include the general business reputation and character of the proposed owners and management, and the probability of successful operation of the Applicant

under their management, including adequate profitability and financial soundness, in accordance with the Act and SBA Rules and Regulations.

Notice is hereby given that any person may, not later than 30 days from the date of publication of this notice, submit written comments on the proposed SBIC to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 L Street NW., Washington, DC 20416.

A copy of this notice shall be published in a newspaper of general circulation in Fort Lauderdale, Florida.

(Catalog of Federal Domestic Assistance Program Nol 59.011, Small Business Investment Companies)

Dated: June 14, 1988.

**Robert G. Lineberry,**  
*Deputy Associate Administrator for Investment.*

[FR Doc. 88-13920 Filed 6-20-88; 8:45 am]

BILLING CODE 8025-01-M

## DEPARTMENT OF STATE

[Public Notice 1065]

### Public Information Collection Requirement Submitted to OMB for Review

**AGENCY:** Department of State.

**ACTION:** The Department of State has submitted the following public information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511.

**SUMMARY:** The proposed information collection is made necessary by the Hague Convention on the Civil Aspects of International Child Abduction and Pub. L. 100-300. The requested information will be used in evaluating applicants' claims, locating abducted children, and advising applicants about available legal remedies. The following summarizes the information collection proposal submitted to OMB:

*Type of Request*—New.

*Originating office*—Bureau of Consular Affairs.

*Title of information collection*—International

*Child Abduction*—1 Request for Return of Child.

*Frequency*—On occasion.

*Respondents*—Individuals.

*Estimated number of responses*—100.

*Average hours per response*—1.

*Total estimated burden hours*—100.

Section 3504(h) of Pub. L. 96-511 does not apply.

### ADDITIONAL INFORMATION OR

**COMMENTS:** Copies of the proposed

forms and supporting documents may be obtained from Gail J. Cook (202) 647-3538. Comments and questions should be directed to (OMB) Francine Picoult (202) 395-7340.

Date: June 8, 1988.

**Richard C. Faulk,**  
*Acting Assistant Secretary for Administration.*

[FR Doc. 88-13967 Filed 6-20-88; 8:45 am]

BILLING CODE 4710-24-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Radio Technical Commission for Aeronautics (RTCA); Special Committee 142 (22nd Meeting), Air Traffic Control Radar Beacon System/ Mode Select (ATCRBS/Mode S) Airborne Equipment; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I), notice is hereby given for the 22nd meeting of RTCA Special Committee 142 on Air Traffic Control Radar Beacon System/ Mode Select (ATCRBS/Mode S) Airborne Equipment to be held on July 13-15, 1988, in the RTCA Conference Room, One McPherson Square, 1425 K Street NW., Suite 500, Washington, DC, commencing at 9:30 a.m.

The agenda for this meeting is as follows: (1) Chairman's remarks, (2) approval of the minutes of the twenty-first meeting held on January 19-20, 1988, (3) briefing on D. D. C. Systems, Incorporated data link service, (4) review of proposed final draft minimum operational performance standards for the airborne data link processor, (5) assignment of tasks, (6) other business, (7) date and place of next meeting.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street NW., Suite 500, Washington, DC 20005; (202) 682-0286. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on June 10, 1988.

**Herbert P. Goldstein,**

*Designated Officer.*

[FR Doc. 88-13868 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-13-M

## Federal Highway Administration

### Environmental Impact Statement: Counties of Fairfax and Loudoun, VA

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Cancellation of notice of intent.

**SUMMARY:** This notice rescinds the previous Notice of Intent issued on March 7, 1986, to prepare an environmental impact statement for a proposed highway project on the widening of existing Route 28 between Interstate 66 and Route 7 in the Counties of Fairfax and Loudoun, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Mr. George E. Kirk, Jr., District Engineer, Federal Highway Administration, Post Office Box 10045, Richmond, Virginia 23240-0045, Telephone (804) 771-2380.

**D. W. Holloway,**  
*Area Engineer, Richmond, Virginia.*

[FR Doc. 88-13888 Filed 6-20-88; 8:45 am]

BILLING CODE 4910-22-M

## DEPARTMENT OF THE TREASURY

### Office of the Secretary

[Dept. Circ.—Public Debt Series—No. 16-88]

#### Treasury Notes of June 30, 1990, Series AC-1990

June 16, 1988.

#### 1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of Chapter 31 of Title 31, United States Code, invites tenders for approximately \$8,500,000,000 of United States securities, designated Treasury Notes of June 30, 1990, Series AC-1990 (CUSIP No. 912827 WH 1), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of the Notes may be issued to Government accounts and Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

#### 2. Description of Securities

2.1. The Notes will be dated June 30, 1988, and will accrue interest from that

date, payable on a semiannual basis on December 31, 1988, and each subsequent 6 months on June 30 and December 31 through the date that the principal becomes payable. They will mature June 30, 1990, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any possession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal taxes.

2.4. The Notes will be issued only in book-entry form in denominations of \$5,000, \$10,000, \$100,000, and \$1,000,000, and in multiples of those amounts. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR Part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the TREASURY DIRECT Book-Entry Securities System in 51 FR 18260, *et seq.* (May 16, 1986), apply to the Notes offered in this circular.

### 3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, D.C. 20239-1500, prior to 1:00 p.m., Eastern Daylight Saving time, Wednesday, June 22, 1988.

Noncompetitive tenders as defined below will be considered timely if postmarked no later than Tuesday, June 21, 1988, and received no later than Thursday, June 30, 1988.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is \$5,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the

term "noncompetitive" on the tender form in lieu of a specified yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than \$1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5. Tenders for their own account will be received without deposit from commercial banks and other banking institutions; primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; Federal Reserve Banks; and Government accounts. Tenders from all others must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in Section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a  $\frac{1}{2}$  of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.500. That stated rate of interest will be paid on all of the Notes. Based on

such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Government accounts and Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

### 4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in Section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this Section is final.

### 5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in Section 3.5. must be made or completed on or before Thursday, June 30, 1988. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Tuesday, June 28, 1988. In addition, Treasury Tax and Loan Note

Option Depositories may make payment for the Notes allotted for their own accounts and for accounts of customers by credit to their Treasury Tax and Loan Note Accounts on or before Thursday, June 30, 1988. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in TREASURY DIRECT are not required to be assigned if the inscription on the registered definitive securities is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes allotted in TREASURY DIRECT must be completed to show all the information required thereon, or the TREASURY DIRECT account number previously obtained.

## 6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may at any time supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Gerald Murphy,  
Fiscal Assistant Secretary.

[FR Doc. 88-14060 Filed 6-17-88; 4:17 pm]

BILLING CODE 4810-40-M

[Dept. Circ.—Public Debt Series—No. 17-88]

## Treasury Notes of June 30, 1992, Series N-1992

June 16, 1988.

### 1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of Chapter 31 of Title 31, United States Code, invites tenders for approximately \$6,750,000,000 of United States securities, designated Treasury Notes of June 30, 1992, Series N-1992 (CUSIP No. 912827 WJ 7), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of the Notes may be issued to Government accounts and Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

### 2. Description of Securities

2.1. The Notes will be dated June 30, 1988, and will accrue interest from that date, payable on a semiannual basis on December 31, 1988, and each subsequent 6 months on June 30 and December 31 through the date that the principal becomes payable. They will mature June 30, 1992, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any possession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal taxes.

2.4. The Notes will be issued only in book-entry form in denominations of \$1,000, \$5,000, \$10,000, \$100,000, and \$1,000,000, and in multiples of those amounts. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR Part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the TREASURY DIRECT Book-Entry Securities System in 51 FR 18260, *et seq.* (May 16, 1986), apply to the Notes offered in this circular.

### 3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239-1500, prior to 1:00 p.m., Eastern Daylight Saving time, Thursday, June 23, 1988. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Wednesday, June 22, 1988, and received no later than Thursday, June 30, 1988.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is \$1,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specified yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than \$1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5. Tenders for their own account will be received without deposit from commercial banks and other banking institutions; primary dealers, as defined

above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; Federal Reserve Banks; and Government accounts. Tenders from all others must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in Section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a  $\frac{1}{8}$  of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.000. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Government accounts and Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

#### 4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this section is final.

#### 5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in section 3.5. must be made or completed on or before Thursday, June 30, 1988. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Tuesday, June 28, 1988. In addition, Treasury Tax and Loan Note Option Depositories may make payment for the Notes allotted for their own accounts and for accounts of customers by credit to their Treasury Tax and Loan Note Accounts on or before Thursday, June 30, 1988. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in TREASURY DIRECT are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes allotted in TREASURY DIRECT must be completed

to show all the information required thereon, or the TREASURY DIRECT account number previously obtained.

#### 6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may at any time supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Gerald Murphy,

*Fiscal Assistant Secretary.*

[FR Doc. 88-14061 Filed 6-17-88; 4:17 pm]

BILLING CODE 4810-40-M

#### Public Information Collection Requirements Submitted to OMB for Review

Date: June 14, 1988.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

#### Internal Revenue Service

OMB Number: New.

Form Number: 8288-B.

Type of Review: New Collection.

Title: Application for Withholding

Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests.

Description: Form 8288-B is used to apply for a withholding certificate from IRS to reduce or eliminate the withholding required by section 1445.

*Respondents:* Individuals or households, Businesses or other for-profit.

*Estimated Number of Respondents:* 5,000.

*Estimated Burden Hours Per Response:* 28 minutes.

*Frequency of Response:* On Occasion.  
*Estimated Average Reporting Burden:* 2,344 hours.

*Clearance Officer:* Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

*OMB Reviewer:* Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,

*Departmental Reports Management Officer.*  
[FR Doc. 88-13898 Filed 6-20-88; 8:45 am]

BILLING CODE 4810-25-M

### Public Information Collection Requirements Submitted to OMB for Review

Date: June 14, 1988.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

#### Alcohol, Tobacco and Firearms

*OMB Number:* 1512-0156.

*Form Number:* ATF F 2987 (5210.8).

*Type of Review:* Extension.

*Title:* Computation and Tax and Agreement to Pay Tax on Puerto Rican Cigars and Cigarettes.

*Description:* ATF F 2987 (5210.8) is used to calculate the tax due on cigars and cigarettes manufactured in Puerto Rico and shipped to the U.S. The form identifies the taxpayer, cigars or cigarettes by tax class and a certification by a U.S. Customs official as to the amount of shipment, and that the shipment has been released to the U.S.

*Respondents:* Businesses or other for-profit, Small businesses or organizations.

*Estimated Number of Respondents:* 30.

*Estimated Burden Hours Per Response:* 30 minutes.

*Frequency of Response:* On Occasion.  
*Estimated Average Reporting Burden:* 150 hours.

*Clearance Officer:* Robert Masarsky (202) 566-7077 Bureau of Alcohol, Tobacco and Firearms, Room 7011, 1200 Pennsylvania Avenue NW., Washington, DC 20226.

*OMB Reviewer:* Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,

*Departmental Reports Management Officer.*  
[FR Doc. 88-13899 Filed 6-20-88; 8:45 am]

BILLING CODE 4810-25-M

### Public Information Collection Requirements Submitted to OMB for Review

Date: June 14, 1988.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

#### Internal Revenue Service

*OMB Number:* 1545-0988.

*Form Number:* IRS Form 8609.

*Type of Review:* Revision.

*Title:* Low-Income Housing Credit Allocation Certification.

*Description:* Form 8609 is used by State and local housing credit agencies to allocate a low-income housing credit dollar amount to owners of low-income housing. Its also used by owners to certify that the building qualifies for credit. Part I completed by State or local agency; rest of form completed by building owner. (Part II completed first year only; Part II completed each year for 15-year compliance period.)

*Respondents:* State and local governments, Businesses or other for-profit, Non-profit institutions, Small businesses or organizations.

*Estimated Number of Respondents:* 1,000.

*Estimated Burden Hours Per Response:* 40 minutes.

*Frequency of Response:* Annually.

*Estimated Average Reporting Burden:* 33,072 hours.

*Clearance Officer:* Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

*OMB Reviewer:* Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,

*Departmental Reports Management Officer.*  
[FR Doc. 88-13900 Filed 6-20-88; 8:45 am]

BILLING CODE 4810-25-M

### Internal Revenue Service

[Delegation Order No. 229]

#### Delegation of Authority; Regional Commissioners

**AGENCY:** Internal Revenue Service; Treasury.

**ACTION:** Delegation of authority.

**SUMMARY:** This delegation order redelegates the authority to terminate collection action against Federal depositaries to the Regional Commissioners. The text of the delegation order appears below.

**EFFECTIVE DATE:** June 16, 1988.

**FOR FURTHER INFORMATION CONTACT:** Pam Hush, TR:R:A, Room 7513, 1111 Constitution Avenue NW., Washington, DC 20224, telephone (202) 566-4600.

Joyce Reilly,

*Chief, Service Center Accounting Section.*

Order No.: 229.

**EFFECTIVE DATE:** June 16, 1988.

#### Termination of Collection Action Against Federal Depositaries

1. Pursuant to authority vested in the Commissioner of Internal Revenue by 31 CFR Part 5 and 4 CFR Part 104, the authority to compromise, suspend or terminate collection action under the Federal Claims Collection Act of 1966 is hereby delegated to the Regional Commissioners. Each Regional Commissioner shall take aggressive action, on a timely basis, with effective follow up, to collect claims of the United States due from their Federal depositaries for deposit credit of tax collections. The Regional Commissioners are authorized to compromise, suspend, or terminate collection action with respect to debt claims due to service centers which do not exceed \$20,000, exclusive of interest and penalties, upon written recommendation of Chief Counsel or Chief Counsel's designee, and may take appropriate action on such claims up to

\$300 without the recommendation of Chief Counsel.

2. This Order only refers to claims of deposit credit due for tax collections presented by service centers to their respective Federal depositaries and does not apply to any claim where there is an indication of fraud or misrepresentation on the part of the debtor nor does it apply to any other claims. Delegation Order No. 111 redelegates the authority to terminate collection action on all other claims.

3. The authority delegated herein may not be redelegated.

Date: May 31, 1988.

**Charles H. Brennan,**

*Deputy Commissioner (Operations).*

[FR Doc. 88-13933 Filed 6-20-88; 8:45 am]

BILLING CODE 4830-01-M

## VETERANS ADMINISTRATION

### Special Medical Advisory Group; Meeting

The Veterans Administration gives notice under Pub. L. 92-463 that a meeting of the Special Medical Advisory Group will be held on July 7 and 8, 1988. The session on July 7 will be held at the Capital Hilton Hotel, 16th and "K" Streets NW., Washington, DC 20036, and the session on July 8 will be held in the Omar Bradley Conference Room (10th floor) at the Veterans Administration Central Office, 810 Vermont Avenue NW., Washington, DC 20420. The purpose of the Special Medical Advisory Group is to advise the Administrator and Chief Medical Director relative to the care and treatment of disabled veterans, and other matters pertinent

to the Veterans Administration's Department of Medicine and Surgery. The session on July 7 (held at the Capital Hilton Hotel) will convene at 6 p.m. and the session on July 8 will convene at 8 a.m. All sessions will be open to the public up to the seating capacity of the rooms. Because this capacity is limited, it will be necessary for those wishing to attend to contact Lorri Fertal, Office of the Chief Medical Director, Veterans Administration Central Office (phone 202/233-3985) prior to July 5, 1988.

Dated: June 18, 1988.

By Direction of the Administrator.

**Rosa Maria Fontanez,**

*Committee Management Officer.*

[FR Doc. 89-13915 Filed 6-20-88; 8:45 am]

BILLING CODE 8320-01-M

# Sunshine Act Meetings

Federal Register

Vol. 53, No. 119

Tuesday, June 21, 1988

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).

## FEDERAL COMMUNICATIONS COMMISSION FCC to Hold Open Commission Meeting, Thursday, June 23, 1988

June 16, 1988

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, June 23, 1988, which is scheduled to commence at 9:30 a.m., in Room 856, at 1919 M Street NW., Washington, DC.

### Agenda, Item No., and Subject

**Private Radio—1—Title:** Reorganization and revision of Part 87 of the rules governing the aviation services. **Summary:** In this Report and Order the FCC will consider whether to revise and reorganize Part 87 of the rules governing the aviation services.

**Common Carrier—1—Title:** In the Matter of MTS and WATS Market Structure and Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board. **Summary:** The FCC will consider whether to amend the eligibility criteria for Link Up America.

**Mass Media—1—Title:** In the Matter of BC Docket No. 81-742 Regarding Formulation of Policies Relating to the Comparative Hearing Process. **Summary:** The Commission will consider whether to expand the scope of this proceeding to examine the question of abuse and other matters relating to the comparative renewal process.

**Mass Media—2—Title:** Complaint filed against KZKC (TV), Kansas City, MO. for alleged broadcast of patently offensive material in violation of 18 U.S.C section 1464 which prohibits the broadcast of obscene and indecent programming. **Summary:** FCC considers what, if any, enforcement action is appropriate.

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

Additional information concerning this meeting may be obtained from Sarah Lawrence, Office of Public Affairs, telephone number (202) 632-5050.

Issued: June 16, 1988.

Federal Communications Commission.

H. Walker Feaster III,

Acting Secretary.

[FR Doc. 88-14001 Filed 6-17-88; 2:30 pm]

BILLING CODE 6712-01-M

## FEDERAL ENERGY REGULATORY COMMISSION

"FEDERAL REGISTER" CITATION OF  
PREVIOUS ANNOUNCEMENT: June 13,  
1988, 53 FR 22067.

PREVIOUSLY ANNOUNCED TIME AND DATE  
OF MEETING: June 15, 1988, 10:00 a.m.

CHANGE IN THE MEETING: The following  
Docket Number and Companies have  
been added to Item ER-6:

Item No., Docket No., and Company

EL88-18-000

Boston Edison Company v. Town of  
Boylston Municipal Light Department,  
Town of Hudson Light and Power  
Department, Town of Littleton Municipal  
Light and Water Department,  
Middleborough Municipal Gas and  
Electric Department, North Attleboro  
Electric Department, Peabody Municipal  
Light Plant, Shrewsbury Electric Light  
Plant, Town of Wakefield Municipal  
Light Department and City of Westfield  
Gas and Electric Light Department

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-14076 Filed 6-17-88; 3:56 pm]

BILLING CODE 6717-02-M

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

June 15, 1988.

TIME AND DATE: 10:00 a.m., Thursday,  
June 16, 1988.

PLACE: Room 600, 1730 K Street NW.,  
Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The  
Commission will consider and act upon  
the following:

1. *Wilmot Mining Company*, Docket No.  
LAKE 85-47. (Issues include consideration of  
matter remanded from the Court of Appeals.)

2. *Robert Simpson v. Kenta Energy, Inc.,  
and Roy Dan Jackson*, Docket No. KENT 83-  
155-D. (Issues include consideration of  
matter remanded from the Court of Appeals.)

3. *Local Union 5817, Dist. 17, UMWA v.  
Monument Mining Corp., and Island Creek  
Coal Co.*, Docket No. WEVA 85-21-C. (Issues  
include consideration of matter remanded  
from the Court of Appeals.)

It was determined by a unanimous  
vote of Commissioners that a meeting be  
held on these items and that no earlier  
announcement of the meeting was  
possible.

Any person intending to attend this  
meeting who requires special  
accessibility features and/or auxiliary  
aids, such as sign language interpreters,

must inform the Commission in advance  
of those needs. Subject to 29 CFR  
2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE  
INFORMATION: Jean Ellen (202) 653-5629/  
(202) 566-2673 for TDD Relay.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 88-13963 Filed 6-17-88; 9:29 am]

BILLING CODE 6735-01-M

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

June 16, 1988.

TIME AND DATE: 10:00 a.m., Thursday,  
June 16, 1988.

PLACE: Room 600, 1730 K Street NW.,  
Washington, DC.

STATUS: Open.

MATTER TO BE CONSIDERED: in addition  
to the previously announced items, the  
Commission considered and acted upon  
the following:

4. *Secretary of Labor on behalf of Jerry  
Dale Aleshire, et al. v. Westmoreland Coal  
Co.*, Docket No. WEVA 84-344-D. (Issues  
include consideration of a petition for  
discretionary review.)

I was determined by a unanimous  
vote of Commissioners that this item be  
included and that no earlier  
announcement of the addition was  
possible.

CONTACT PERSON FOR MORE  
INFORMATION: Jean Ellen (202) 653-5629/  
(202) 566-2673 to TDD Relay.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 88-14000 Filed 6-20-88; 2:29 am]

BILLING CODE 6735-01-M

## FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

"FEDERAL REGISTER" CITATION OF  
PREVIOUS ANNOUNCEMENT: Notice  
forwarded to Federal Register on June  
14, 1988.

PREVIOUSLY ANNOUNCED TIME AND DATE  
OF THE MEETING: 10:00 a.m., Wednesday,  
June 22, 1988.

CHANGES IN THE MEETING: Deletion of  
the following open item(s) from the  
agenda: Publication for comment of  
proposed interagency policy statement  
regarding interest rate swaps.

CONTACT PERSON FOR MORE  
INFORMATION: Mr. Joseph R. Coyne,  
Assistant to the Board; (202) 452-3204.

Date June 17, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-14058 Filed 6-17-88; 2:31 am]

BILLING CODE 6210-01-M

**FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS**

**TIME AND DATE:** 12:00 noon, Monday, June 27, 1988.

**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. Government in the Sunshine consideration of a personnel matter. (This item was originally announced for a closed meeting on May 31, 1988.)

2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

3. Any items carried forward from a previously announced meeting.

**CONTACT PERSON FOR MORE**

**INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: June 17, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-14059 Filed 6-17-88; 2:31 pm]

BILLING CODE 6210-01-M

**NUCLEAR REGULATORY COMMISSION**

**DATE:** Weeks of June 20, 27, July 4, and 11, 1988.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Open and Closed.

**MATTERS TO BE CONSIDERED:**

**Week of June 20**

*Monday, June 20*

1:00 p.m.

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 4).

2:30 p.m.

Briefing on Technical Specification Revisions (Public Meeting).

*Tuesday, June 21*

10:00 a.m.

Briefing by TVA on TVA Reorganization and Plant Status (Public Meeting).

2:00 p.m.

Briefing on Proposed Rule on Fitness for Duty (Public Meeting).

*Friday, June 24*

10:00 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed).

**Week of June 27—Tentative**

*Monday, June 27*

10:00 a.m.

Briefing on Proposed Rule on Early Site Permits; Standard Design Certification; and Combined Licenses for Nuclear Power Reactors (Public Meeting).

*Wednesday, June 29*

10:00 a.m.

Initial Briefing by the Advisory Committee on Nuclear Waste (Public Meeting).

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed).

**Week of July 4—Tentative**

*Tuesday, July 5*

2:00 p.m.

Briefing on Accountability of Radioactive Material Used by Material Licensees (Public Meeting).

*Wednesday, July 6*

10:00 a.m.

Briefing on EEO Program (Public Meeting).

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

*Thursday, July 7*

2:00 p.m.

Briefing on Continuity of Government Handbook (Closed—Ex. 1).

**Week of July 11—Tentative**

*Tuesday, July 12*

10:00 a.m.

Annual Briefing by INPO (Public Meeting).

2:00 p.m.

Briefing on Policy Paper for Plant Life Extension (Public Meeting).

*Wednesday, July 13*

1:00 p.m.

Periodic Briefing on Operating Reactors and Fuel Facilities (Public Meeting).

*Thursday, July 14*

2:00 p.m.

Periodic Briefing by Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting).

3:30 p.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed).

*Friday, July 15*

10:00 a.m.

Briefing on Matters of Common Interest Between NRC and EPA in the Regulation of Radiological Hazards (Public Meeting).

**Note.**—Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

**TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING):** (301) 492-0292.

**CONTACT PERSON FOR MORE**

**INFORMATION:** William Hill, (301) 492-1661.

June 16, 1988.

William M. Hill, Jr.,

Office of the Secretary.

[FR Doc. 88-14066 Filed 6-17-88; 3:44 pm]

BILLING CODE 7590-01-M

# Corrections

Federal Register

Vol. 53, No. 119

Tuesday, June 21, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, 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.

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-122-401]

#### Red Raspberries From Canada; Final Results of Antidumping Duty Administrative Review

##### Correction

In notice document 88-12410 beginning on page 20150 in the issue of Thursday, June 2, 1988, make the following corrections:

1. On page 20151, in the second column, in the third complete paragraph, in the second line, "Packaging" should read "Packing".

2. On the same page, in the same column, in the third complete paragraph, the second line from the bottom should read "determine the foreign market value for red".

3. On the same page, in the same column, in the fourth line from the bottom, "production" should read "producing".

4. On the same page, in the third column, in the sixth complete paragraph,

in the seventh line, "of" should read "or".

BILLING CODE 1505-01-D

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 172

[Docket No. 85F-0092]

#### Food Additives Permitted for Direct Addition to Food for Human Consumption; Aspartame

##### Correction

In rule document 88-12741 beginning on page 20838 in the issue of Tuesday, June 7, 1988, make the following correction:

On page 20839, in the first column, in the second complete paragraph, in the ninth line, "171.7(h)" should read "171.1(h)".

BILLING CODE 1505-01-D

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 522

#### Animal Drugs, Feeds, and Related Products; Change of Sponsor

##### Correction

In rule document 88-12740 beginning on page 20842 in the issue of Tuesday,

June 7, 1988, make the following corrections:

#### § 522.2680 [Corrected]

On page 20843, in the second column, the line preceding amendatory instruction 4, should read "§ 522.2680 [Amended]"; and in the first line of amendatory instruction 4, "Zeranol" was misspelled.

BILLING CODE 1505-01-D

## DEPARTMENT OF TRANSPORTATION

### Urban Mass Transportation Administration

#### 49 CFR Part 604

[Docket 88-E]

#### Charter Service; Information on Public Hearings

##### Correction

In proposed rule document 88-12695 beginning on page 20660 in the issue of Monday, June 6, 1988, make the following corrections:

On page 20660, in the third column, under **ADDRESSES**, in paragraph 1., in the second line, add a comma after "Room 2230". Also, in paragraph 4., in the first line, "GAS" should read "GSA".

BILLING CODE 1505-01-D

**Register**

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Tuesday  
June 21, 1988

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**Part II**

**Environmental  
Protection Agency**

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40 CFR Part 270  
Requirements for Hazardous Waste  
Incinerator Permits; Proposed Rule

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 270

[FRL 3350.7]

#### Requirements for Hazardous Waste Incinerator Permits

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule clarifies the requirements of 40 CFR 270.62(d), which describe procedures for permitting existing hazardous waste incineration facilities under the Resource Conservation and Recovery Act (RCRA). The Agency is concerned that one aspect of the permitting procedures for interim status hazardous waste incineration facilities may be misunderstood due to ambiguous regulatory language. EPA is proposing today to amend § 270.62(d) to clarify that when information is submitted under § 270.19(b), trial burn data must be submitted prior to issuance of a permit.

**DATES:** Comments must be submitted on or before July 21, 1988.

**ADDRESS:** The public must submit an original and two copies of their comments to: EPA RCRA Docket (S-212)(WH-562), 401 M Street SW., Washington, DC 20460.

Place "Docket number F-88-TBRP-FFFFF" on your comments. The OSW docket for this proposed rulemaking is located in the sub-basement at the above address, and is open from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. The public must make an appointment by calling (202) 475-9327 to review docket materials. The public may copy a maximum of 100 pages of material from any one regulatory docket at no cost; additional copies cost \$0.15 per page.

**FOR FURTHER INFORMATION CONTACT:** David Dellarco, Assistance Branch, Office of Solid Waste (WH-563), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, Phone (202) 382-4206, or the RCRA Hotline (800) 424-9346 (or 382-3000 in the Washington, DC metropolitan area).

#### SUPPLEMENTARY INFORMATION:

##### Table of Contents

- I. Introduction
- II. Purpose of Clarification
- III. State Authority
- IV. Effective Date
- V. Regulatory Analysis

#### I. Introduction

The purpose of this regulation is to eliminate potential confusion regarding one aspect of the permitting procedures for existing hazardous waste incineration facilities by clarifying the intent of the regulatory language in 40 CFR 270.62(d). Specifically, the Agency wishes to clarify with this proposed regulation that permit conditions for existing hazardous waste incinerators must be based on pre-permit trial burn results under § 270.19(b) or other data submitted by the applicant as specified in § 270.19(c), unless the applicant is not required to conduct a trial burn pursuant to an exemption under § 270.19(a). "Incinerators" are defined in 40 CFR Part 260 as " \* \* \* any enclosed device using controlled flame combustion that neither meets the criteria for classification as a boiler nor is listed as an industrial furnace."

#### II. Purpose of Clarification

The Agency is concerned that one aspect of the permitting procedures for interim status hazardous waste incineration facilities may be misunderstood due to ambiguous regulatory language. EPA promulgated § 270.19 on April 1, 1983 (48 FR 14239), to require that the Part B of a permit application for incinerators include one of the following: (1) Sufficient information submitted under § 270.19(a) to obtain an exemption from compliance with the performance standards in § 264.343 and the operating conditions in § 264.345; (2) a trial burn plan or the results of a trial burn under § 270.19(b), including all required determinations, in accordance with § 270.62; or (3) information in lieu of a trial burn under § 270.19(c) that is sufficient to determine compliance with performance standards and develop operating conditions under § 264.343 and § 264.345, respectively.

Sections § 270.19(a) and (c) are explicit as to what information is required prior to issuance of a permit, but the Agency believes that language in § 270.62(d) is ambiguous as to what must be accomplished under § 270.19(b) prior to issuing a permit. Specifically, the Agency is concerned that a loose interpretation of § 270.62(d) might lead a Regional Administrator or State Director to set a date for submittal of trial burn data after the permit is issued. This strained interpretation of § 270.62(d) might lead one to think that permits can be written under § 270.19(b) based on the submission of a trial burn plan instead of the results of the trial burn, contrary to the intended meaning of § 270.62(d). Although the Agency is making this clarification to the actual

language of § 270.62(d) in a proposed rule, EPA believes that the intended meaning of § 270.62(d) has been clear since § 270.62(d) was promulgated.

EPA is proposing today to amend § 270.62(d) to clarify that when information is submitted under § 270.19(b), trial burn data must be submitted prior to issuance of a permit. EPA originally intended when promulgating § 270.62 that permit conditions must be based on trial burn data or other data submitted under § 270.19(c) unless data submitted under § 270.19(a) justifies a trial burn exemption. Indeed, the Agency's preamble to the interim final rule published in the Federal Register on June 24, 1982 (47 FR 27522), stated that when incinerator permitting procedures were originally promulgated on January 23, 1981, incineration facilities "were either required to conduct a trial burn or seek a waiver of the trial burn requirements by submitting sufficient alternative information." The preamble to the June 24, 1982 rule which revised the original incinerator permitting procedures also stated that, "Following submission of the trial burn results and the Part B application, the Director may prepare a draft permit which will specify the proper operating requirements under § 264.345, based on the results of the trial burn \* \* \*". In addition, the Office of Solid Waste and Emergency Response (OSWER) Policy Directive #9488.00-2 dated June 10, 1986, states, " \* \* \* the intent of the regulation (§ 270.62(d)) is to require performance of the trial burn and receipt of the data prior to permit issuance so that permit conditions may be set based on actual operating data \* \* \*". This directive was issued to ensure that there would be no mistake about proper interpretation of the regulation. The requirement for a trial burn (or sufficient information in lieu of a trial burn) prior to permit issuance is intended to ensure that a permit writer has sufficient information to be able to define the operating conditions in the permit that are necessary to meet the performance standard and to ensure that the performance standards listed in a permit could be met. EPA believes these two criteria are important to protect human health and the environment.

Therefore, the Agency is proposing today to amend § 270.62(d) to make it very clear that existing incineration facilities must (1) conduct a trial burn and submit the trial burn results prior to permit issuance, or (2) submit other information as specified in § 270.19(a) or (c) before a permit can be written for that facility. Should a permit applicant

submit trial burn results under § 270.19(b), permit conditions must be established using the trial burn results. Conversely, if the applicant submits other information under § 270.19(a) or (c), the permit must be based on that information.

### III. State Authority

#### A. Applicability of Rule in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State that the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, HSWA applies in authorized States in the interim.

#### B. Effect on State Authorization

Today's rule proposes requirements that would not be effective in authorized States since the requirements would not be imposed pursuant to the Hazardous and Solid Waste Amendments of 1984. Thus, the proposed requirements will be applicable only in those States that do not have final authorization.

40 CFR 271.21(e)(2) requires States that have final authorization to modify their programs to reflect Federal

program changes and to subsequently submit the modification to EPA for approval. The deadline by which the State must modify its program to adopt this proposed regulation will be determined by the date of promulgation of the final rule, in accordance with § 271.21(e). These deadlines can be extended in certain cases (40 CFR 271.21(e)(3)). Once EPA approves the modifications, the State requirements become Subtitle C RCRA requirements.

States that submit their official application for final authorization less than 12 months after the effective date of these proposed standards are not required to include standards equivalent to these standards in their application. However, the State must modify its program by the deadlines set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of those standards must include standards equivalent to these standards in their application. 40 CFR 271.3 sets forth the requirements a State must meet when submitting its final authorization application.

In authorized States, the proposed requirements of this rule will not be applicable until the State revises its program to adopt equivalent requirements under State law. However, because EPA is only clarifying regulatory language, the Agency assumes that these proposed requirements are already in effect in most States and, therefore, a simplified application will be allowed for the program revision required following promulgation of a final rule in this docket. In order to maintain authorization, a State's revision application may consist of a certification by the State Attorney General that he/she interprets his/her State's existing regulations in the manner described in the rule. Otherwise, the State's regulations must be amended to reflect the interpretation set forth in the rule. If a State Attorney General cannot certify that he/she interprets his/her State's existing regulations in the manner described in the rule or if the State fails to make necessary regulatory amendments, that State's program will be less stringent than the Federal program. In that case, the State must amend its regulations to incorporate the interpretation set forth in the rule in order to maintain equivalence to the Federal program.

#### IV. Effective Date

This rule, if promulgated, would be effective 30 days after final promulgation. Section 3010(b) of RCRA provides that regulations concerning

permits for the treatment, storage, or disposal of hazardous waste shall take effect six months after the date of promulgation. However, section 3010(b)(1) provides for a shorter period if the Agency finds that the regulated community does not need six months to comply with the new regulation. Since this proposed rule would merely clarify a requirement that is already in effect and the regulated community should already be in compliance, EPA believes that good cause exists to make this rule, if promulgated, effective less than six months after promulgation.

### V. Regulatory Analysis

#### A. Regulatory Impact Analysis

Under Executive Order 12291, EPA must determine whether a regulation is "major" and thus whether EPA must prepare and consider a Regulatory Impact Analysis in connection with the rule. Today's proposal clarifies existing requirements and is not major because it will not result in an annual effect on the economy of \$100 million or more, nor will it result in an increase in costs or prices to industry. There will be no adverse impact on the ability of the U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, the Agency does not believe a Regulatory Impact Analysis is required for today's rule. The proposed rule has been submitted to the Office of Management and Budget (OMB) for review in accordance with Executive Order 12291.

#### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, at the time an agency publishes any proposed or final rule, it must prepare a regulatory flexibility analysis that describes the impact of the rule on small entities unless the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities. Today's proposed rule merely clarifies a requirement that is already in effect. It does not impose any additional requirements on or affect the compliance burdens of the regulated community. Therefore, pursuant to 5 U.S.C. 601, I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 40 CFR Part 270

Administrative practice and procedure, Hazardous waste, Reporting and recordkeeping requirements, Permit modification procedures, Waste treatment and disposal.

Dated: June 14, 1988.

Lee M. Thomas,  
Administrator.

Part 270 is amended as follows:

**PART 270—EPA-ADMINISTERED  
PERMIT PROGRAMS: THE  
HAZARDOUS WASTE PERMIT  
PROGRAM**

1. The authority citation for Part 270 continues to read as follows:

Authority: Secs. 1006, 2002, 3005, 3007, 3019, and 7004 of the Solid Waste and Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912, 6927, 6939, and 6974).

2. Section 270.62 is amended by revising paragraph (d) to read as follows:

**§ 270.62 Hazardous waste incinerator permits.**

\* \* \* \* \*

(d) For the purposes of determining feasibility of compliance with the performance standards of § 264.343 of this chapter and of determining adequate operating conditions under § 264.345 of this chapter, the applicant for a permit for an existing hazardous waste incinerator must prepare and submit a trial burn plan and perform a trial burn in accordance with § 270.19(b) and paragraphs (b)(2) through (b)(9) of this section or, instead, submit other information as specified in § 270.19(c). Applicants submitting information under § 270.19(a) are exempt from compliance with § 264.343 and § 264.345 and, therefore, are exempt from the requirement to conduct a trial burn.

Applicants who submit trial burn plans and receive approval before submission of a permit application must complete the trial burn and submit the results, specified in paragraph (b)(6), with Part B of the permit application. If completion of this process conflicts with the date set for submission of the Part B application, the applicant must contact the Director to establish a later date for submission of the Part B application or the trial burn results. Trial burn results must be submitted prior to issuance of the permit. When the applicant submits a trial burn plan with Part B of the permit application, the Director will specify a time period prior to permit issuance in which the trial burn must be conducted and the results submitted.

[FR Doc. 88-13814 Filed 6-20-88; 8:45 am]

BILLING CODE 6560-50-M

**20 CFR Part 654**

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Tuesday  
June 21, 1988

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**Part III**

**Department of Labor**

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**Employment and Training Administration**

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**20 CFR Part 654  
Preference in Federal Procurement for  
Labor Surplus Areas; Final Rule**

## DEPARTMENT OF LABOR

Employment and Training  
Administration

## 20 CFR Part 654

Preference in Federal Procurement for  
Labor Surplus AreasAGENCY: Employment and Training  
Administration, Labor.

ACTION: Final rule.

**SUMMARY:** The Department of Labor is amending its regulations for classifying labor surplus areas to modify the types of areas eligible for classification under the criteria for exceptional circumstances. The rule takes into account the fact that workers in larger metropolitan areas often reside in one civil jurisdiction but work in another civil jurisdiction in the same metropolitan area.

EFFECTIVE DATE: June 21, 1988.

**FOR FURTHER INFORMATION CONTACT:** William J. McGarrity. Telephone: (202) 535-0185.

**SUPPLEMENTARY INFORMATION:**

Executive Order 12073 requires executive agencies to emphasize procurement set-asides in high unemployment areas known as labor surplus areas. The Secretary of Labor is responsible under that Order for classifying and designating areas as labor surplus areas.

Under Executive Order 10582 executive agencies may reject bids or offers of foreign materials in favor of the lowest offer by a domestic supplier, provided that the domestic supplier undertakes to produce substantially all of the materials in areas of substantial unemployment as defined by the Secretary of Labor.

The Department of Labor's (DOL's) regulations implementing Executive Orders 12073 and 10582 are set forth at 20 CFR Part 654, Subparts A and B. Subpart A requires the Assistant Secretary of Labor for Employment and Training (Assistant Secretary) to classify "civil jurisdictions" (defined below) as labor surplus areas pursuant to the criteria specified in the regulations and to publish annually a list of labor surplus areas. Subpart B of Part 654 states that an area of substantial unemployment for purposes of Executive Order 10582 is any area classified as a labor surplus area under Subpart A. Thus, labor surplus areas under Executive Order 12073 are also areas of substantial unemployment under Executive Order 10582.

At present, the regulations classify as labor surplus areas only high

unemployment civil jurisdictions, 20 CFR 654.5(b) (1985). "Civil jurisdictions" are:

(1) Cities of 25,000 or more population on the basis of the most recently available Bureau of the Census estimates; or

(2) Towns and townships in the States of New Jersey, New York, Michigan, and Pennsylvania of 25,000 or more population and which possess powers and functions similar to cities; or

(3) All counties, except those counties which contain any of the types of political jurisdictions defined in paragraphs (b) (1) and (2) of this section; or

(4) All other counties are defined as "balance of county" (i.e., total county less component cities and townships identified in paragraphs (b) (1) and (2) of this section); or

(5) County equivalents which are towns in the States of Massachusetts, Rhode Island and Connecticut.

20 CFR 654.5(b), as applied at 51 FR 36611 (October 14, 1986).

Civil jurisdictions are classified as labor surplus areas when the average unemployment rate for all civilian workers in the civil jurisdiction for the reference period is (1) 120 percent of the national average unemployment rate for civilian workers or higher for the reference period, or (2) 10 percent or higher. 20 CFR 654.5(a). No civil jurisdiction is classified as a labor surplus area if the national civilian unemployment rate is below 6.0 percent.

Upon petition by a State employment security agency, a civil jurisdiction, under the regulations as currently in force, may be classified as a labor surplus area without regard to the unemployment rate of all civilian workers for the reference period, whenever it meets or is expected to meet the above unemployment tests as a result of "exceptional circumstances," meaning catastrophic events, such as natural disasters, plant closings, and contract cancellations expected to have a long-term impact on labor market area conditions, discounting temporary or seasonal factors. 20 CFR 654.5(b).

Unemployment rates, the criteria for classifying labor surplus areas, are estimated on a "place of residence" basis, not a "place of employment" basis. Under the rule prior to this revision, since only civil jurisdictions were classified as labor surplus areas, a problem was caused, particularly in large metropolitan areas, when workers reside in one civil jurisdiction, but work, or may seek work, in another civil jurisdiction of the same metropolitan area. Civil jurisdictions where workers reside sometimes were classified as

labor surplus areas, but nearby civil jurisdictions in the same metropolitan area which might have been employment centers might not have been classified as labor surplus areas because the employment centers' unemployment rates (based on place of residence) were not high enough to meet the unemployment rate criteria. In those cases, the procurement preference granted to labor surplus areas (civil jurisdictions) might have been of little value in alleviating the unemployment problem in the metropolitan area.

For the above reasons, DOL proposed on July 24, 1986, to amend the labor surplus area regulations to take into account that employment and residency may occur in different, but neighboring, jurisdictions in the same metropolitan area. 51 FR 26555. Other benefits of such an action are expected to include some reduction of a need for relocation (and possible loss) of employment opportunities, and some reduction of a need for labor surplus area residents to relocate to obtain employment.

The criteria for determining "exceptional circumstances" were proposed to be amended to provide the Assistant Secretary the necessary discretion to designate an entire Metropolitan Statistical Area or Primary Metropolitan Statistical Area (terms defined by the Office of Management and Budget) as a labor surplus area if the entire area meets or is expected to meet the unemployment criteria established under the labor surplus area basic criteria at 20 CFR 654.5(a). This would allow the preference in bidding on Federal contracts (called for in E.O. 12073 and E.O. 10582) to all firms located in high unemployment Metropolitan Statistical Areas and Primary Metropolitan Statistical Areas, the largest labor markets in the United States. The Assistant Secretary would continue to have the authority to add civil jurisdictions to the annual labor surplus area list, if they meet the exceptional circumstances criteria at 20 CFR 644.5(b).

Interested parties were invited to submit comments on or before August 25, 1986. The following summarizes the comments received and adopts the proposed rule as the final rule.

**Discussion of Comments**

A total of 13 comments were received on the proposed rule. All of the responses concurred with the proposed change, although two suggested that the Department of Labor might consider expanding the proposed rule.

One response suggested that the change be expanded to 20 CFR 654.5 (a)

and (b) instead of just (b). Another suggested that the change be expanded to include all labor areas in the Nation. The Department of Labor is completing a computer conversion related to the labor surplus area program. Expansion of the rule to 20 CFR 654.5(a) would require further expansion of the data base for the program, and thus further delay implementation of the rule being finalized. Consideration of expansion of the rule to all labor areas would have to wait until the Department has completed its current review of the definitions of the labor areas throughout the United States.

Based upon its review of the comments received, the Department has decided to implement the rule as originally proposed on July 24, 1986.

Another amendment to the labor surplus area regulations, not discussed in the July 24, 1986, proposed rule, is included in the final rule. The minimum population criterion for civil jurisdictions to be classified as labor surplus areas is changed from 50,000 to 25,000. This of course also affects the balance of county areas which include such civil jurisdictions.

Section 18003(a) of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 82, 363, added a new section 15(n) to the Small Business Act, 15 U.S.C. 644(n). Section 15(n) provides, in part, that "the determination of labor surplus areas shall be made on the basis of the criteria in effect at the time of the determination, except that any minimum population criteria shall not exceed twenty-five thousand." The amendment was effective on July 7, 1986. Pub. L. 99-272, Section 18003(b). Accordingly, since July 1986, the Department of Labor has applied a minimum population criterion of 25,000 to "exceptional circumstances" labor surplus area determinations. 51 FR 36611 (October 14, 1986). The annual list was modified effective April 1, 1987, to reflect the 25,000 minimum. 52 FR 9727 (March 26, 1987).

The change in the minimum population criterion is mandated by statute. DOL already has been applying the change administratively, having provided notice in the *Federal Register* and through administrative directive to the State employment service agencies. Therefore, DOL for good cause finds that further notice and public procedure on the change in the minimum population criterion to 25,000 is impracticable, unnecessary, and contrary to the public interest. 5 U.S.C. 553(a)(b).

### Regulatory Impact

The financial and other impact of the rule is less than specified in Executive Order 12291 for designation as a major rule.

At the time the proposed rule was published, DOL certified to the Chief Counsel for Advocacy, Small Business Administration, pursuant to 5 U.S.C. 605(b), that the rule would not have a significant impact on a substantial number of small entities because only a small number of Metropolitan Statistical Areas and Primary Metropolitan Statistical Areas were expected to qualify as a result of this change.

In a letter of August 22, 1986, to the U.S. Department of Labor, Employment and Training Administration, the Chief Counsel for Advocacy, Small Business Administration, stated the opinion that the "rule may have the salutary effect of making more small businesses—which are the primary beneficiaries of labor surplus preferences—eligible for these programs." The Chief Counsel indicated that the "publication of a final rule should be accompanied either by a regulatory flexibility analysis or a statement as to why the rule is appropriately certifiable as having no significant impact."

After review, DOL continues to certify to the Chief Counsel for Advocacy, Small Business Administration, that the rule would not have a significant impact on a substantial number of small entities because an analysis by the DOL at that time estimated that less than twenty-five percent of the Metropolitan Statistical Areas and Primary Metropolitan Statistical Areas in the United States would qualify as labor surplus areas under the rule. In addition, it was estimated that of the potential twenty-five percent that might qualify, almost eighty-five percent of the civil jurisdictions in the potential areas were already classified as labor surplus areas under 20 CFR 654.5.

In summary, the number of additions to the labor surplus area list resulting from this change is expected to be small in comparison to the number of areas already on the list and the number of additional small businesses eligible is expected to be small in comparison to the number of small businesses already eligible in the 1,687 civil jurisdictions already classified as labor surplus areas by the DOL to date in Fiscal Year 1988.

### Paperwork Reduction

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the paperwork requirements that are included in this regulation have been approved by the Office of Management

and Budget (OMB) and assigned OMB control number 1205-0207.

### List of Subjects in 20 CFR Part 654

Employment, Labor.

### Final Rule

Accordingly, Part 654 of Chapter V of Title 20, Code of Federal Regulations, is amended as follows:

### PART 654—SPECIAL RESPONSIBILITIES OF THE EMPLOYMENT SERVICE SYSTEM

1. The blanket authority citation for Part 654 is removed.

#### Subpart A—Responsibility Under Executive Order 12073

2. Subpart A is amended by adding an authority citation as set forth below and by removing the separate authority citations for all the sections in Subpart A.

Authority: 41 U.S.C. 10a *et seq.*; 29 U.S.C. 49 *et seq.*; 15 U.S.C. 644(n); E.O. 12073; 10582, as amended by E.O. 11051 and 12148.

#### § 654.4 [Amended]

3. In 20 CFR 654.4(b) (1) and (2) remove the word "50,000" and add, in its place, the word "25,000."

4. Section 654.5 is amended by revising paragraph (b) to read as follows:

#### § 654.5 Classification of labor surplus areas.

\* \* \* \* \*

(b) *Criteria for exceptional circumstances.* The Assistant Secretary, upon petition submitted by the appropriate State employment security agency, may classify a civil jurisdiction, a Metropolitan Statistical Area, or a Primary Metropolitan Statistical Area as a labor surplus area whenever such an area meets or is expected to meet the unemployment tests established under § 654.5(a) as a result of exceptional circumstances. For purposes of this paragraph "exceptional circumstances" shall mean catastrophic events, such as natural disasters, plant closings, and contract cancellations expected to have a long-term impact on labor market area conditions, discounting temporary or seasonal factors. For purposes of this paragraph, "Metropolitan Statistical Area" and "Primary Metropolitan Statistical Area" shall mean the areas officially defined and designated as such by the Office of Management and Budget.

(Approved by OMB under control number 1205-0207)

**Subpart B—Responsibilities Under  
Executive Order 10582**

5. Subpart B is amended by adding an authority citation as set forth below and by removing the separate authority citations following all the sections in Subpart B:

**Authority:** 41 U.S.C. 10a *et seq.*; 29 U.S.C. 49 *et seq.*; 15 U.S.C. 644(n); E.O. 12073, E.O. 10582 as amended by E.O. 11051 and 12148.

Signed at Washington, DC, on June 14, 1988.

**Ann McLaughlin,**  
*Secretary of Labor.*

[FR Doc. 88-13670 Filed 6-20-88; 8:45 am]

BILLING CODE 4510-30-M

**34 CFR Parts 350 and 360**

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Tuesday  
June 21, 1988

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**Part IV**

**Department of  
Education**

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34 CFR Parts 350 and 360  
National Institute on Disability and  
Rehabilitation Research; Final Regulations

## DEPARTMENT OF EDUCATION

## 34 CFR Parts 350 and 360

## National Institute on Disability and Rehabilitation Research

AGENCY: Department of Education.

ACTION: Final regulations.

**SUMMARY:** The Secretary amends the regulations governing the National Institute on Disability and Rehabilitation Research (NIDRR). These regulations implement the statutory requirement that NIDRR support projects for the training of rehabilitation researchers, as added by the Rehabilitation Act Amendments of 1986. These regulations define the purpose and required activities of the program, identify eligible applicants, and specify criteria by which applicants will be selected to receive awards.

**EFFECTIVE DATE:** These regulations take effect either 45 days after publication in the *Federal Register* or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

**FOR FURTHER INFORMATION CONTACT:** Betty Jo Berland, National Institute on Disability and Rehabilitation Research, 400 Maryland Avenue, SW., Washington, DC 20202. Telephone: (202) 732-1142; deaf or hearing impaired individuals may call (202) 732-1198 for TTY services.

**SUPPLEMENTARY INFORMATION:** The NIDRR, established under Title II of the Rehabilitation Act of 1973, carries out a variety of research and related activities. Title II was amended most recently in 1986. Regulations to implement most changes made by the Rehabilitation Act Amendments of 1986 were published in the *Federal Register* on August 12, 1987 at 52 FR 30060. The Secretary now amends the regulations to implement a new program authority for training in rehabilitation research under section 202(k) of the Rehabilitation Act, as added by Pub. L. 99-506, the Rehabilitation Act Amendments of 1986.

On the basis of an analysis of the need for expertise in particular rehabilitation research fields, the Secretary has determined that the appropriate implementation of this authority is to provide advanced training in research for individuals trained in rehabilitation-related clinical specialties whose professional practice degree requirements did not include an emphasis on research capability. This is typical in many fields of medicine and

allied health specialties, social work, and similar applied disciplines. The research training that is currently provided, frequently through in-service training or occasional workshops, is not sufficient in duration or intensity. Thus, the Secretary is establishing a program that would require project grantees to provide training that is at least one year in duration. Additional training would be required if necessary to enable individual trainees to become qualified to conduct independent research.

The Secretary believes that evaluating applications for projects to train researchers differs significantly from evaluating applications for projects to conduct research, and thus the selection criteria for this program focus on four major components of an effective research training program. They are: The relevance and importance of the proposed training program and its probable contribution to increasing the population of qualified rehabilitation researchers; the quality of the proposed training program; the quality of the resources and the personnel involved in the project; and the plan for management and operation of the training program.

These selection criteria incorporate all of the elements specified as selection criteria in the Education Department General Administrative Regulations (EDGAR). However, these regulations consolidate those criteria into the four described categories.

On February 9, 1988, the Secretary published a notice of proposed rulemaking for NIDRR at 53 FR 3832. NIDRR received several comments and some changes have been made in response to those comments. An Analysis of Comments and Changes follows this paragraph. The principal changes from the proposed regulations are to change in § 360.40 the minimum two-year training period to a one year requirement, unless a longer training period is necessary to enable a trainee to become qualified to conduct independent research, and to adjust the weights for the selection criteria in § 360.31(a) and (d). However, these changes will not become effective until fiscal year 1989. The fiscal year 1988 competition for this program was announced under the Notice of Proposed Rulemaking, and the closing date for receipt of applications has passed. Thus, applications in fiscal year 1988 will be reviewed in accordance with proposed §§ 360.31(a), (d), and 360.40. Changes to these provisions are not being made effective for fiscal year 1988 because NIDRR would not have time to notify all applicants of the changes, allow them an extension of time to amend or resubmit

their applications, and still make timely 1988 awards.

## Analysis of Comments and Changes

NIDRR received several letters containing comments on the proposed rules. A discussion of comments and substantive changes follows.

**Comment:** One commenter recommended that the term "Director" be substituted for the term "Secretary" and the term "Institute" be substituted for "Department", since the Rehabilitation Act, as amended, clearly specifies that the Director of NIDRR is authorized to award grants.

**Discussion:** The Department of Education Organization Act authorizes the Secretary to exercise all functions of the Department and its constituent officials, including the promulgation of regulations. The Education Department General Administrative Regulations (EDGAR), in Part 77, defines "Secretary" to mean "the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority."

**Changes:** None.

**Comment:** One commenter recommended that § 350.20 be revised to require that applicants submit applications to State rehabilitation agencies for the blind as well as to the State rehabilitation agency. Most States have two State rehabilitation agencies.

**Discussion:** The requirement in § 350.20 is based on provisions of the Rehabilitation Act. Section 204(c) of the Act mandates that the general grant and contract requirements of section 306 apply to all NIDRR financial assistance, unless the content of the requirement indicates that it is clearly inapplicable. For example, the construction requirements of section 306(b) would not apply because NIDRR does not support construction projects. One of the requirements that does apply to NIDRR is section 306(i), which requires that the appropriate State rehabilitation agency or agencies designated under section 101 be provided an opportunity to comment on proposed grants or contracts. Section 101(a)(1)(A) of the Act permits each State to designate a separate rehabilitation agency to provide services to the blind that is separate from the State agency providing services to all other disability groups.

**Changes:** A technical change has been made to § 350.20 to clarify that if a State has designated two rehabilitation agencies to provide services, then both agencies must be afforded the opportunity to comment on proposed NIDRR grants or contracts.

*Comment:* On commenter suggested that there be a change in the weighting of the selection criteria, arguing that the criterion, "Importance and potential contribution" is extremely significant and should be increased from 10 points to 20 points.

*Discussion:* The Secretary agrees that this is an important aspect of the program and should be given greater emphasis.

*Changes:* The weight accorded to the criterion, "Importance and potential contribution", has been increased to 20 points. The weight accorded to the criterion, "Management and operating plans", has been decreased, consequently, to 10 points.

*Comment:* Several commenters recommended that the requirement of a minimum training period of two years would discourage many potential trainees from participating in the program, and thus urged that a one year minimum be adopted.

*Discussion:* The Secretary agrees that the two year requirement could be a barrier to participation by individuals who have other career commitments. At the same time, the Secretary is concerned that a shorter training program may not be sufficient to prepare some individuals, depending on their prior academic and research backgrounds, to conduct independent research. Therefore, the Secretary is establishing, as a general rule, a minimum training period of only one academic year, but is requiring additional training if necessary to enable individual trainees to develop competence to conduct independent research.

*Changes:* The absolute requirement of a minimum two year training program has been changed to a minimum training period of one year, with an exception requiring longer training if needed by individual trainees.

*Comment:* Several commenters recommended that any priorities established in this program be based on survey data reflecting rehabilitation research manpower needs and be expressly consistent with the NIDRR long-range plan.

*Discussion:* The Secretary agrees that priorities should be based on some objectively identified needs for additional research expertise. However, there are no reliable sources of survey data for the entire field of rehabilitation research. In addition, NIDRR has other sources of information on needs, such as analyses of grant applications submitted to the Institute, conferences with professional associations, and input from established rehabilitation

researches and from other Federal research agencies.

*Changes:* No changes have been made.

*Comment:* Several commenters recommended that the requirement in § 360.10 that training be provided to " \* \* \* individuals who have clinical experience \* \* \*" be broadened to include " \* \* \* individuals who have clinical or other experience \* \* \*"

*Discussion:* The Secretary agrees that rehabilitation research training should be available to individuals who lack clinical experience but have research experience in basic sciences or relevant management experience.

*Changes:* Section 360.10 has been revised to include individuals with relevant management or basic science research experience.

*Comment:* Several commenters recommended that the requirement for laboratory experience be deleted, since "laboratories" are not relevant to some fields of research.

*Discussion:* The Secretary believes that the concept of laboratory, or its equivalent in a community-based alternative research setting, applies in all areas of scientific inquiry. It is important that independent researches be able to conduct research in such settings.

*Changes:* Section 360.11 has been changed to expand the concept of laboratory experience to include equivalent experience in a community-based research setting.

#### Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations specified in the order.

#### Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority in the United States. Based on the response to the proposed rules and its on own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

#### List of Subjects

##### 34 CFR Part 350

Administrative practice and procedure, Education, Educational

research, Grant programs—education, Handicapped.

##### 34 CFR Part 360

Education, Educational research, Grant programs—education, Handicapped, Manpower training programs, Vocational rehabilitation.

Dated: June 7, 1988.

William J. Bennett,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number 84.133P, National Institute on Disability and Rehabilitation Research)

The Secretary amends Title 34 of the Code of Federal Regulations by amending Part 350 and adding a new Part 360 as follows:

#### PART 350—DISABILITY AND REHABILITATION RESEARCH: GENERAL PROVISIONS

1. The authority citation for Part 350 continues to read as follows:

Authority: 29 U.S.C. 760-762, unless otherwise noted.

2. Section 350.1 is amended by revising the introductory text in paragraph (b) and adding a new paragraph (b)(10) to read as follows:

##### § 350.1 Disability and rehabilitation research.

(b) The Secretary awards financial assistance through ten types of programs:

(10) Research Training and Career Development Projects (34 CFR Part 360).

(Authority: Secs. 200, 202, and 204; 29 U.S.C. 760, 761a, and 762)

3. Section 350.2 is amended by revising the introductory text to read as follows:

##### § 350.2 Who is eligible for assistance under these programs?

The following agencies and organizations are eligible for grants or contracts as appropriate under these programs, except for programs described in 34 CFR Parts 356, 359, and 360:

4. Section 350.3 is amended by revising paragraph (c) to read as follows:

##### § 350.3 What regulations apply to these programs?

(c) The regulations in 34 CFR Part 351, 352, 353, 354, 355, 356, 357, 358, 359, or 360, as appropriate; and

5. Section 350.20 is revised to read as follows:

**§ 350.20 What are the application procedures under these programs?**

An applicant for assistance under 34 CFR Parts 351, 352, 353, 354, 355, 357, 358, 359, or 360, shall submit a copy of its application to the appropriate state rehabilitation agency or agencies for comment in accordance with the procedures in EDGAR, 34 CFR 75.155-75.159.

(Authority: Secs. 204(c) and 306(i); 29 U.S.C. 762(c) and 766(a))

6. Section 350.30 is amended by revising the second sentence to read as follows:

**§ 350.30 To whom does the Secretary refer an application?**

\* \* \* Peer review panels review applications for the Secretary on the basis of selection criteria described in 34 CFR 350.34, 352.31, 353.31, 358.32, 359.31, or 360.31, as appropriate.

7. Section 350.40 is amended by revising paragraph (a) to read as follows:

**§ 350.40 What are the matching requirements?**

(a) The Secretary may make grants to pay for part of the costs of research and demonstration projects that bear directly on the development of procedures, methods, and devices to assist the provision of vocational and other rehabilitation services, and research training and career development projects. Each grantee must participate in the costs of those projects. The specific amount of cost sharing to be borne by each grantee is negotiated at the time of the award and is not a factor that is considered in the selection process.

8. A new Part 360 is added to read as follows:

**PART 360—DISABILITY AND REHABILITATION RESEARCH: RESEARCH TRAINING AND CAREER DEVELOPMENT PROGRAM**

**Subpart A—General**

Sec.

- 360.1 What is the Research Training and Career Development Program?  
360.2 Who is eligible for assistance under this program?  
360.3 What regulations apply to this program?  
360.4 What definitions apply to this program?

**Subpart B—What Kinds of Activities Does the Department Support Under This Program?**

- 360.10 What types of projects are authorized under this program?  
360.11 What types of activities are required under these projects?

**Subpart C—[Reserved]**

**Subpart D—How Does the Secretary Make a Grant?**

- 360.30 How is peer review conducted under this program?  
360.31 What selection criteria are used under this program?  
360.32 What are the priorities for funding under this program?

**Subpart E—What Conditions Must Be Met After an Award?**

- 360.40 What is the required duration of the training?  
360.41 What level of participation is required of trainees?

Authority: 29 U.S.C. 760-762, unless otherwise noted.

**Subpart A—General**

**§ 360.1 What is the Research Training and Career Development Program?**

The purpose of this program is to expand capability in the field of rehabilitation research by supporting projects that provide advanced training in rehabilitation research.

(Authority: 29 U.S.C. 761a(k))

**§ 360.2 Who is eligible for assistance under this program?**

Institutions of higher education are eligible to receive assistance under this program.

(Authority: 29 U.S.C. 761(a)(k))

**§ 360.3 What regulations apply to this program?**

The regulations referenced in 34 CFR 350.3 apply to this program.

(Authority: 29 U.S.C. 761a(i)(1))

**§ 360.4 What definitions apply to this program?**

The definitions listed in 34 CFR 350.4 apply to this program.

(Authority: 29 U.S.C. 761a(i)(1))

**Subpart B—What Kinds of Activities Does the Department Support Under This Program?**

**§ 360.10 What types of projects are authorized under this program?**

The Research Training and Career Development Program provides financial assistance for projects of advanced training in rehabilitation research. These projects provide research training and experience at an advanced level to individuals with doctorates or similar advanced degrees

who have clinical or other relevant experience, including experience in management or basic science research, in fields pertinent to rehabilitation in order to qualify those individuals to conduct independent research on problems related to disability and rehabilitation.

(Authority: 29 U.S.C. 761a(k))

**§ 360.11 What types of activities are required under these projects?**

Each project must include the following activities:

- (a) Recruitment and selection of candidates for advanced research training.  
(b) Provision of a training program that includes didactic and classroom instruction, is multidisciplinary, and emphasizes scientific methodology, and that may involve collaboration among institutions.

(c) Provision of research experience, laboratory experience or its equivalent in a community-based research setting, and a practicum that involve each individual in clinical research and in practical activities with organizations representing individuals with disabilities.

(d) Provision of academic mentorship or guidance, and opportunities for scientific collaboration with qualified researchers at the host university and other appropriate institutions.

(e) Opportunities for participation in the development of professional presentations and publications, and for attendance at professional conferences and meetings as appropriate for the individual's field of study and level of experience.

(Authority: 29 U.S.C. 761(a)(k))

**Subpart C—[Reserved]**

**Subpart D—How Does the Secretary Make a Grant?**

**§ 360.30 How is peer review conducted under this program?**

Peer review is conducted under this program in accordance with 34 CFR 350.30-350.32.

(Authority: Sec. 202(e); 29 U.S.C. 761a(e))

**§ 360.31 What selection criteria are used under this program?**

(a) *Importance and potential contribution.* (20 points) (Note: For fiscal year 1988 only, the maximum number of points to be awarded under this criterion is 10 points.) The Secretary reviews each application to determine to what degree—

- (1) The applicant is responsive to any priority established under § 360.32;

(2) The applicant proposes to provide training in a rehabilitation discipline or area of study in which there is a shortage of qualified researchers, or to provide training to a trainee population in which there is a need for more qualified researchers, such as clinicians in rural areas, or clinicians who are directly experienced with underserved populations; and

(3) The applicant is likely to make a significant increase in the number of trained rehabilitation researchers.

(b) *Quality of proposed training program.* (40 points) The Secretary reviews each application to determine to what degree—

(1) The applicant's proposed recruitment program is likely to be effective in recruiting highly qualified trainees;

(2) The proposed didactic and classroom training programs emphasize scientific methodology, are multidisciplinary, comprehensive, and appropriate to the level of the trainees, and are likely to produce qualified independent researchers;

(3) The quality and extent of the academic mentorship, guidance, and supervision to be provided to each individual trainee are of a high level and are likely to produce highly qualified researchers;

(4) The type, extent, and quality of the proposed clinical and laboratory research experience, including the opportunity to participate in research on meaningful topics at an advanced level, are likely to develop individuals with the capacity to perform independent research; and

(5) The opportunities for collegial and collaborative activities, exposure to outstanding scientists in the field, and opportunities to participate in the preparation of scholarly or scientific publications and presentations are extensive and appropriate.

(c) *Personnel and resources committed to the project.* (30 points) The Secretary evaluates each application to determine to what degree—

(1) The activities of the project will be implemented by sufficient and qualified

staff who are outstanding scientists in the field;

(2) The project director and other key staff are experienced in the delivery of advanced research training as well as knowledgeable about the methodology and literature of pertinent subject areas;

(3) All required disciplines are effectively included; and

(4) The applicant possesses the appropriate facilities, laboratories, and access to clinical populations and organizations representing persons with disabilities to support the conduct of advanced clinical rehabilitation research.

(d) *Management and operating plans.* (10 points) (Note: For fiscal year 1988 only, the maximum number of points to be awarded under this criterion is 20 points.) The Secretary evaluates each application to determine to what degree—

(1) There is an effective plan of operation that ensures proper and efficient administration of the project;

(2) There is an effective plan for collaboration with other institutions of higher education and organizations whose participation is necessary to ensure effective classroom and clinical research training;

(3) The applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected without regard to race, color, national origin, gender, age, or handicapping condition;

(4) The applicant has provided an adequate plan for the use of facilities, resources, supplies, and equipment;

(5) The budget for the project is reasonable and adequate to support the proposed activities; and

(6) The applicant provides an appropriate plan for the evaluation of all phases of the project.

(Authority: 29 U.S.C. 761a(e) and 76(a)(k))

(Approved by the Office of Management and Budget under Control Number 1820-0027)

**§ 360.32 What are the priorities for funding under this program?**

(a) Each year, the Secretary may establish priorities to support research

training in one or more of the following areas of study:

(1) Medicine or medical specialties, such as physical medicine and rehabilitation; neurology; orthopedics; otolaryngology; rheumatology; psychiatry; family medicine; endocrinology; pediatrics; podiatry; dentistry; urology; plastic and reconstructive surgery; or maxillofacial prosthodontics.

(2) Allied health professions, such as physical therapy; occupational therapy; nursing; audiology; speech pathology; psychology; or recreational therapy.

(3) Engineering and rehabilitation technology fields, such as prosthetics and orthotics; engineering; design; architecture; computer applications; or biomechanics.

(4) Miscellaneous clinical or technical fields, such as rehabilitation counseling; social work; law; social and behavioral sciences; gerontology; or demographics.

(b) The Secretary establishes any priorities under this section through a notice in the **Federal Register**.

(Authority: 29 U.S.C. 760-762)

**Subpart E—What Conditions Must Be Met After an Award?**

**§ 360.40 What is the required duration of the training?**

A grantee shall provide training to individuals that is not less than one academic year in duration, unless a longer training period is required to ensure that each trainee is qualified to conduct independent research upon completion of the course of training. (Note: For fiscal year 1988 only, the minimum required training period is two academic years.)

(Authority: 29 U.S.C. 760-762)

**§ 360.41 What level of participation is required of trainees?**

Individuals who are receiving training under this program shall devote a minimum of eighty percent of their time to the activities of the training program during the training period.

(Authority: 29 U.S.C. 760-762)

[FR Doc. 88-13962 Filed 6-20-88; 8:45 am]

BILLING CODE 4000-01



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Tuesday  
June 21, 1988

**14 CFR Part 91**  
**Federal Register**

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**Part V**

**Department of  
Transportation**

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**Federal Aviation Administration**

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**14 CFR Part 91**  
**Transponder With Automatic Altitude  
Reporting Capability Requirement; Final  
Rule**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 91

[Docket No. 25531 Amdt. No. 91-203]

RIN 2120-AC66

## Transponder with Automatic Altitude Reporting Capability Requirement

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This action establishes requirements for an aircraft to have an operating transponder (basic transponder or Mode S transponder) with automatic altitude reporting equipment (referred to in this document as "a transponder with Mode C") when operating in the vicinity of certain primary airports for which a terminal radar approach control service area has been established, and in other airspace at and above 10,000 feet mean sea level (MSL). Implementation of this action is being accomplished in two phases. Phase I will require a transponder with Mode C at and above 10,000 feet MSL, and in the vicinity of terminal control area (TCA) primary airports. Phase II will implement a transponder with Mode C requirement in the airspace in the vicinity of airport radar service area (ARSA) primary airports (see charts in the appendix to this document). Also in Phase II, a transponder with Mode C requirement at other airports for which a TCA or ARSA has not been designated is being adopted in this rule at Logan International Airport, Billings, MT, and Hector International Airport, Fargo, ND; other such airports will be considered for a similar requirement on a case-by-case basis under separate rulemaking. These changes are intended to significantly reduce the potential for midair collisions in terminal and en route airspace.

EFFECTIVE DATE: July 21, 1988.

**FOR FURTHER INFORMATION CONTACT:** Mr. Reginald C. Matthews, Airspace-Rules and Aeronautical Information Division, ATO-200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-8783.

## SUPPLEMENTARY INFORMATION:

## Background and Related Rulemaking Actions

On December 2, 1985, the FAA issued a rule, informally called the "transponder-on" rule (50 FR 45599, December 5, 1985). The "transponder-on" rule requires any person operating

an aircraft equipped with an operable transponder to have that transponder turned on while operating in controlled airspace. In addition, if the aircraft is equipped with automatic altitude reporting equipment, that equipment must also be turned on. The "transponder-on" rule is intended to enhance aviation safety by providing an increased degree of aircraft target visibility to radar controllers in air traffic control (ATC) facilities. The transponder-on environment has enhanced aviation safety by increasing controller awareness and facilitating controller recognition and resolution of potential traffic conflict situations between controlled and non-controlled aircraft.

On February 3, 1987, the FAA published the Mode S final rule in the *Federal Register* (52 FR 3380). That rule pertains to the use, installation, inspection, and testing of air traffic control radar beacon systems (ATCRBS) and Mode S Transponders in U.S.-registered civil aircraft. The portion of that rule requiring a transponder with Mode C for operation in Group II TCA's was effective on December 1, 1987, with other portions effective in various phases through January 1, 1992.

On February 12, 1988, the FAA published Notice 88-2 (53 FR 4306) proposing to establish a transponder with Mode C requirement in all airspace within 40 miles of an airport for which terminal radar approach control service has been established, and in all other controlled airspace above 6,000 feet above the surface (AGL) or 12,500 feet MSL whichever is lower. While Notice 88-2 also proposed to replace the Continental Control Area (CCA) with the United States (U.S.) Control Area, Notice 88-2 primarily responded to two recently enacted statutes requiring the FAA to broaden its existing requirement for the use of transponders with Mode C. First, the *FY 1988 Continuing Resolution* (Pub. L. 100-202) provides that the FAA shall issue regulations requiring a transponder with Mode C on all aircraft operating: (1) In terminal airspace where ATC radar service is provided, and (2) in all other controlled airspace above a minimum altitude determined by the FAA. Under this statute, a final rule must be issued by December 22, 1988, and must be made effective at the earliest feasible date. Second, *The Airport and Airway Safety and Capacity Expansion Act of 1987* (Pub. L. 100-223) provides that the FAA shall require a transponder with Mode C in designated airspace where radar service is provided for separation of aircraft. Under Pub. L. 100-223, access to designated airspace other than TCA's

and ARSA's may be granted to nonequipped aircraft if such access will not interfere with normal traffic flow. Additionally, Pub. L. 100-223 provides that a final rule must be issued by June 30, 1988, and must be made effective no later than December 30, 1990.

Prior to the issuance of Notice 88-2, the FAA, on June 16, 1987, issued Notice 87-7 (52 FR 22918) proposing to require all aircraft operating within 30 miles of a TCA primary airport to be equipped with a transponder with Mode C. Additionally, Notice 87-7 proposed to: (1) Establish other pilot and equipment requirements associated with operations in a TCA, and (2) establish a single-class TCA which would replace the existing three groups of TCA's.

## Analysis of Comments

Due to the overlapping nature of the transponder with Mode C proposals in Notices 87-7 and 88-2, the overwhelming public response to the proposals, and the FAA's interest in dealing with the issues associated with those proposals, the final rule adopted today in Notice 88-2 has the effect of obviating the Mode C issues in Notice 87-7. Disposition of the other proposals in Notice 87-7 and the issue of lowering the floor of controlled airspace reflected in Notice 88-2 will be addressed outside the framework of this final rule.

The FAA received approximately 7,000 comments concerning the proposals in Notice 87-7. In addition, the FAA received approximately 43,000 pre-printed form letters that did not address the specifics of the proposals in Notice 87-7 but were generally critical of the more restrictive rules associated with flight in busy terminal areas. In response to the proposals in Notice 88-2, the FAA received more than 50,000 comments. The vast majority of these comments expressed general opposition to the proposals. The following is a categorization and discussion of the substantive comments received on both proposals.

## Notice 88-2 Exceeded Congressional Intent

Many commenters, including members of Congress, suggested that the FAA exceeded the requirements of the recent legislative enactments with the proposals contained in Notice 88-2.

As stated earlier, Notice 88-2 proposed to require a transponder with Mode C for any operation within a 40-mile radius of more than 250 airport locations, and for operations in controlled airspace above 6,000 feet AGL or 12,500 feet MSL whichever is lower. These proposals were intentionally broad, based on the

FAA's interest in soliciting comments on the widest possible range of alternatives. As with most proposed rulemaking actions, the FAA fully anticipated that comments and further considerations could generate modifications to the proposal.

In the process of developing a rulemaking proposal based on the legislation, the FAA needed to consider the respective applicability of the two statutes, which are not identical, and the degree of rulemaking discretion they afforded the FAA. The FAA has assumed, in order to promulgate a final rule that will fulfill the legislative mandate, that the laws permit the FAA to provide for the exception of certain categories of nonequipped aircraft from the transponder with Mode C requirement. This conclusion is supported by the content of Congressional correspondence received since the publication of Notice 88-2. These letters uniformly consider the FAA to have the flexibility and exception authority which is incorporated in Pub. L. 100-233. It is FAA's belief that the regulations adopted herein are in compliance with the legislation.

#### *Establishment of Controlled Airspace*

Many commenters objected to the proposed replacement of the CCA with the U.S. Control Area being included with the transponder with Mode C aspects of Notice 88-2. These commenters expressed a belief that the U.S. Control Area proposal was an airspace "grab" and that the FAA was disguising it with the legislative mandates of Pub. L. 100-202 and Pub. L. 100-223. Further, other commenters stated opposition to this aspect because they believed that such an action would require all aircraft operating in the U.S. Control Area to be under positive control. Many commenters were unaware that a common floor for controlled airspace already exists at 1,200 feet AGL east of the Mississippi and in a large portion of the Western U.S. Other commenters objected to the proposal mistakenly assuming that operations in the Eastern U.S. above 1,200 feet would be grounded because of the increased flight visibility requirements, when such requirements already exist. Another commenter suggested that the CCA be rescinded.

Based on the overwhelming number of comments received concerning this issue that indicated a basic misunderstanding of the effect of controlled airspace, the FAA is separating this aspect of the proposal from the other proposals in Notice 88-2. The disposition of the U.S.

Control Area proposal will be addressed outside the framework of this final rule.

#### *Transponder with Mode C Proposals in Notice Nos. 87-7 and 88-2*

The preponderance of commenters expressed general objection to the transponder with Mode C proposals in Notice Nos. 87-7 and 88-2. Many commenters were of the opinion that the proposal in Notice 88-2 to require a transponder with Mode C within a 40-mile radius of certain airports is unnecessary, especially when it followed the proposal in Notice 87-7 to require the transponder with Mode C in the airspace within 30 miles of a TCA primary airport.

The FAA reviewed the Mode C proposal of Notice 87-7 in light of Pub. L. 100-202 and Pub. L. 100-223. It is the FAA's opinion that the scope of the legislation, which referred to terminal airspace where radar is utilized to separate aircraft (more than 250 airports), is broader than the scope of the transponder with Mode C proposal in Notice 87-7, which affected only 23 terminal areas. I.e., the Notice 87-7 proposal for a 30-mile-radius at TCA locations might not have met the requirement of the public laws. Thus, the 40-mile-radius proposal was developed and issued to solicit public comments on the widest possible alternatives to the FAA proposal with an expectation that the proposal could be modified in response to further study and public comments and recommendations. Subsequently, the FAA suspended further action on the disposition of the proposals in Notice 87-7 pending a determination on the proposals in Notice 88-2. The action taken in this final rule obviates the need for the transponder with Mode C proposals contained in Notice No. 87-7. The disposition of other issues related to controlled airspace, single-class TCA, student pilots, and helicopter equipment will be addressed outside this rulemaking action.

#### *Floor of the Transponder Equipment Requirement*

Many commenters objected to the lowering of the floor for the en route transponder with Mode C requirement from 12,500 feet MSL to 6,000 feet AGL or 12,500 feet MSL, whichever is lower. Commenters based their objections on the perception that the FAA exceeded the scope of the legislation, or on the absence of radar coverage in some areas at and above 6,000 feet AGL. Many commenters recommended that the FAA establish 12,500 feet as the floor for the en route transponder with Mode C requirement. Other commenters

included recommendations to establish 10,000 feet MSL as the base altitude because of the perception that air carrier aircraft seldom operate below that altitude except when transitioning to/from terminal airspace. Some commenters stated that the 250-knot speed limit below 10,000 feet MSL and the increased visibility requirement above 10,000 feet MSL preclude the need to change the floor for the en route transponder with Mode C requirement because pilots of aircraft operating below 12,500 feet MSL would be operating either at slower speeds or with visibility ranges at or greater than 5 miles, or both. Such operators, it was argued, would be able to see and avoid other aircraft without intervention from ATC.

Under the legislation, the FAA was mandated to require a Mode C transponder in other (non-terminal) airspace at an altitude to be determined by the FAA. The FAA could infer that it was the intent of Congress that the agency not retain the existing floor of 12,500 feet MSL; otherwise, there would be no need for that aspect of the legislation. The proposal to lower the floor of the en route transponder with Mode C requirement was based on actual or planned national radar coverage. Existing radar coverage at 6,000 feet above the elevation of en route radar sites virtually covers the entire Continental U.S. Based on the comments and other factors, however, the FAA has adopted 10,000 feet MSL as the floor of the en route transponder with Mode C requirement. Operations conducted outside terminal airspace above 10,000 feet MSL but below 2,500 feet AGL do not require a transponder with Mode C. The factors for adopting 10,000 feet MSL as the floor of the en route transponder with Mode C requirement include the fact that the preponderance of aircraft that operate above 10,000 feet MSL are already equipped with the required equipment, so the number of operators affected by the new requirement will be minimal. While the increased visibility minimum above 10,000 feet MSL does provide benefit to aircraft operating above that altitude, the FAA believes that an absence of a 250-knot speed limit above 10,000 feet MSL, with its associated impact on a pilot's ability to see and avoid other aircraft, provides the basis for lowering the floor of the en route transponder with Mode C requirement from 12,500 to at least 10,000 feet MSL. However, FAA will consider a reevaluation of this adjustment in light of national ATC radar coverage, implementation and evolution of TCAS

equipment trends, identification of the types of aircraft that routinely operate at altitudes below 10,000 feet MSL, and other safety factors.

#### *Controller Selective Awareness*

An aviation organization, in disagreement with the proposed transponder requirements, stated that the FAA and the public must recognize that the ATC system is not a self-contained automation system, but that it is a system that is dependent on a controller's ability to see and utilize the information provided. This organization stated that it has seen by example in two recent midair collisions that a controller did not effectively use the data which he/she was provided.

There are reasons, relating to both actual working conditions and to perception, why a controller may not observe a radar target on his/her radar display. While it is conceivable that ATC automated radar tracking and display systems will detect, but *not* display, a radar target on a controller's radar screen, the probability of such an occurrence is remote. This anomaly may be the result of a computer-hardware failure along the "path" between the detection and the display computer subsystems. Since these failures are not a regular occurrence, it is reasonable to assume that in the midair collisions the radar targets of the non-controlled aircraft were displayed, but for some unknown reason other than hardware failure the targets were not noted by the controllers.

The need for improved detection and depiction became evident in the early stages of the use of radar in providing ATC service. The following discussion summarizes the problem and the continuing efforts to address it.

Positive control areas (PCA) were established in certain airspace to exclude non-controlled aircraft. Complementing the PCA implementation, the FAA in 1973 established the requirement for aircraft to be equipped with and operate a transponder while in a PCA. A transponder in an aircraft provides a radar controller with a more discernable radar target of that aircraft by reinforcing the less-obvious basic or primary radar target. Thus, a controller was provided with the means to better track controlled traffic and provide traffic advisory information to the controlled traffic concerning other transponder-equipped aircraft.

This transponder requirement has had a negative effect, however, in that controllers are less likely to detect radar targets of uncontrolled aircraft not equipped with a transponder or a

transponder with Mode C. To illustrate, as a controlled transponder-equipped aircraft proceeds through a terminal area at lower altitudes, it would more than likely traverse areas of heavy radar target concentration primarily from non-controlled aircraft. Such an area may have coincided with or overlapped the traffic patterns of other airports, where aircraft would be operating at altitudes that would not normally conflict with the controlled aircraft. On the radar screen, the non-controlled aircraft would appear close to the controlled traffic but would in fact be well below the controlled traffic.

In most of these situations, the controller would provide only general traffic information. Moreover, because in the prior ATC environment the issuance of traffic advisories was classified as an additional duty, the priority of providing traffic information was low in comparison to a controller's primary duty to separate controlled aircraft. Further, a controller responsible for aircraft operating in a PCA could very well have assumed that once the controlled traffic entered a PCA, traffic advisory information concerning radar targets of non-controlled aircraft need not be issued since all aircraft operating in a PCA had received an appropriate ATC clearance and were being adequately separated.

With the establishment of the TCA program, a controller could also reasonably assume that randomly-detected radar targets within the lateral limits of the TCA are from aircraft actually operating above or below TCA airspace and, therefore, not in conflict with aircraft operating inside the TCA. This assumption tended to reduce the controller's concentration on radar targets of non-controlled aircraft without automatic altitude reporting capability, even though such a randomly-detected target could in fact be an aircraft that unknowingly, or otherwise, entered a TCA without an ATC clearance.

Recognizing the limitations of traffic advisory service as a non-mandatory, workload-permitting service, the FAA upgraded the service, in part, to a priority equal to that of providing aircraft separation to controlled aircraft. A controller is now required to issue aircraft pertinent control instructions to assist in avoiding an unsafe situation involving another aircraft or terrain. This type of service is called a safety alert. Optional aspects of the service were, therefore, eliminated. In the current ATC environment, a situation requiring a safety alert can be brought to the controller's attention by the automated system with a conflict alert

or a low altitude alert provided the aircraft is appropriately equipped.

A partial solution to the problem of controller-nondetection of non-controlled aircraft was brought about by the transponder with Mode C requirement in all controlled airspace above 12,500 feet MSL and in certain TCA's. That requirement facilitated controller receipt of more information concerning non-controlled traffic operating in the stratum between 12,500 feet MSL and the floor of a PCA as well as on those aircraft climbing to, or descending from that stratum. With this altitude information, controllers are better able to select radar targets that are potential conflicts for controlled aircraft. For example, automated ATC system can utilize such information to filter out those targets operating outside of certain altitude ranges which would not be factors to the aircraft that are being or would be controlled in a specific airspace area. Automated ATC systems present the controller with altitude information on non-controlled or unknown aircraft equipped with a radar transponder and Mode C when such aircraft are detected to have penetrated the airspace defined by the appropriate altitude filter limits. With this type of alert, the controller can take the appropriate action to maintain a margin of safety between the known aircraft and the unknown or non-controlled target.

Another existing automation feature that can contribute significantly to the solution and is programmed for enhancement is the presentation to the controller of a conflict alert when two radar targets (one of which may represent an unknown aircraft) are estimated to approach each other with less than a specified horizontal or vertical distance. A conflict alert can be presented conspicuously to the controller, prompting him/her to take action to ensure that safety is maintained. This feature is most efficient in situations where both of the aircraft involved are equipped with a transponder with Mode C.

#### *Advantages of a Transponder with Mode C Equipment*

A number of comments related to the benefits of a transponder with Mode C requirement for both air traffic control and collision avoidance and, generally, the extent to which a requirement for such equipment should apply. Some commenters, including one aviation organization, argued that the proposed transponder requirements should not apply to uncontrolled airspace or in airspace where radar service is not

available. Other commenters argued that justification cited in the proposals did not substantiate the proposed mandatory transponder with Mode C equipment requirement. An organization in general agreement with the proposal stated that it believes that the FAA must take prompt action to enhance the ATC system by providing collision protection between non-controlled and controlled aircraft. Another organization stated that the FAA should extol the benefits of the transponder with Mode C as a complement to airborne collision avoidance systems. Additionally, an argument was made by general aviation advocates that pilots who operate solely under visual flight rules (VFR) and who do not take advantage of available ATC services will not receive any safety benefits from the proposed transponder with Mode C requirements.

There are distinct safety advantages attributable to transponders with Mode C equipment. Automated ATC radar tracking systems are programmed, based on this equipment, to provide automatic conflict alert and low-altitude alert warnings to the controller, which can be quickly relayed to the pilot(s). Aircraft altitude information derived from this equipment can be displayed directly on a controller's radar screen. This equipment will activate traffic alert and collision avoidance systems (TCAS) in aircraft equipped with TCAS.

An advantage of a transponder with Mode C is derived from an existing capability of automated ATC radar tracking systems. These systems are currently programmed to continually predict and update the paths of Mode C transponder-equipped aircraft being controlled by ATC. These predictions are constantly compared with those of other controlled aircraft that are also tracked by the system. In addition, these systems compare the aircraft data with pre-programmed terrain information. If any of the comparisons predict a potentially hazardous situation for a controlled aircraft, a visual and aural alarm immediately alerts the controller who issues safety instructions to the aircraft. Furthermore, a new software feature called "Mode C Intruder" (MCI) is being implemented in the automated en route ATC system and will eventually be implemented in the terminal ATC systems. The MCI feature establishes tracks on transponder with Mode C-equipped aircraft that are not being controlled by ATC and alerts controllers to potential conflicts between controlled and non-controlled aircraft.

Having nearly all aircraft equipped with transponders with Mode C in

specified airspace provides controllers with a continuous, more complete traffic picture. This allows altitude, distance, and azimuth information to be correlated and control instructions to be issued to assure that safe separation is provided between controlled and non-controlled aircraft. In addition, radio communications are reduced. For example, controllers would not have to repeatedly ask pilots to report altitude, and aircraft climb/descent paths can be independently monitored for possible conflicts with other traffic. Unnecessary traffic advisories concerning non-controlled aircraft (equipped with a transponder with Mode C) are eliminated. This is true even when such aircraft are in uncontrolled airspace; therefore, it is not necessary for an aircraft equipped with a transponder with Mode C to be in controlled airspace for pilots of affected aircraft and ATC to receive the benefits of such equipment.

The FAA has proposed rulemaking to require airborne traffic alert and collision avoidance systems on larger aircraft (Notice 87-8; 52 FR 32268, August 26, 1987). A transponder with Mode C has the ability to provide critical information to TCAS-equipped aircraft. The TCAS equipment transmits periodic interrogation signals. If a nearby aircraft is equipped with a basic transponder, that aircraft's range and azimuth from the TCAS-equipped aircraft is calculated by the TCAS-equipped aircraft. However, if a nearby aircraft is equipped with a transponder with Mode C, altitude information is provided in addition to range and azimuth. TCAS will assimilate the data and consolidate range, direction, and altitude information, when available, into a collision risk prediction and issue traffic advisories to the flightcrew.

While TCAS I will alert a flightcrew of a collision potential, a crew so alerted must determine the correct course of action to avoid a collision. TCAS II and TCAS III will issue resolution advisories, which are instructions to a flight crew as to what evasive actions are most appropriate to avoid a collision. TCAS II provides resolution advisories in a vertical plane, and TCAS III would provide resolution advisories in both vertical and horizontal planes.

Pilots of aircraft equipped with a transponder with Mode C who choose, where permitted, to operate without the assistance of ATC will indirectly benefit from such equipment. For example, TCAS-equipped aircraft are better able to avoid such aircraft; and, when such aircraft are under surveillance of ATC radar, controllers are better able to

maintain safe distances between such aircraft and those aircraft being controlled.

For these reasons, the FAA finds that there is justification for a general transponder with Mode C requirement in both controlled and uncontrolled airspace at certain locations.

#### *Access to Terminal Airspace*

Many commenters, including members of Congress, objected to the proposal to establish a transponder with Mode C requirement at all airports where terminal radar approach control service exists. Some commenters suggested the FAA limit the application to a 30-mile radius of TCA primary airports as proposed in Notice 87-7. Others suggested that the requirement be limited to TCA/ARSA/terminal radar service areas (TRSA) airports. Some commenters even suggested reducing the size of the affected terminal airspace as a compromise to the 40-mile radius proposed in Notice 88-2. Many commenters suggested that authorization provisions be provided for nonequipped aircraft.

An aviation organization stated that it was of the opinion that "cut-outs" should be provided to accommodate operations below 1,200 feet above the surface. Within these "cut-outs," aircraft could operate without the proposed transponder equipment from or to airports outside the surface areas of designated airspace. One commenter stated the FAA should consider the site-specific need for airspace exclusions through which non-controlled aircraft could safely operate provided these corridors/airspace exclusions do not affect the safety of controlled aircraft.

Another aviation organization strongly urged the FAA to include provisions to allow nonequipped aircraft to operate under a TCA or ARSA floor or within the airspace where a transponder with Mode C is required. Another organization stated that it believes a limited number of aircraft can be safely accommodated in areas where a transponder with Mode C would be required provided such aircraft were conducting ingress/egress operations at altitudes below 2,500 feet AGL to airports outside designated airspace.

An aviation organization, although in general agreement with the proposed transponder requirements, stated that aircraft authorized to deviate from the transponder requirement should not be permitted to fly within 1,000 feet of the floor of a TCA unless that aircraft is equipped with a transponder with Mode C, but in no case should any aircraft be

allowed to operate within 500 feet of the floor of the TCA.

As stated earlier, the FAA proposals in Notice 88-2 were intentionally broad to gather the widest possible alternatives and suggestions through public comments. The FAA has considered the comments in regard to reducing the scope of the proposed requirement and believes that such a reduction can be made, in compliance with the legislation, without significantly reducing the safety benefits envisioned by the proposals. Further, the FAA believes that the greatest benefit of an expanded transponder with Mode C requirement will be realized in the airspace surrounding airports with the highest number of passenger enplanements and aircraft operations. The airspace surrounding such airports is typically designated as a TCA or ARSA. At other airports which do not meet the current TCA or ARSA establishment criteria, the FAA believes a transponder with Mode C requirement equivalent to that for ARSA's should be considered where the annual enplaned passenger count is sufficiently high.

In consideration of the foregoing comments, the FAA is limiting the transponder with Mode C requirement around TCA primary airports to that airspace within a 30-mile radius. With this action, the FAA is effectively adopting requirements for transponders with Mode C essentially the same as those proposed in Notice 87-7. While this airspace extends from the surface upward and will not have any "cut outs," provisions are being made for operations by nonequipped aircraft as discussed later in this document. Further, the issues of TCA/ARSA design, VFR transition routes through designated TCA's and equipment requirements on such routes, and other issues dealing with classification of TCA's will be addressed in the disposition of the non-Mode C proposals in Notice 87-7.

In regard to the airspace around ARSA primary airports, the transponder with Mode C requirement is being limited to the airspace within the lateral limits of an ARSA (normally a 10-mile radius). Additionally the airspace below an ARSA (normally beneath 1,200 feet AGL) is being effectively "cut out" to accommodate operations by nonequipped aircraft.

For airports not designated as a TCA or ARSA primary airport but where terminal radar approach control service is provided, the transponder with Mode C requirement is being limited to that airspace within 10 miles of such an airport. Similar to the requirement at ARSA locations, the airspace below

1,200 feet AGL outside of the airport traffic area (ATA) is also being excluded from the requirement in order to accommodate operations by nonequipped aircraft. Further, the FAA will consider such airports as candidates for imposing the transponder with Mode C requirement when the annual enplaned passenger count exceeds 200,000. The FAA believes that this number of enplaned passengers per year is a reasonable threshold for the level of air carrier activity that would support a more stringent transponder with Mode C requirement. However, the fact that an airport has experienced such an enplaned passenger count does not automatically trigger a transponder with Mode C requirement in the surrounding airspace. Each candidate airport will be considered on a case-by-case basis after a review clearly indicates that a significant safety benefit would be realized.

There are several airports that currently exceed 200,000 annually enplaned passengers which have not been designated as, or planned for an ARSA; e.g., Billings, MT, Fargo, ND, Eugene, OR, Sioux Falls, SD, Hilo, HI, Fairbanks, AK, etc. The FAA has examined the operations at each of these locations and has determined that a transponder with Mode C requirement should be established at Billings, MT, and Fargo, ND. Both of these airports have experienced a significantly high number of passenger enplanements, and both typically generate over 50,000 instrument operations per year.

Most of the other airports that experience over 200,000 annual passenger enplanements are located within a terminal radar service area (TRSA), have unique geographical limitations, relatively high number of instrument operations, complex traffic mixes, or extensive pilot training in proximity to the ATA. These factors will be considered in decisions to extend the transponder with Mode C requirement to airports that exceed 200,000 passenger enplanements.

TRSA's have been designated at most of the other non-TCA, non-ARSA locations where airport passenger enplanements exceed 200,000 per year. Aircraft operating in TRSA's are provided with air traffic control separation service. The provision of this service is mandatory on the part of ATC but voluntary on the part of pilots. Participation in the air traffic control service is mandatory for pilots of aircraft operating in the ATA to or from the airport for which the ATA is designated, or those simply transiting the ATA. An ATA is in effect at all

airports with an operating air traffic control tower.

Also, controlled airspace has been established to the surface in the vicinity of each of these airports in the form of transition areas or control zones, or both. As a result, there is an existing requirement, under § 91.24(c), that transponder and Mode C equipment installed on an aircraft must be operated while in controlled airspace in the vicinity of these airports ("transponder-on" rule). In effect, a transponder with Mode C operating requirement already exists at these airports for all aircraft that are now or will in the future be equipped with such equipment. The FAA has determined that this requirement, in connection with other air traffic operating requirements at airports with terminal radar approach control service, provides the desired level of safety at this time. The FAA further considers this requirement to meet the mandate of Pub. L. 100-223 for a transponder with Mode C requirement in terminal airspace where radar service is provided. The exception for nonequipped aircraft at these airports is consistent with the legislation's provisions for access by nonequipped aircraft where such access will not interfere with the traffic flow.

In general, then, the rule adopted will require a transponder with Mode C in the terminal airspace of airports with terminal radar approach control service as follows: (1) In TCA and ARSA airspace; (2) from the surface to 10,000 feet MSL within 30 miles of a TCA primary airport, with certain exceptions for aircraft which were not originally certificated with an engine-driven electrical system or which have not subsequently been certified with such a system installed, balloons, and gliders; (3) in the airspace above an ARSA to 10,000 feet MSL; and (4) within 10 miles of additional high-passenger-traffic airports identified in Appendix D of Part 91. Moreover, in controlled airspace in the vicinity of other airports, pilots of all aircraft equipped with Mode A or Mode C transponders must operate that equipment, but no additional equipment requirement is imposed on operators of nonequipped aircraft.

Currently, the FAA provides for the exception of nonequipped aircraft from the transponder with Mode C requirements on a case-by-case basis by granting ATC authorizations under § 91.24(d). This provision has worked well in the past, and some provision of this nature is necessary for efficient control of air traffic in a transponder with Mode C environment. It is essential that the agency have the ability to

suspend or authorize exceptions from rules where necessary for safety or otherwise beneficial to ATC. For example, a controller must be empowered to direct a pilot to turn off a malfunctioning transponder or Mode C unit, or to direct a nonequipped aircraft through a regulated area if that is the safest route.

Accordingly, the FAA will assume that case-by-case ATC authorizations continue to be permitted under the terms of the recent legislation as a necessary concomitant of a general transponder with Mode C program. ATC authorizations will contain any conditions that may be necessary to provide a level of safety equivalent to operation by an aircraft equipped with transponder with Mode C.

It should be recognized that ATC will not be able to grant authorization in all cases requested. However, a person who has been denied an authorization to deviate from the requirement, and who believes that the requested authorization would have no adverse impact on safety or ATC services, may request an administrative review of the denial by the Air Traffic Division Manager for the FAA region in which the ATC facility is located. In addition, Part 11 of the FAR provides procedures for the filing of a petition for exemption from the regulations, where an exemption is warranted and would be a more appropriated form of relief.

Further, prior to the July 1, 1989, compliance date, the FAA will consider the impact of the required equipment in this final rule on aircraft not landing or taking off at TCA primary airports. Additionally, the FAA will look at providing access to outlying general aviation airports for those aircraft without the required equipment. The FAA will take such action only to the extent that it would be consistent with maintaining adequate safety within the TCA and the airspace surrounding the TCA primary airport.

#### *Agricultural Aircraft Operations*

An aviation organization, supported by other commenters, suggested that agricultural aircraft operations be excluded from the proposed transponder requirements. The organization stated that flight safety would be jeopardized if agricultural aircraft (AG) pilots were compelled to adjust transponder settings and make radio contact during an application operation. Further, the organization stated AG's regularly work from unimproved landing strips and repeated landings and takeoffs cause dust and dirt to affect delicate electronic avionics.

AG's are already required to be equipped with radio, navigational, and transponder capabilities in TCA's and are required to be equipped with two-way radios in ARSA's. The proposals in Notice Nos 87-7 and 88-2 did not address these issues with regard to fixed-wing aircraft. Further, AG's have historically obtained authorizations from ATC to operate without required equipment when necessary. The final rules being adopted does not alter those provisions for obtaining authorizations.

#### *Aircraft Without Electrical Systems*

Many commenters stated that it is not practical to install a transponder with Mode C on balloons and gliders and, therefore, such aircraft should be excluded from the proposed requirements. Several commenters stated that there has never been any indication that these types of aircraft have been hazardous to other aircraft operations in the area surrounding airports with terminal radar approach control service. Many commenters suggested that the FAA should exclude aircraft without electrical systems from any new transponder with Mode C requirement.

Currently, a transponder with Mode C is required on all aircraft (except gliders) operating above 12,500 feet mean sea level (MSL) in the U.S., except Hawaii and Alaska, transponders are required above 18,000 feet MSL in Alaska. Additionally, in a TCA, aircraft operations, including gliders and balloons, may only be conducted with a transponder with Mode C.

The fact that an aircraft is a glider or balloon does not diminish the safety benefits and increased efficiency of ATC control and pilot operations which the FAA is trying to achieve. However, there is no question that the proposed requirement, if adopted without modification, would have had an impact on operations conducted by aircraft which were not originally certificated with an engine-driven electrical system or which have not subsequently been certified with such a system installed, balloons, and gliders. Were there no contemplated provisions for exception or regulatory relief, some of these operators would be eliminated from certain airspace unless a transponder with Mode C were to be installed. The FAA has information that a portable, battery-operated transponder with Mode C is on the market. However, the unit apparently would require an antenna installation on some aircraft, raising certification questions, and its use is time-limited by the battery charge. The unit can function for approximately 4 hours between charges and can be

purchased and installed for approximately \$2,000. For these reasons the unit may well enable some operators to continue operating in the regulated airspace, but the unit does not appear to represent a universal solution to the issue. The FAA has reconsidered the need to impose all of the new transponders with Mode C requirements on such owners as proposed in Notice 88-2.

In regard to aircraft which were not originally certificated with an engine-driven electrical system or which have not subsequently been certified with such a system installed, balloons, and gliders, the final rule being adopted herein excludes or excepts such aircraft from the transponder with Mode C requirement when operating beneath the floors of a PCA (below 18,000 feet MSL) provided such operation is not conducted: (1) In any ARSA or TCA; (2) above the altitude of a TCA ceiling at and below 10,000 feet MSL within a 30-mile radius of a TCA primary airport; and (3) above an ARSA at and below 10,000 feet MSL within the lateral dimensions of that ARSA. Additionally, the FAA is extending compliance dates to facilitate the acquisition and installation of required equipment for those operators that plan to conduct flight in areas where a transponder with Mode C will be required. July 1, 1989, is the compliance date for operations within 30 miles of a TCA primary airport, and at and above 10,000 feet MSL; the compliance date for the remaining requirements is December 30, 1990.

The FAA believes that excluding aircraft which were not originally certificated with an engine-driven electrical system or which have not subsequently been certified with such a system installed, balloons, and gliders from a universal requirement for the transponder with Mode C requirement will not have a detrimental effect on the safety of other operations. For example, the small numbers of operations conducted by these types of aircraft that could interfere with traffic flows do not warrant requiring such equipment; balloons are conspicuously visible in VFR flight environments; other aircraft without an electrical system normally do not operate above 10,000 feet MSL; and in most cases, ATC and transient pilots have notice of the locations of glider operations.

#### *Equipment Cost*

Many commenters objected to the proposed transponder requirements stating that the acquisition and installation expense of transponders

and encoders is prohibitive. Others commented that such expenditure would have to be repeated because Mode S transponders are required after January 1, 1992.

Under Amendment No. 91-198 (52 FR 3380, February 3, 1987) all transponders installed after January 1, 1992, must meet the technical standard order for the Mode S transponder. However, that amendment permits transponders installed prior to January 1, 1992, to be used indefinitely until replaced. Therefore, there is no requirement that a transponder with Mode C be upgraded to Mode S after January 1, 1992, until such time as the transponder must be replaced.

A basic transponder costs approximately \$1,050 and upgrading that transponder with Mode C equipment would cost an additional \$850. The cost for a Mode S transponder with Mode C is estimated to be \$2,900 or about \$1,000 more than a comparable basic transponder with Mode C.

The congressional mandate to require the use of transponder with Mode C in additional airspace was not conditioned on the economic impact of the requirement, and the FAA acknowledges that some operators will experience the cost of installing the required equipment. The cost impact of the required equipment is discussed in more detail below in the summary of the Regulatory Evaluation.

#### ATC Operations

Numerous commenters were concerned that the transponder with Mode C requirement would have an adverse effect on the air traffic system. These commenters predict the creation of a radio frequency congestion problem as well as an inability of the ATC automation system to handle an increased number of transponder replies. One commenter stated that each year during the EAA Fly-In at Oshkosh, WI, when thousands of operations occur within a period of a few days, ATC directs pilots of participating aircraft to turn off their transponders while operating in the Oshkosh area. Other commenters suggested that the FAA should assure the ability of the ATC system to both cope with and then effectively use the additional information before any new transponder requirement is levied.

Numerous glider and balloon enthusiasts commented that it is unrealistic for ATC to expect them to follow ATC directions because of the aircraft's inability to maintain the type of directional control that is expected in an ATC environment. Other commenters suggested that, since ATC does not have

the capability to control all aircraft within the terminal airspace associated with the more than 250 airports proposed for a transponder with Mode C requirement, it should not try to assert such control.

The FAA does not seek to control all aircraft operating outside a TCA, ARSA, or ATA, nor does the FAA expect that it would be necessary to require a balloon or a glider to follow a specified route (in areas outside the actual confines of a TCA or ARSA). Under current rules, however, both gliders and balloons, when operating *inside* a TCA or ARSA, are expected to comply with the regulations and ATC clearances and instructions just as all other aircraft are required to do. Under the proposed transponder provisions and under the rules being adopted herein, balloons and gliders operating outside of a TCA or ARSA, but in airspace where a transponder with Mode C is required, would be required to be equipped with a transponder and Mode C but not to communicate with ATC.

Under the transponder with Mode C proposals of Notices 87-7 and 88-2, no corresponding two-way radio communications requirements were proposed. Further, the rule being adopted does not impose any new communications requirement; nor should any appreciable workload increase be placed on ATC. Operators of aircraft with the required transponder with Mode C can continue on their route of flight without any new ATC involvement or communications requirement.

The FAA does expect, however, that occasionally requests will be made by pilots to continue flight without the proper equipment when an equipment failure occurs in flight. However, it is expected that such occurrences would be minimal considering the reliability of such equipment. Regarding planned flight without the required equipment, such flight would have to be approved in advance as is currently required in areas where such equipment is required. Requests for such flight are normally made via telephone communications prior to the flight's departure. Additionally, FAA expects a reduction in radio frequency usage because fewer traffic and safety advisories would be required in the environment with the vast majority of aircraft equipped with a transponder with Mode C. While the FAA does foresee a slight increase, at least initially, in two-way radio requests from aircraft to operate without the required transponder equipment, the FAA is confident that it is prepared to handle such requests during the transition period. Based on the

voluntary transponder equipage trends and the amount of time in which the FAA is allowing aircraft operators to acquire and install the proper transponder equipment, the FAA is confident that the number of such requests will be minimal and manageable.

The FAA recognizes that there will be rare circumstances, such as the annual Oshkosh, WI, Fly-In, when ATC may request the pilot of an aircraft operating under VFR to turn off the transponder. However, such a request would be in the interest of segregating IFR operations from VFR operations under unusually heavy VFR operations where a large and concentrated number of aircraft are operating in a small segment of airspace, such as is the case in the annual Oshkosh, WI, Fly-In. The FAA does not envision such situations to occur in the vicinity of areas in which a transponder with Mode C is now required under this rule.

Some commenters stated that high performance aircraft are not allowed below the TCA; therefore, there should be no conflict with smaller aircraft in that airspace. Additionally, the commenters stated that there has never been a midair collision in the areas under TCA's.

Notwithstanding the absence of past midair collisions in the airspace beneath a TCA, it is a benefit to ATC to have as many aircraft as possible equipped with a transponder with Mode C when operating beneath a TCA. The general use of transponder with Mode C in this environment makes controllers aware of more unknown and non-controlled aircraft. This, in turn, facilitates a more positive decisionmaking process in regard to those aircraft being controlled. As stated earlier, however, gliders, balloons, and aircraft without electrical systems are being excluded from the transponder with Mode C requirement beneath the floors of TCA's and ARSA's.

Some commenters, including an aviation organization, suggested that the proposed transponder requirement would be unnecessary if ATC were to follow its own directives by keeping high-performance aircraft at higher altitudes until descent is necessary for landing. These procedures, the commenters stated, would help maintain separation between controlled and non-controlled traffic and would also reduce noise on the ground from these aircraft as well as conserve aviation fuel.

Under the current requirements of Part 91, only large turbine-powered aircraft are required to operate at or above the floors of a TCA and only

when conducting operations to or from a TCA primary airport, e.g., Seattle-Tacoma International Airport. This requirement does not apply to similar aircraft in a TCA that operate to or from other airports beneath the designated floors of a TCA, e.g., Boeing Field. The FAA agrees that the "Keep 'em High Program" is an effective method for segregating high-performance aircraft from other traffic. However, such procedures alone cannot assure controllers that certain received radar information on unknown or non-controlled traffic represents aircraft that are below the traffic being controlled by ATC. As mentioned earlier, these unknown aircraft appear on radar scopes as targets that are dangerously close to controlled aircraft. On the other hand, a non-controlled, nonequipped aircraft may actually intrude into a TCA dangerously close to controlled aircraft and the controller, well within the realm of expectation, may conclude that the intruder is below or above the TCA and take no action.

Another commenter objecting to the proposed transponder requirement was of the opinion that the FAA should provide some form of ATC service to all aircraft that would be required to be equipped with the proposed transponder equipment. An aviation organization stated that it believes that the FAA's philosophy associated with controller duty priorities renders the ATC system inadequate in assuring the protection of IFR aircraft from collision with unknown aircraft.

Preventing collisions by the application of aircraft separation and the issuance of safety alerts are a controller's first priority. This is true regardless if one of the aircraft is operating under VFR and is unknown to the controller. However, when potentially conflicting aircraft are equipped with transponders with automatic altitude reporting equipment, it enables controllers to relay decisive instructions associated with these procedures. Additionally, traffic advisory service is now provided by ATC in an ARSA and within 20 miles of an ARSA primary airport on a mandatory basis, and, elsewhere, on a workload-permitting basis.

#### *Effect on Automated ATC Systems*

An aviation organization stated that it expects that some ATC facilities, because of radar target capacity problems, will be forced to reduce the size of the area being processed to accommodate the expected increase in radar targets. The same organization commented that existing ATC terminal automation systems can only handle

approximately 230 radar targets before the data displayed begins to flicker and become unusable. Some commenters suggested that the ATC system is already overloaded.

The most advanced terminal automation system in use today by the FAA has a capacity of 300 tracked targets for each radar sensor. Several TCA airports use 2 radar sensors which equates to a 600-target capacity. Using the Los Angeles, CA, terminal area as representative of a "worst case" situation (because of the number of aircraft based in that area and excellent VFR flying conditions), during the busiest hour of traffic for the month of August 1987, 284 aircraft with transponders were detected by the 2 Los Angeles radar sensors. This number includes all targets with transponders within the 55-mile-radius radar processing areas of the 2 sensors. Again, using the "worst case" situation of a 2.5:1 ratio of transponder targets to non-transponder targets, the number 284 would be increased to 397 total targets. (The 2.5:1 ratio is based on the 1985 statistics of the numbers of aircraft in the State of California versus the number of aircraft without transponders.) While an actual ratio for aircraft based in the Los Angeles area is not available to the FAA at this time, the FAA is confident, based on experience, that the 2.5:1 ratio would increase if limited to the aircraft within a 55-mile radius of Los Angeles. Further, based on the comments that a large number of aircraft without electrical systems would be affected by the proposed rules, this ratio will increase because of the provisions and exclusions being adopted herein for such aircraft. With this increased ratio, the number 397 would be significantly smaller. Even in the "worst case" scenario, the 397 total targets can be handled by the ATC automation systems. While it may be desirable for some locations to retain a 55-mile radius radar processing area, ATC terminal automation systems have a feature that can be used to selectively inhibit processing of radar data received from aircraft operating in segments of that area. For example, the number 397 can be reduced significantly by using a customized and reduced radar processing area. In doing so, radar tracking slots outside the customized radar processing area that would otherwise be used could be made available for radar targets inside the customized radar processing area. This feature may be activated in terminal automation systems with more than one radar sensor or with radar systems

whose coverage overlaps that of an adjacent ATC facility.

The FAA does, however, have terminal automated ATC systems with only one radar sensor. Further, it is extremely difficult to predict accurately when any such system would reach its critical capacity of 70% of available computer capacity. Accordingly, the FAA has addressed these factors in its accelerated facilities enhancement program. This program is designed to provide hardware/software automation system enhancements to satisfy the transponder with Mode C requirements of this rule until current terminal systems are replaced.

Two aviation organizations were of the opinion that additional significant safety gains could be achieved by upgrading the terminal automation systems to provide controllers with computer-generated alerts to developing collision threats between any controlled aircraft equipped with altitude reporting transponders and non-controlled aircraft similarly equipped. One of these organizations stated that the enhanced conflict alert feature should be installed in the en route automation systems as soon as possible. Additionally, this organization stated that prior to the installation of the Advanced Automation Systems for approach control facilities, the FAA should also upgrade existing terminal automation systems with the enhanced conflict alert feature even if additional hardware has to be procured for this purpose.

On June 20, 1986, the FAA's Fort Worth Air Route Traffic Control Center began testing a computer software program designed to provide alerts to controllers concerning non-controlled aircraft that represent potential conflict to a controlled aircraft. This program will be included in all other ATC en route facilities by the fall of 1988. Additionally, the FAA's accelerated facilities enhancement program addressed above will also provide the software capacity and enhancements for similar features in existing terminal automation systems.

#### *See and Avoid*

Numerous commenters were concerned that pilots would become even more reliant on ATC to detect and avoid other traffic. Some of these commenters stated that the requirement to see and avoid other aircraft is a pilot responsibility and that as an alternative to the transponder requirement, see-and-avoid responsibilities should be reemphasized to pilots. An aviation organization claimed that FAA's statement that "the Mode C requirement

has no safety benefit unless one or both are air traffic controlled" implies that the resulting level of control provided by ATC as a result of this proposal will mislead VFR pilots into a false sense of security with respect to ATC separation services.

The FAA disagrees with the allegation that pilots flying in either a VFR or IFR environment would have less incentive to avoid potentially hazardous situations. Rather, the FAA is confident that pilots understand that regardless of whether an aircraft is non-controlled, operating under IFR, or operating under VFR and subject to ATC services, each pilot is responsible to see and avoid other aircraft. This principle is persistently emphasized through FAA-initiated programs designed to remind pilots of their roles in preventing midair collisions. Such programs include pilot certification training, flight safety publications, accident prevention seminars, pilot biennial reviews, raincheck programs, etc. Even though there is no regulatory requirement to attend such programs, the FAA believes that pilots now attend and would attend such training programs in order to obtain the skills necessary for flight in an ATC environment. Further, as a part of the implementation process for this final rule, the FAA intends to issue an advisory circular that will address the benefits of and the requirements for operating with transponders and automatic altitude reporting equipment.

#### Promoting Aviation

Several commenters felt that the FAA should concern itself with the promotion of aviation, which includes general aviation, and not what they claimed would be the elimination of most general aviation activity. According to one commenter, the general aviation industry is already in a prolonged slump and the proposed transponder requirement would only make it worse.

Further, some commenters felt that transponder requirements would cause many of the general aviation airports, flight schools, and aircraft repair shops within the affected airspace to go out of business. Some commenters were of the opinion that non-transponder aircraft would have to relocate.

While FAA does have a responsibility to encourage and foster the development of civil aeronautics and air commerce, it has a higher responsibility to provide the safest aviation system that is reasonably possible. The FAA believes that its responsibility to promote safety is met by the provisions being adopted under this rule. The equipment requirements of this rule allow for an orderly transition and make provision

for those operators temporarily incapable of meeting the rule's requirements. Additionally, as mentioned earlier, this rule does not alter existing provisions for nonequipped aircraft whereby the operator may receive an authorization to conduct operations without the required equipment.

#### Collision Avoidance Systems

An aviation organization stated that the recent TCAS test would have been more effective and realistic had more aircraft been equipped with a transponder with Mode C.

While it might be true that a TCAS test conducted in areas where all aircraft are equipped with transponders with Mode C would be more realistic, the test did confirm that a pilot is more efficient in detecting and avoiding traffic when given an adequate advance alert. Nevertheless, the transponder requirements imposed by this rule are primarily intended to improve a controller's ability to detect aircraft that present a potential conflict for controlled aircraft. The FAA also recognizes the potential benefits associated with a TCAS equipment requirement and, as discussed above, has proposed a TCAS requirement for certain operators.

Other commenters stated that LORAN C is excellent for navigation and could be adapted for use as a collision avoidance system and that such adaptation should be developed by the FAA. Supporting this view, an aviation organization stated that recently developed LORAN C equipment can provide warning signals to aircraft operators when they are approaching specifically programmed airspace such as TCA's and restricted areas. Another organization stated that the FAA should promote an inexpensive, independent, and on-board proximity warning indicator that could aid pilots in their see-and-avoid responsibilities rather than trying to solve the midair collision potential problem with TCA's and new transponder equipment requirements.

The FAA recognizes the potential benefits of LORAN C equipment in regard to navigation. However, the FAA remains convinced that the transponder with Mode C provides the best possible means whereby controllers and pilots are better able to identify and correlate unknown aircraft operating in and around terminal airspace.

An aviation organization pointed out that approximately 45 percent of the near midair collisions (NMAC) reported over the last year have occurred in controlled airspace. Yet, this organization stated, the FAA is

proposing to increase the NMAC exposure risk by increasing the volume of controlled airspace at those very locations where NMAC's are most concentrated—busy terminal areas. This organization stated that it believes that, statistically, the probability of a NMAC would be greater as a result of an unmanageable increase to the volume of controlled airspace (up to 100 percent in some areas).

The fact that NMAC's occur primarily in terminal airspace has little or nothing to do with the coincidence that this airspace is also designated as controlled airspace. One of the reasons NMAC's occur predominantly in terminal airspace is that a large volume of aircraft tend to concentrate at lower altitudes, in and around terminal airspace. Most significantly, the majority of the aircraft involved in NMAC's are non-controlled and unknown to ATC. The FAA envisions the Mode C requirement will significantly reduce the number of NMAC's between controlled and non-controlled aircraft operating in the affected airspace. The transponder with Mode C requirement, however, does not increase or affect in any manner the size of any controlled airspace.

#### Climb Corridors

An aviation organization, as well as other individual commenters, suggested that the FAA should seriously consider establishing arrival and departure corridors for primary airports that are currently in TCA's instead of continuing to establish and retain TCA's with existing designs. Numerous commenters agreed with this position, stating that the FAA should establish arrival and departure corridors for air carrier aircraft that would be similar to climb corridors now used by military aircraft. Additionally, they stated that such a design could provide a variety of benefits to air carrier aircraft as well as to pilots who want to avoid air carrier arrival and departure routes.

A simulation of the climb/descent corridor concept was conducted in the Boston, Massachusetts, area. One TCA and three corridor configurations were tested. The simulation revealed that, while the use of corridors did provide a degree of safety, these corridors cannot provide the required airspace to vector, sequence, and meter effectively the variety and numbers of aircraft that demand service at major terminal airports. Based on this evaluation, it was concluded that the use of corridors would result in a substantial loss in airport and airspace efficiency with a corresponding increase in arrival and

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departure delays. This concept was more recently reviewed by the TCA Task Group and the group confirmed the earlier findings of the tests. Regardless, the FAA did not, under Notice Nos. 87-7 and 88-2, propose to change the physical dimensions of any TCA. Before such an action is formally proposed in a rulemaking action, the public will be given the opportunity to comment on, and in some cases, participate actively in the development of an airspace design or design modification.

#### Implementation

Several commenters stated that they believe there are not enough transponders now available to timely equip all aircraft that would be required to have them under this rule. An aviation organization stated that it objected to the compliance dates as it believed sufficient time is not allowed for aircraft owners to acquire and install required equipment or relocate the aircraft outside of the airspace where the equipment is required.

The compliance date of December 30, 1990, is mandated by statute. However, the FAA agrees that an effective date should be established that is consistent

with, among other factors, the availability of the required equipment given the numbers of aircraft that need to be equipped. In this regard, the FAA has reviewed the numbers of affected aircraft and the present and future availability of required transponder equipment.

Using information furnished in the comments of various user organizations and others, and FAA's own statistical information (discussed in more detail below in the summary of the Regulatory Evaluation), the FAA has concluded that approximately 106,000 aircraft will be required to install all or a part of the equipment being required in this final rule. Of these 106,000 aircraft, approximately 72,000 will require the installation of the Mode C equipment only; the remaining aircraft (approximately 34,000) will require the installation of a transponder and the Mode C equipment.

Based on the foregoing, FAA estimates that there is a need for 106,000 encoders and 34,000 transponders. Further, the FAA conservatively estimates that half of this equipment will be required to facilitate compliance

by July 1, 1989, and half by December 30, 1990. The following analysis of transponder and altitude encoder equipment production and installation is based on information received from the General Aviation Manufacturing Association (GAMA) in December 1987.

Current production of altitude encoders and transponders is estimated to be 1,800 and 600 per month respectively. Six months after publication of a final rule, GAMA estimated that these monthly production rates could double or triple. Based on a July 1, 1988, publication date of a final rule, and based on the number of transponders and encoders that are required, the FAA assumes that by January 1, 1989, production will have reached a triple-rate (5,400 encoders and 1,800 transponders per month).

#### Transponder and Encoder at Triple-Rate Production

Need by	Encoders	Transponders
7/01/89 .....	53,000	17,000
12/30/90 .....	106,000	34,000

Event	Date	Encoders	Transponders
Current production .....	12/01/87 thru 6/30/88 .....	12,600	4,200
Final rule published .....	6/30/88 .....		
Current production .....	7/01/88 thru 12/31/88 .....	10,800	3,600
Begin triple-rate production .....	1/01/89 .....		
Production from 1/01/89 to 07/01/89 .....		32,400	10,800
Totals by 7/1/89 .....		55,800	18,600
Production from 7/1/89 to 12/30/90 .....		97,200	32,400
Totals by 12/30/90 .....		153,000	51,000

Based on GAMA's predictions and assuming a triple-rate production, by July 1, 1989, there would be enough encoder and transponder equipment produced for every aircraft that is assumed to be affected. Further, the FAA has significantly reduced the amount of airspace that would have been affected by the proposals in Notice 88-2 to an amount that nonequipped aircraft, without a significant inconvenience, could circumnavigate affected airspace until the required equipment is acquired and/or installed.

Nevertheless, the FAA strongly advises aircraft owners/operators to begin purchasing and installing equipment immediately.

An aviation organization stated that the proposal does not clearly identify the effects on adjacent airspace, airports, operations, special-use airspace activities, and NAVAID's. One

aviation organization stated that the proposed transponder equipment requirement is an attempt to improve safety by separating airspace from aircraft when the FAA should be separating aircraft from aircraft.

The FAA, in this rule, is limiting the application of the transponder and Mode C requirement to airspace that is traversed by a significant number of controlled and non-controlled aircraft. Within this airspace, the FAA believes that as many aircraft as possible should be identifiable with regard to location and altitude. Having such information facilitates the reduction of the collision potential between controlled and non-controlled aircraft.

Additionally, many of these controlled aircraft will be equipped with TCAS which, as discussed earlier, is most effective when a potentially conflicting

aircraft is equipped with the required transponder equipment.

#### Short Comment Periods

An aviation organization stated that the FAA showed a disregard for the airspace users it regulates by an inadequate public comment period in Notice No. 88-2. Many commenters were generally critical of the comment periods provided by the FAA, and requested extensions.

The FAA extended the comment period by 45 days. This extension was in response to requests from Members of Congress, an aviation association that it needed extra time in order to circularize the notice to its members, and others. The FAA is aware that many general aviation pilots receive notification of proposed rulemaking only through user organizations and, in these particular cases, noted that an extension of the

comment periods would not jeopardize the ability of the agency to reach final rulemaking action in a timely manner.

### Helicopters

A national aviation association stated that there was no information provided in the Notice that would indicate that a problem exists with helicopters operating without the proper transponder equipment. In all cases today, these aircraft operate under letters of agreement with the appropriate ATC facility. This organization further stated that the regulatory evaluation is seriously flawed and failed to assess realistically the total costs necessary to equip commercial helicopters. This organization said that, typically, many helicopter operators already equip their aircraft with transponders with Mode C if their operations routinely use TCA airspace. Other operators do not equip their fleets with such equipment simply because there is no need; e.g., local flight training or agricultural operations. Additionally, many smaller helicopters do not have a place on the instrument panel for the installation of transponders and the added weight poses a penalty in the form of a reduced useful load.

Helicopters no longer represent a small percentage of the aircraft operating in busy terminal areas nor are they limited by operational capability with respect to flight within these areas, which was the rationale applied to their original exclusion in § 91.24. Their versatility has brought about a significant rise in operations in and around busy metropolitan areas, particularly those where TCA's and ARSA's exist. The FAA believes that helicopters must be treated in the same manner as any other aircraft. Also, the congressional mandate referred to all aircraft, with no provision for a categorical exclusion of helicopters. The need for safety, especially since a significant number of travelers will be transported from airports in busy terminal areas (i.e., inter-city transport) to other areas, argues against the contention that helicopters should be viewed as "special applications" type aircraft.

### Charting

An aviation organization stated that charting of the transponder with Mode C requirement areas is necessary so that pilots of aircraft without the required equipment can readily avoid them as necessary.

The FAA believes that most aircraft owners/operators will voluntarily equip their aircraft with the required

transponders with Mode C rather than avoid the airspace with the requirement. With the required equipment on the aircraft, pilots have more flexibility in planning their flights than those in nonequipped aircraft. However, in the interest of providing assistance to those nonequipped aircraft to avoid areas where a transponder with Mode C is being required, the FAA will ensure that appropriate charting changes are implemented.

### Ultralights

Many commenters, including those who addressed their comments to Members of Congress, expressed concern that the proposals would require transponders with Mode C equipment on ultralight vehicles.

The FAA, in Notice Nos. 87-7 and 88-2, did not propose to impose any new transponder requirement on ultralight vehicles and the final rule adopted herein does not impose such a requirement.

### Federalism Determination

The amendment set forth herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The regulations set forth in this notice would be promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which has been construed to preempt state law regulating the same subject. Therefore, in accordance with Executive Order 12612, it is determined that such a regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

### Regulatory Evaluation Summary

#### Benefit-Cost Analysis

The regulatory evaluation prepared for this final rule examines the cost and benefit aspects of expanding the existing transponder with Mode C requirement. This rule amends Part 91 of the FAR by requiring an aircraft to be equipped with a transponder with Mode C when operating in the vicinity of certain airports for which terminal radar approach control service area has been established, and in other non-terminal airspace at the above 10,000 feet MSL.

Implementation of this rule will be accomplished in two phases. Phase I will require a transponder with Mode C for most aircraft operations in the airspace at the above 10,000 MSL, and in the vicinity of TCA primary airports.

Phase II will require a transponder with Mode C for most operations in the vicinity of ARSA primary airports and other designated airports.

The FAA believes these actions are necessary in order to reduce the potential for midair collisions between controlled or TCAS-equipped aircraft and non-controlled aircraft. Similar safety concerns have been expressed by members of Congress, user associations, and national safety organizations.

### Costs

The FAA estimates the total cost of compliance expected to accrue from implementation of this rule to be \$140 million (discounted in 1987 dollars), between 1989 and 1998. This cost of compliance estimate includes acquisition and installation of an electrical system in some aircraft and maintenance of the required transponder and Mode C equipment. The derivation of this cost estimate and the assumptions on which it is based are discussed below.

Based on the informed judgment of FAA personnel and information contained in the FAA report entitled, "General Aviation Activity and Avionics Survey (December 1987)," this rule is expected primarily to impact single-engine (piston) airplanes and some rotorcraft. This evaluation assumes a worst-case scenario that all operators of general aviation aircraft without a transponder with Mode C will acquire such equipment, excluding most aircraft without electrical systems. Virtually all operators of aircraft constructed without the capability for an electrical system are not expected to be significantly impacted by this rule because of the airspace exclusions being adopted in this rule. In addition, other types of general aviation fixed-wing airplanes, which include twin-engine (piston), turbojets, and turboprops will not be impacted by this rule because virtually all of them are already equipped with a transponder with Mode C, based on the subject report.

Based on equipment cost data obtained from industry sources for transponder and altitude encoding equipment that is likely to be installed on the number of impacted reciprocating single-engine airplanes and rotorcraft, the FAA estimates that these aircraft operators will likely incur a one-time acquisition and installation cost ranging between \$900 and \$2,000, depending on whether or not they have a transponder or transponder with Mode C.

According to the above avionics survey report, there are an estimated 39,361 single-engine aircraft that are not

equipped with a transponder. Of these aircraft, the FAA estimates that 19,681 and 19,680 will be impacted in implementation, respectively, in Phases I and II of this rule. The cost of compliance for these operators can be determined by multiplying the number of aircraft without any transponder in Phases I and II by \$2,000. This computation amounts to an estimated \$36 million (discounted) in Phase I and \$33 million (discounted) in Phase II, in 1987 dollars.

The above avionics report also revealed there are an estimated 64,657 aircraft currently being operated with a transponder having no Mode C capability. These aircraft will likely be impacted by this rule. Among these aircraft, approximately 32,329 will be impacted in Phase I and 32,328 in Phase II. The estimated cost of compliance for these aircraft operators can be determined by multiplying these numbers of aircraft by \$900. This computation amounts to an estimated \$26 million (discounted) in Phase I and \$24 million (discounted) in Phase II, in 1987 dollars.

This rule will impose an additional cost component for transponder maintenance. The cost estimate for maintenance can be determined by multiplying the undiscounted costs in Phase I (\$69 million) and Phase II (\$68 million) for aircraft with a transponder without Mode C and aircraft with no transponders by 5 percent, which amounts to \$3.4 million biennially in each phase (transponder maintenance is required biennially under § 91.172, ATC transponder tests and inspection). After discounting \$6.8 million, biennially, over a 10-year period this computation results in an estimated maintenance costs of \$10 million (discounted) in Phase I and \$8 million (discounted) in Phase II, in 1987 dollars.

Some of those aircraft operators without transponders are expected to incur additional costs to acquire and install an electrical system. Based largely on cost information received in the comments to Notice 88-2, the average number of general aviation aircraft without an electrical system is estimated to be 27,000. Some comments indicated an average cost estimate of \$4,000 to acquire and install such a system. For reasons explained earlier, it is estimated that only 1,000 of these aircraft will be impacted by this rule. An estimated 500 of these aircraft will be impacted in each of the two phases. Therefore, multiplying the figures of 500 by \$4,000 results in estimated cost of \$1.8 million (discounted) in Phase I and

\$1.6 million (discounted) in Phase II, in 1987 dollars.

The total cost of compliance amounts to an estimated \$140 million (discounted, in 1987 dollars), between 1989 and 1998. Phase I is expected to account for an estimated \$74 million (or 53 percent) of this cost estimate, while Phase II captures the remainder.

#### *Benefits*

This rule is expected to generate potential benefits primarily in the form of enhanced safety to the aviation community and flying public. Such safety, for instance, will take the form of reduced likelihood of midair collisions.

This rule will require a transponder with Mode C for most aircraft operations within 30 nautical miles of any designated TCA primary airport and generally within 10 nautical miles of an ARSA or other high-passenger-traffic airport designated in this rule. The FAA believes that the adoption of this expanded transponder with Mode C requirement will immediately help to reduce the potential for midair collisions. For example, the continuous display of altitude information on ATC radar scopes assists controllers in separating aircraft. It provides the requisite information to the ATC computer to provide a controller with an alert in the event of a potential conflict between controlled aircraft. The FAA plans to expand this alert feature to provide a similar alert in situations involving potential conflicts between controlled and non-controlled aircraft. Additionally, an environment within which nearly all aircraft are equipped with a transponder with Mode C is essential to allow TCAS-equipped aircraft to function as intended to avert potential midair collisions with other aircraft.

It is difficult to determine the prospective reduction in casualty loss that this rule will provide. Some insight can be gained by examining the historical record of accidents. An examination of the National Transportation Safety Board (NTSB) data base revealed that over 50 midair collisions have occurred in the U.S. over the past 5 to 10 years, including two within TCA's (San Diego, California in 1978 and Cerritos, California in 1986) that involved air carriers. For air carriers, this equates to a rate of two fatal midair collisions every 10 years. For the purpose of analysis, the FAA has used a minimum statistical value of each fatality prevented of \$1 million. For midair collisions involving air carriers, the annual loss is estimated at \$28 million (or \$172 million discounted over 10 years). For midair collisions involving

commuters or air taxis (Part 135 operations), the annual loss is estimated at \$16 million (or \$98 million discounted over 10 years). In addition, for general aviation aircraft the annual loss is estimated at \$19 million (or \$117 million discounted over 10 years). The FAA does not know with certainty to what extent this rule will help to reduce the probability of future midair collisions. This assessment is based on the fact that midair collisions are random events. Such events cannot be predicted with a reliable degree of certainty based on past events. For this reason, it is difficult to predict the frequency and magnitude of casualty losses associated with future midair collisions. Nonetheless, for the purpose of this evaluation, the midair collision data obtained from the NTSB will serve as the FAA's best indication of potential magnitude and frequency of future midair collisions in the U.S. over the next 10 years, with one exception. Unlike general aviation aircraft, midair collisions involving air carriers are not only random but they are rare. Thus, it is not prudent to assume that the likelihood of an equal number of fatal midair collisions will take place over the next 10 years. For this reason, a Poisson distribution has been used to estimate the probability of experiencing two or more random midair collisions over the next 10 years. The Poisson distribution indicates there is a 60 percent probability of such midair collisions occurring over the next 10 years. Multiplying this probability by the cost of two potential midair collisions (\$256 million), results in an expected value of potential benefits of \$154 million. Discounted over the next 10 years results in potential benefits of \$95 million. This estimate, along with those for commuters and general aviation aircraft, amounts to a total potential benefits estimate of \$310 million (discounted in 1987 dollars).

The FAA believes there is a high likelihood that a number of these potential fatal midair collisions can be avoided over the next 10 years, although this may not be attributed solely to this rule. In fact, there is a greater tendency for such accidents to occur over the next 5 years (1989-1993) than thereafter because of the numerous aviation safety measures that have been adopted by the FAA in the past and those presently proposed with full effectiveness expected by 1993. For example, FAA Notice 87-8 (TCAS) is expected to reduce significantly the likelihood of midair collisions as early as next year and thereafter.

### Conclusions

While the cost of compliance estimate of \$140 million (discounted) associated with this rule involves some uncertainty, the estimate of potential benefits of \$310 million (discounted) contains more uncertainty. Most of this uncertainty is due to the belief that some of this rule's effectiveness in the future will be attributed to the combined benefits from the TCAS proposal and transponder with Mode C equipment. Not knowing what increased benefit the TCAS proposal will have on this rule's effectiveness affects the extent to which the benefits figure of \$310 million can be confidently attributed to this rule. I.e., the benefits of this final rule and the TCAS proposal are inextricably linked and cannot be determined separately at this time. Nonetheless, the FAA firmly believes this final rule, standing alone, is cost-beneficial.

The Regulatory Evaluation that has been placed in the costs and benefits that are expected to accrue from the implementation of this rule.

### International Trade Impact Assessment

This rule will have no effect on the sale of foreign aviation products or services in the United States, nor will it affect the sale of United States products or services in foreign countries. This is because the rule being adopted herein will only impact operators of aircraft not equipped with a transponder with Mode C. Virtually all foreign aircraft are believed to be equipped with a transponder with Mode C.

### Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The RFA requires agencies to review rules which may have "a significant cost impact on a substantial number of small entities." The small entities that could be potentially affected by the implementation of this rule are primarily air taxi operators, fixed based operators, and small airports.

The Initial Regulatory Flexibility Analysis published in the Notice 87-7 indicated that the then proposed rule would not have a significant economic impact on a substantial number of small entities. This initial analysis indicated that the proposals would not affect the operations or impose any costs on the individual flight schools and flying clubs because their student training activities would not be impacted. However, several types of small business were not addressed in the initial analysis. These

included aerial advertising, aerial agriculture and pest control, and fixed base operators that offer services and goods. Those businesses in aerial agriculture or in aerial advertising will not incur a significant impact since the required transponder with Mode C equipment is relatively inexpensive. Fixed base operators may be impacted significantly since some of the aircraft based at some airports may choose to move. This may also affect some small airports, though it is less likely to occur under this rule because of its more restrictive nature due to the imposition of a transponder with Mode C requirement at ARSA and other designated airport locations. Nevertheless, from a conservative standpoint, the FAA will consider the potential cost impacts on fixed based operators and small airports. However, since the annualized cost for a Mode C transponder is only about \$300 over a 10-year period, Part 135 operators would not be impacted significantly. Accordingly, the FAA believes that the comments did indicate that there would be a significant economic impact on a substantial number of small entities. Therefore, the following final regulatory flexibility analysis is presented in compliance with section 604(a) of the Regulatory Flexibility Act.

### Public Comments in Response to the Initial Regulatory Flexibility Analysis

There were numerous comments related to the initial regulatory flexibility determination contained in Notice 87-7. The vast majority of those comments indicated that the proposal would cause undue hardships on small businesses.

There were many comments from private airports, state aviation organizations, and private trade associations which indicated there would be significant economic impact to private and public airports as well as fixed base operators operating at those airports. For example, one private airport operator estimated that he would lose up to 50 percent of the aviation activity at his airport. Many businesses engaged in aerial agriculture and pest control and in aerial advertising indicated that the proposed rules would have significant economic impact.

### Description of Significant Alternatives

#### Alternative One—Delay Implementation for a Longer Period

This alternative would enable the supply of avionics to be in better balance with demand and, therefore, the cost should be less. In addition it will allow the operator to equip at the most

propitious time as well as to optionally equip with Mode S.

The FAA believes there is merit in this alternative. However, the safety need is such that at a time certain for compliance should be established and the FAA has selected two phases for implementation. The first phase requires a transponder with Mode C transponder on most aircraft operating within 30 nautical miles of a TCA by July 1, 1989. The second phase requires a transponder with Mode C on most aircraft operating in the vicinity of an ARSA and other designated airports by December 1, 1990 (approximately one and a half years after phase I).

#### Alternative Two—Have Different Standards for Small Businesses

This alternative would save the small firm the compliance cost of this rule. The FAA has rejected this approach because it is contrary to the statute, inequitable to the individual owner operator, and safety would be derogated.

#### Alternative Three—Design the Airspace to Minimized Impact

This alternative would exclude more airspace within the affected areas from the transponder with Mode C requirement, saving the user the cost of the avionics. The FAA has rejected this because it is contrary to the statute and falls short of the projected safety benefits provided in the rule being adopted.

### The Rule

For the reasons stated above, the FAA is substantially adopting the Mode C proposal contained in Notice 87-7 with certain exclusions, and modifying the transponder with Mode C proposals contained in Notice 88-2. The following is a discussion of the regulatory changes contained in this final rule:

### Transponder with Mode C Requirement

#### Vicinity of TCA's

Effective July 1, 1989, all aircraft are required to have a transponder with Mode C when operating within 30 miles of any designated TCA primary airport from the surface to the 10,000 feet MSL. Aircraft which were not originally certificated with an engine-driven electrical system or which have not subsequently been certified with such a system installed, balloons, and gliders are excluded from this requirement when conducting operations below the altitude of the ceiling of a TCA or 10,000 feet MSL, whichever is lower, and outside any airspace in which a transponder with Mode C is otherwise required. This requirement would also

apply on the effective date of any future designated TCA primary airport. TCA primary airports are designated by rulemaking actions associated with the establishment or modification of a TCA. Limited deviation from this requirement may be permitted on a case-by-case basis by authorization under existing regulations.

#### *Vicinity of ARSA's*

Effective December 30, 1990, all aircraft operating in an ARSA and in all airspace above an ARSA beginning at the ceiling of that ARSA and extending upward to 10,000 feet MSL within the lateral confines of that ARSA must be equipped with an operable transponder with Mode C. The requirement would also apply on the effective date of any future designated ARSA. Aircraft operating in the airspace beneath an ARSA are not required to have a transponder with Mode C. Limited deviation from this requirement may be permitted on a case-by-case basis by authorization under existing regulations.

#### *Vicinity of Other High-Passenger-Traffic Airports*

Effective December 30, 1990, aircraft operating in the airspace from the surface to 10,000 feet MSL within a 10-mile radius of any airport listed in newly designated Appendix D of Part 91 must be equipped with an operable transponder with Mode C except when operating in the airspace below 1,200 feet AGL outside of the ATA. Currently, Logan International Airport, Billings, MT; and Hector International Airport, Fargo, ND; are the only airports listed. Aircraft which were not originally certificated with an engine-driven

electrical system or which have not subsequently been certified with such a system installed, balloons, and gliders are excluded from this requirement. Other aircraft may be granted authorization to deviate from this requirement under existing regulations.

#### *Vicinity of Other Airports*

At other airports where terminal radar service is provided, operators are subject to the existing requirement that pilots of aircraft with a transponder with a Mode C must operate that equipment while in controlled airspace. The rule adopted does not alter that requirement.

#### *En Route Airspace*

Effective July 1, 1989, aircraft operating in all airspace of the 48 contiguous States and the District of Columbia at and above 10,000 feet MSL must be equipped with an operable transponder with Mode C except when operating at and below 2,500 feet AGL. Aircraft which were not originally certificated with an engine-driven electrical system or which have not subsequently been certified with such a system installed, balloons, and gliders are excluded from the transponder requirement when operating beneath the floor of a PCA (below 18,000 feet MSL) provided such operation is not conducted in any ARSA, TCA, or other airspace requiring the equipment. The exclusion of gliders from the en route airspace requirement continues the existing provisions for glider operations up to but not including 18,000 feet MSL. The similar exclusion for other aircraft which were not originally certificated with an engine-driven electrical system

or which have not subsequently been certified with such a system installed and balloons permits such operations between 10,000 feet MSL and 18,000 feet MSL without a waiver or authorization, as is currently required. However, the number of operations by such aircraft at these altitudes is expected to be negligible. Other nonequipped aircraft may obtain authorization to conduct operations without the required equipment under existing regulations.

#### *Editorial Changes to TCA and ARSA Requirements*

By adopting an expanded requirement for a transponder with Mode C in this final rule, a transponder is required with stated exceptions within a 30-mile radius of any Group I, II, or III TCA. This action effectively cancels the provisions contained in § 91.90 for Group III TCA's. Since a Group III TCA has never been designated, the provisions for such TCA's are revoked in this final rule. Additionally, § 91.90 is amended to reflect Amendment No. 91-198 (52 FR 3391; February 3, 1987) which imposed the Group I TCA transponder with Mode requirement in Group II TCA's. However, Notice 87-7 addressed the issue of a single-class TCA; therefore, Group I and II TCA's are retained pending a final disposition of that notice. Additionally, § 91.88 is amended to reflect the adoption of the transponder with Mode C requirement for operations in an ARSA.

These amendments to §§ 91.90 and 91.88 are limited to those necessary for consistency with the revised transponder with Mode C requirements in § 91.24.

BILLING CODE 4910-13-M

Appendix

Note.—This appendix will not appear in the Code of Federal Regulations.

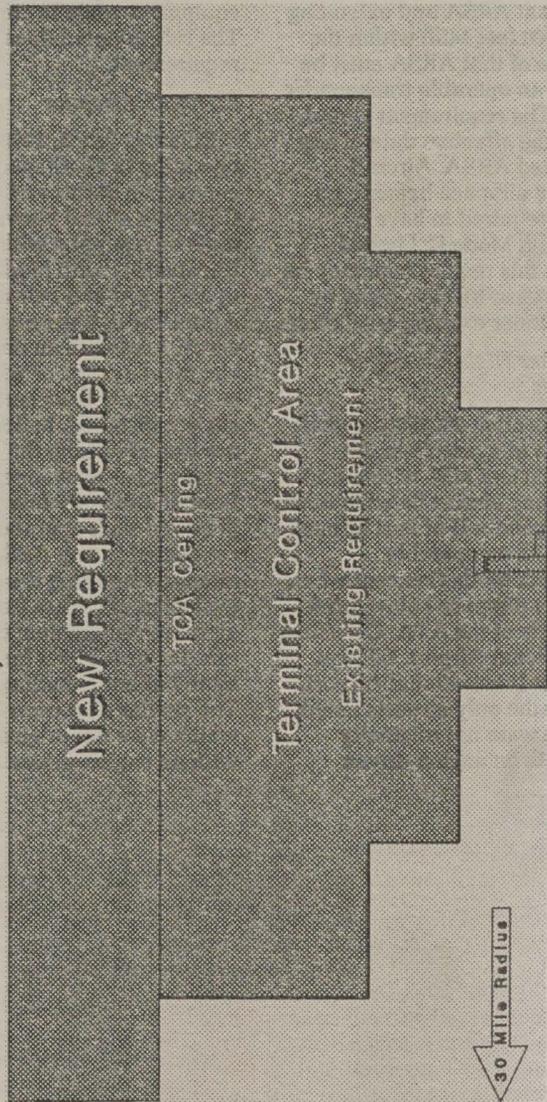
# Mode C Transponder Terminal Control Area Requirement

Within 30 Miles of a TCA Primary Airport Unless Otherwise authorized by ATC

Aircraft Without Electrical Systems  
 Are Exceptions to the Requirement

No Exceptions

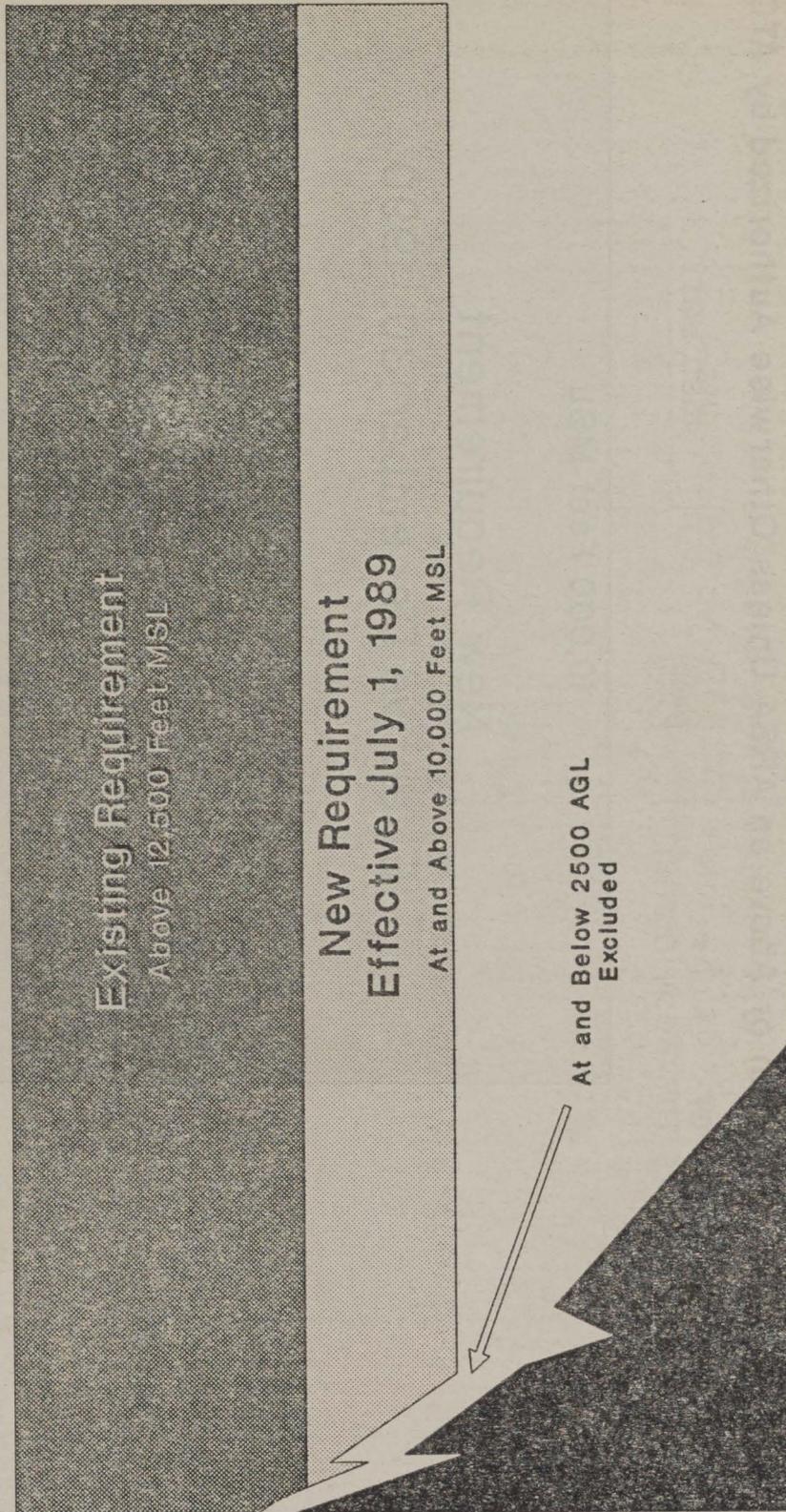
10,000 Feet MSL



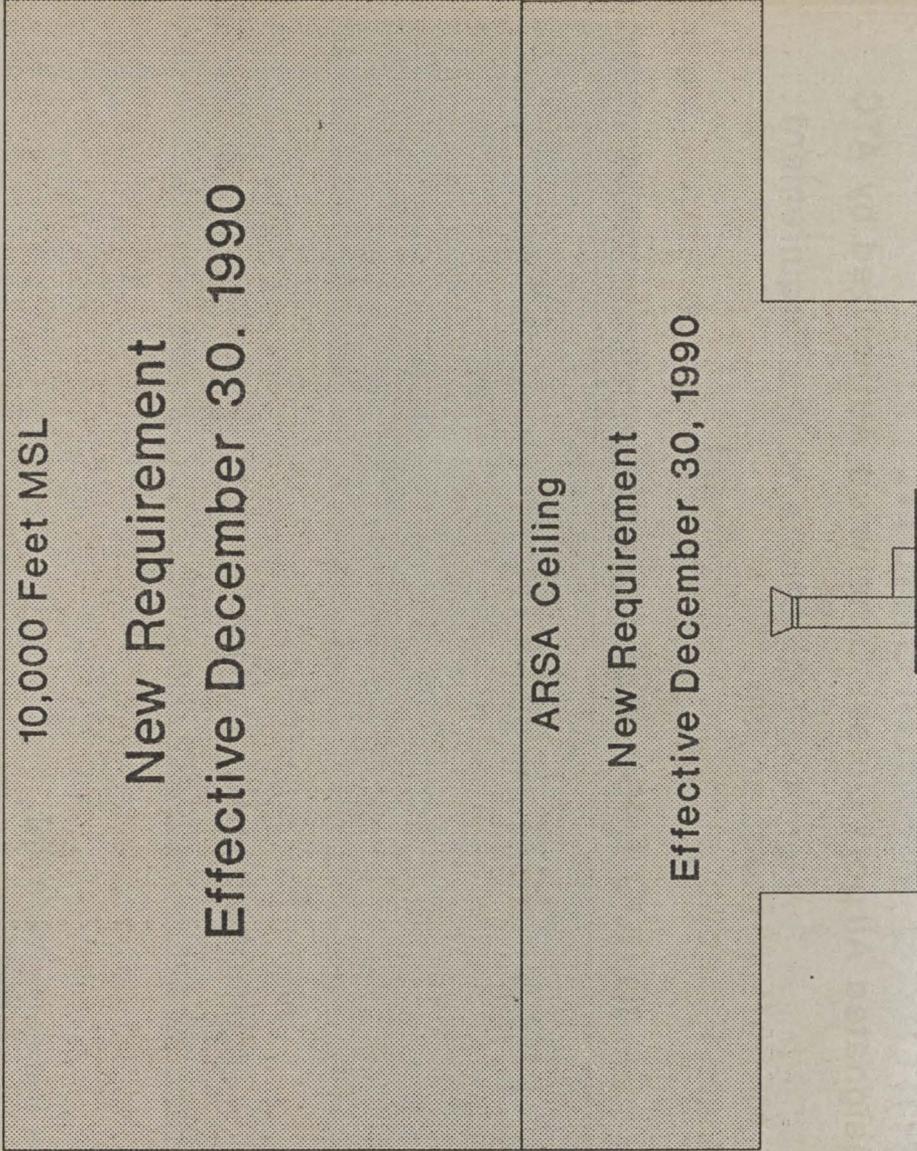
Mode C Transponder

# Mode C Transponder Enroute Requirement

Aircraft Without an Electrical System Are Exceptions to the Requirement



# Mode C Transponder Airport Radar Service Area Requirement Within or Above an ARSA Unless Otherwise Authorized by ATC



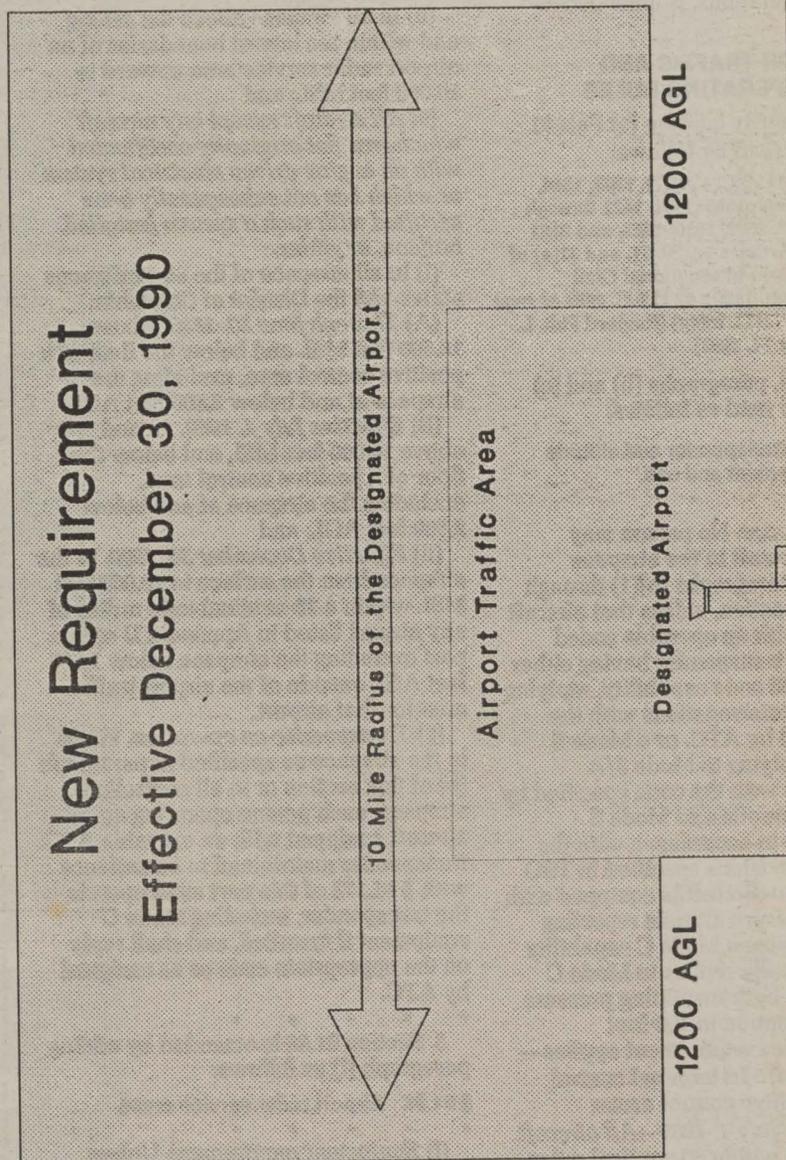
Mode C Transponder

# Mode C Transponder Designated Airport Requirement

Within 10 Miles of a Designated Airport Unless Otherwise Authorized by ATC

Aircraft Without an Electrical  
System are Exceptions to the Requirement

10,000 Feet MSL



**List of Subjects in 14 CFR Part 91**

Aviation safety, Safety, Aircraft, Air traffic control, Pilots, Airspace, Air transportation, and Airports.

**Adoption of the Amendments**

For the reasons set forth in the preamble, Part 91 of the Federal Aviation Regulations, is amended as follows:

**PART 91—AIR TRAFFIC AND GENERAL OPERATING RULES**

1. The authority citation for Part 91 continues to read as follows:

Authority: 49 U.S.C. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 31(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 *et seq.*; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

2. In § 91.24, paragraphs (b) and (c) are revised to read as follows:

**§ 91.24 ATC Transponder and altitude reporting equipment and use.**

(b) *All airspace.* No person may operate an aircraft in the airspace described in paragraphs (b)(1) through (b)(5) of this section, unless that aircraft is equipped with an operable coded radar beacon transponder having either Mode 3/A 4096 code capability, replying to Mode 3/A interrogations with the code specified by ATC, or a Mode S capability, replying to Mode 3/A interrogations with the code specified by ATC and intermode and Mode S interrogations in accordance with the applicable provisions specified in TSO C-112, and that aircraft is equipped with automatic pressure altitude reporting equipment having a Mode C capability that automatically replies to Mode C interrogations by transmitting pressure altitude information in 100-foot increments. This requirement applies—

(1) *All aircraft.* In terminal control areas and positive control areas;

(2) *Effective July 1, 1989—All aircraft.* In all airspace within 30 nautical miles of a terminal control area primary airport, from the surface upward to 10,000 feet MSL;

(3) *Effective July 1, 1989.* Notwithstanding paragraph (b)(2) of this section, any aircraft which was not originally certificated with an engine-driven electrical system or which has not subsequently been certified with such a system installed, balloon, or glider may conduct operations in the airspace within 30 nautical miles of a terminal control area primary airport provided such operations are conducted—

(i) Outside any terminal control area and positive control area; and  
(ii) Below the altitude of the terminal control area ceiling or 10,000 feet MSL, whichever is lower; and

(4) *Effective December 30, 1990—All aircraft.*

(i) In the airspace of an airport radar service area, and

(ii) In all airspace above the ceiling and within the lateral boundaries of an airport radar service area upward to 10,000 feet MSL; and

(5) *All aircraft except any aircraft which was not originally certificated with an engine-driven electrical system or which has not subsequently been certified with such a system installed, balloon, or glider.*

(i) In all airspace of the 48 contiguous states and the District of Columbia:

(A) *Through June 30, 1989.* Above 12,500 feet MSL and below the floor of a positive control area, excluding the airspace at and below 2,500 feet AGL.

(B) *Effective July 1, 1989.* At and above 10,000 feet MSL and below the floor of a positive control area, excluding the airspace at and below 2,500 feet AGL; and

(ii) *Effective December 30, 1990.* In the airspace from the surface to 10,000 feet MSL within a 10-nautical-mile radius of any airport listed in Appendix D of this part excluding the airspace below 1,200 feet AGL outside of the airport traffic area for that airport.

(c) *Transponder-on operation.* While in the airspace as specified in paragraph (b) of this section or in all controlled airspace, each person operating an aircraft equipped with an operable ATC transponder maintained in accordance with § 91.172 of this part shall operate the transponder, including Mode C equipment if installed, and shall reply on the appropriate code or as assigned by ATC.

3. Section 91.88 is amended by adding paragraph (f) as follows:

**§ 91.88 Airport radar service areas.**

(f) *Equipment requirement.* Unless otherwise authorized by ATC, no person may operate an aircraft within an airport radar service area unless that aircraft is equipped with the applicable equipment specified in § 91.24.

5. Section 91.90 is revised to read as follows:

**§ 91.90 Terminal control areas.**

(a) *Group I and II terminal control area operating rules.* No person may operate an aircraft within a terminal control area designated in Part 71 of this chapter except in compliance with the following rules:

(1) No person may operate an aircraft

within a terminal control area unless that person has received an appropriate authorization from ATC prior to operation of that aircraft in that area.

(2) Unless otherwise authorized by ATC, each person operating a large turbine engine-powered airplane to or from a primary airport shall operate at or above the designated floors while within the lateral limits of the terminal control area.

(b) *Group I terminal control area pilot requirements.* (1) The pilot in command of any civil aircraft conducting take off and landing operations at an airport within any terminal control area listed in paragraph (b)(2) below must hold at least a private pilot certificate.

(2) *List of terminal control areas.*

(i) Atlanta, GA.

(ii) Boston, MA.

(iii) Chicago, IL.

(iv) Dallas, TX.

(v) Los Angeles, CA.

(vi) Miami, FL.

(vii) New York, NY.

(viii) San Francisco, CA.

(ix) Washington, DC.

(c) *Group I and II terminal control area communications and navigation equipment requirements.* Unless otherwise authorized by ATC in the case of inflight VOR, TACAN, or two-way radio failure, no person may operate an aircraft within a terminal control area unless that aircraft is equipped with an operable VOR or TACAN receiver (except for helicopters) and an operable two-way radio capable of communications with ATC on appropriate frequencies for that terminal control area.

(d) *Group I and II terminal control area transponder requirement.* No person may operate an aircraft in a terminal control area without the applicable transponder and automatic altitude reporting equipment specified in paragraph (a) of § 91.24 except as provided for in paragraph (d) of that section.

6. In Part 91, Appendix D is added as follows:

**Appendix D—Airports/Locations Where the Transponder Requirements of Section 91.24(b)(4)(ii) Apply**

Section 1. The requirements of § 91.24(b)(4)(ii) apply to operations in the vicinity of each of the following airports: Logan International Airport, Billings MT. Hector International Airport, Fargo, ND.

Issued in Washington, DC, on June 17, 1988.

T. Allan McArtor,  
Administrator.

[FR Doc. 88-14065 Filed 6-17-88; 3:40 pm]

BILLING CODE 4910-13-M

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Tuesday  
June 21, 1988

# National Dairy Goat Federation

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## Part VI

## The President

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Proc. 5834—National Dairy Goat  
Awareness Week, 1988

MEMORANDUM FOR THE RECORD

DATE: 10/10/54  
BY: [illegible]

RE: [illegible]

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## Presidential Documents

Title 3—

Proclamation 5834 of June 17, 1988

The President

National Dairy Goat Awareness Week, 1988

By the President of the United States of America

### A Proclamation

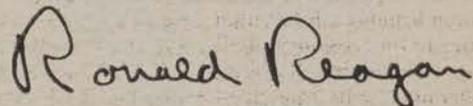
For many centuries, dating perhaps to prehistoric times, dairy goats have provided mankind with a reliable and abundant source of milk and milk products, meat, and clothing. Here in the United States, goats have been valued throughout our history primarily as dairy animals. Because of their ability to thrive in either lush or arid country, efficiently converting a wide variety of vegetation into nutritious milk and meat, these animals often accompanied American pioneer families in the days of westward expansion. Goats have long been a part of the typical mix of animals on farms in every region of the United States.

Today, among the contributions of dairy goat farming to our Nation's economy is an impressive array of dairy products. The interest of both domestic and foreign consumers in U.S. domestic goat cheeses, or Chevre, continues to increase, as does awareness of all dairy goat products. These trends deserve every encouragement.

The Congress, by House Joint Resolution 423, has designated the period beginning the second Saturday and ending the third Saturday of June 1988 as "National Dairy Goat Awareness Week" and has authorized and requested the President to issue a proclamation in its observance.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the period beginning the second Saturday and ending the third Saturday of June 1988 as National Dairy Goat Awareness Week. I call upon the people of the United States to observe this week with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of June, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.



Confidential Documents

CONFIDENTIAL

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Vol. 53, No. 119

Tuesday, June 21, 1988

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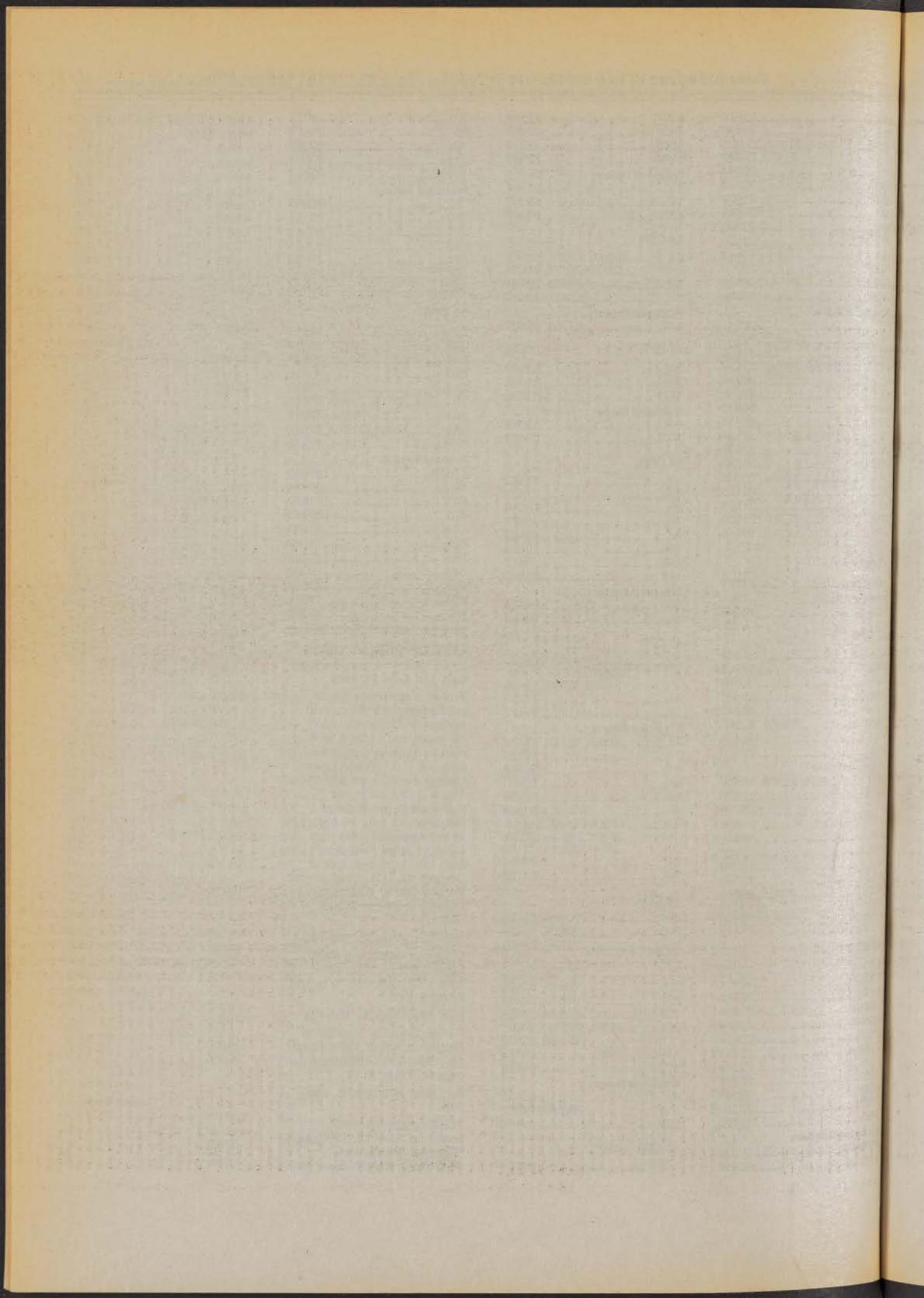
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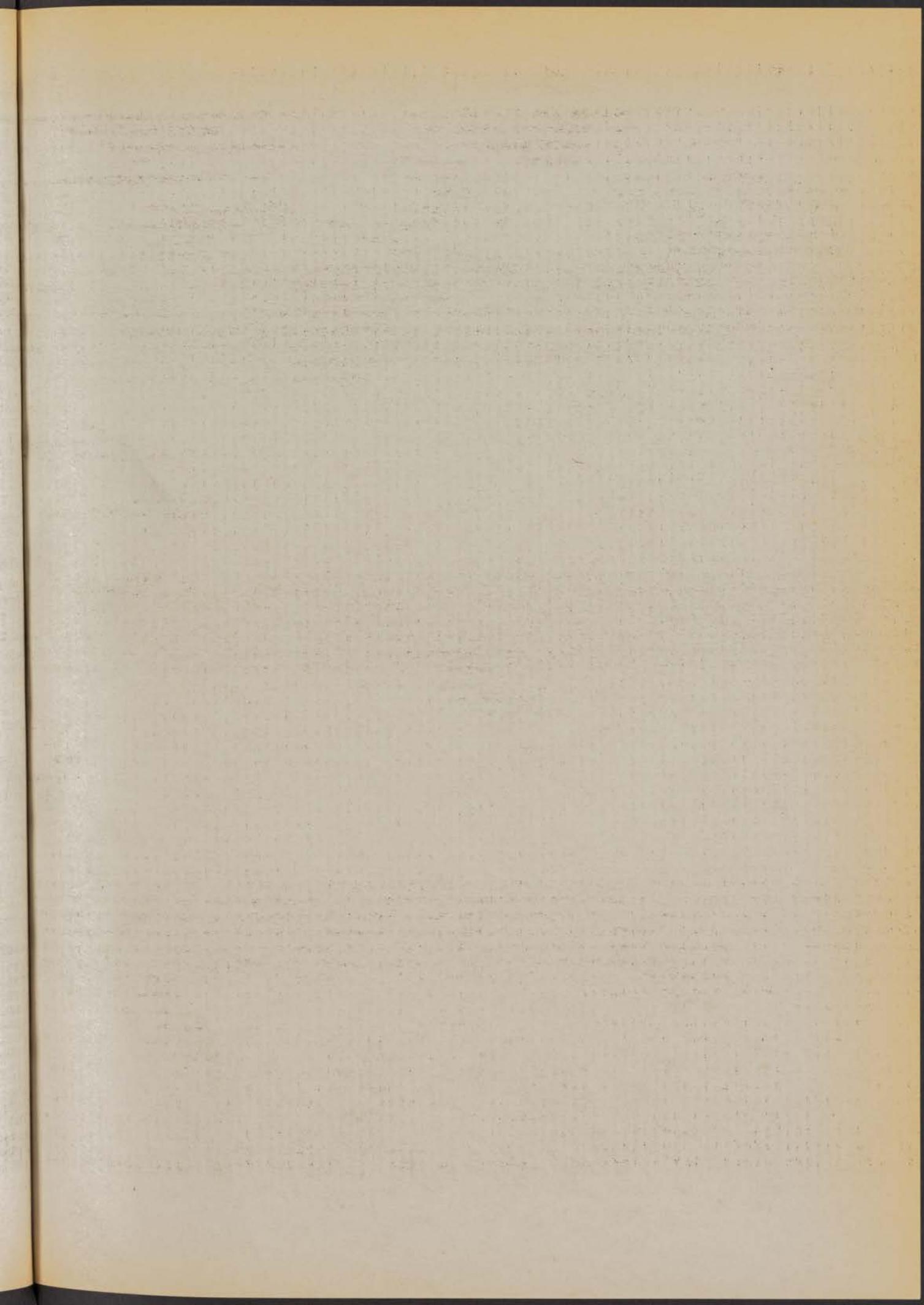
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Organotin Antifouling Paint Control Act of 1988. (June 16, 1988; 102 Stat. 605; 5 pages) Price: \$1.00

**H.R. 2969/Pub. L. 100-334**  
Retiree Benefits Bankruptcy Protection Act of 1988. (June 16, 1988; 102 Stat. 610; 6 pages) Price: \$1.00

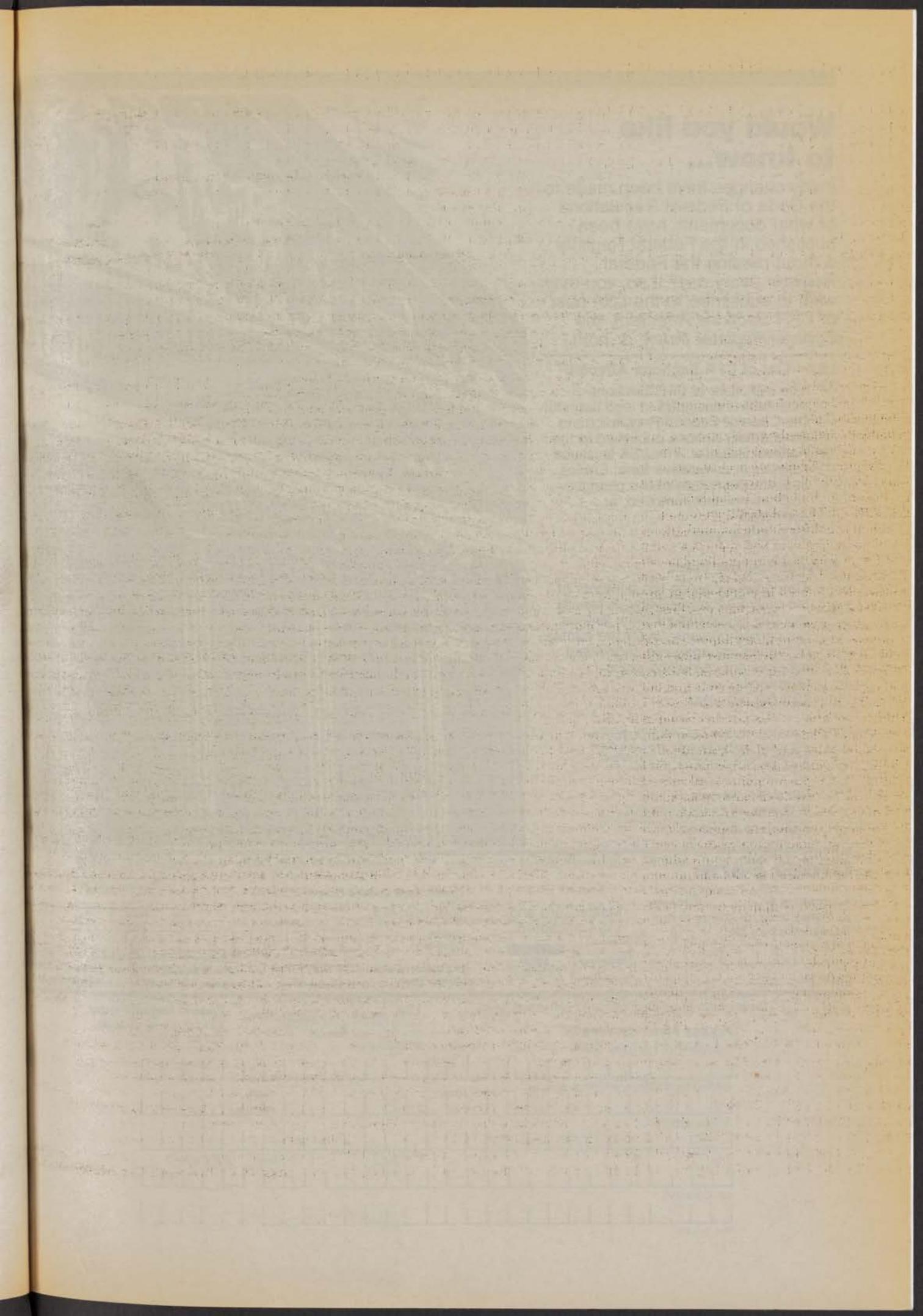
**S.J. Res. 266/Pub. L. 100-335**

To designate the week beginning June 12, 1988, as "National Scleroderma Awareness Week." (June 16,









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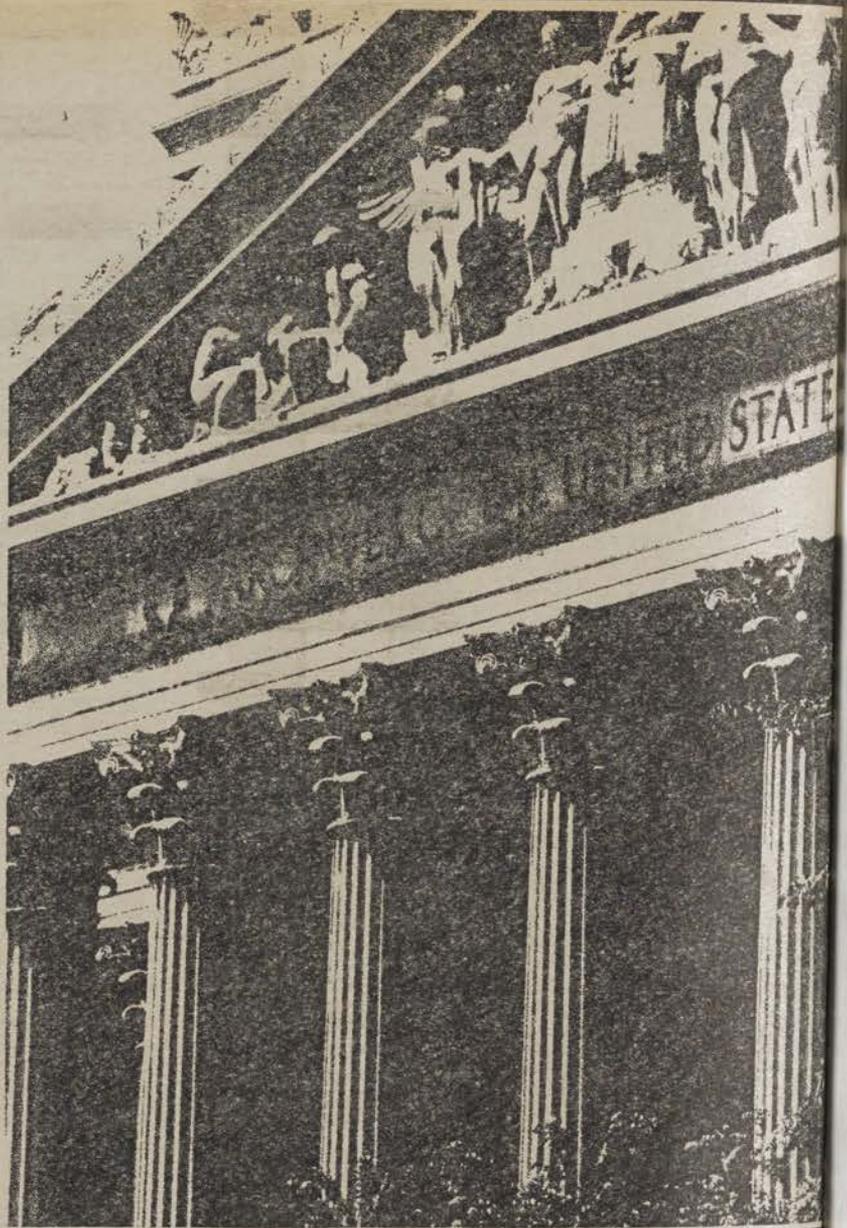
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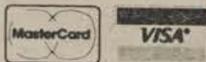
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