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October 27, 1988

Briefing on How To Use the Federal Register—
For information on a briefing in Washington, DC, see announcement on the inside cover of this issue.

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THE FEDERAL REGISTER
WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

WHEN: November 4; at 9:00 a.m.
WHERE: Office of the Federal Register,
First Floor Conference Room,
1100 L Street NW., Washington, DC
RESERVATIONS: 202–523–5240

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Separate Parts In This Issue

Reader Aids
Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

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Presidential Documents

Title 3—

The President

Proclamation 5888 of October 24, 1988

National Down Syndrome Month, 1988

By the President of the United States of America

A Proclamation

During National Down Syndrome Month, 1988, we can all grow in awareness of the nature of Down Syndrome; of the needs, rights, and abilities of persons affected by it; and of continuing progress in our understanding of this developmental disability and our responsibilities, as individuals and communities, toward those involved and their families.

Today, fortunately, we are making many options available for people with Down Syndrome, such as early intervention, mainstreaming, recreation, socialization, respite services, employment, and independent living programs. These welcome developments are in the finest traditions of American life and of our long-standing willingness to offer acceptance, help, and hope to our neighbors in time of need.

Private and public research continues in areas such as finding the cause of the extra chromosome 21 in people with Down Syndrome; mapping this chromosome's genes; understanding the relationship between Down Syndrome and Alzheimer's disease; and using computers to facilitate language and speech. Private groups such as the National Down Syndrome Congress and the National Down Syndrome Society, and public units such as the National Institute of Child Health and Human Development, the Public Health Service's Division of Maternal and Child Health, and the President's Committee on Mental Retardation, foster these and other activities for the benefit of persons affected by Down Syndrome and for the good of Americans yet unborn.

As we salute past and present accomplishments, we realize that many important needs still remain—and that we can solve them better the more we keep in mind the innate rights and human dignity Down Syndrome individuals share with their fellow Americans.

The Congress, by Senate Joint Resolution 302, has designated the month of October 1988 as "National Down Syndrome Month" and authorized and requested the President to issue a proclamation in observance of this month.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the month of October 1988 as National Down Syndrome Month. I invite all concerned citizens, agencies, and organizations to unite during October with appropriate observances and activities directed toward helping affected individuals and their families enjoy to the fullest the blessings of life.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of October, 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 thirteenth.

Ronald Reagan

[FR Doc. 88-25053
Filed 10-26-88; 11:11 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 5889 of October 24, 1988

National Lupus Awareness Month, 1988

By the President of the United States of America

A Proclamation

This year, we again set aside the month of October to mark our great concern for the thousands of Americans who suffer from lupus. An immune system disorder of unknown cause, lupus in its systemic form may affect the joints, skin, and one or more internal organs, such as the kidney, heart, and brain.

Lupus is a chronic disease in which there is always the potential threat of serious illness and disability. The disease can occur in men, but women in their childbearing years are the majority of its victims. Minorities, especially blacks, are particularly vulnerable; lupus is three times more prevalent in black women than in white women.

Ordinarily, the immune system protects against infection by producing antibodies that successfully combat foreign substances. In people with lupus, the immune system produces abnormal antibodies that react harmfully against the individual's own tissues.

To combat lupus, we need new research findings and new approaches to diagnosis and treatment. Scientists in biology, biochemistry, immunology, genetics, and other fields are seeking to understand its causes and disease processes to develop better means of detection, treatment, and prevention. If this work is to continue, and if we are to take advantage of the knowledge we have already gained, public awareness of lupus and of the importance of continuing scientific research on this disease is critical. The Federal Government and private health organizations are working together to promote awareness of lupus and research on it. This collaboration ultimately will conquer this significant public health problem.

The Congress, by Senate Joint Resolution 303, has designated the month of October 1988 as "National Lupus Awareness Month" and authorized and requested the President to issue a proclamation in observance of the event.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the month of October 1988 as National Lupus Awareness Month. I urge the people of the United States and educational, philanthropic, scientific, medical, and health care organizations and professionals to observe this month with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of October, 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 thirteenth.

Ronald Reagan

[FR Doc. 88-25054
Filed 10-26-88; 11:12 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 5890 of October 25, 1988

Pregnancy and Infant Loss Awareness Month, 1988

By the President of the United States of America

A Proclamation

Each year, approximately a million pregnancies in the United States end in miscarriage, stillbirth, or the death of the newborn child. National observance of Pregnancy and Infant Loss Awareness Month, 1988, offers us the opportunity to increase our understanding of the great tragedy involved in the deaths of unborn and newborn babies. It also enables us to consider how, as individuals and communities, we can meet the needs of bereaved parents and family members and work to prevent causes of these problems.

Health care professionals recognize that trends of recent years, such as smaller family size and the postponement of childbearing, adds another dimension of poignance to the grief of parents who have lost infants. More than 700 local, national, and international support groups are supplying programs and strategies designed to help parents cope with their loss. Parents who have suffered their own losses, health care professionals, and specially trained hospital staff members are helping newly bereaved parents deal constructively with loss.

Compassionate Americans are also assisting women who suffer bereavement, guilt, and emotional and physical trauma that accompany post-abortion syndrome. We can and must do a much better job of encouraging adoption as an alternative to abortion; of helping the single parents who wish to raise their babies; and of offering friendship and temporal support to the courageous women and girls who give their children the gifts of life and loving adoptive parents. We can be truly grateful for the devotion and concern provided by all of these citizens, and we should offer them our cooperation and support as well.

The Congress, by Senate Joint Resolution 314, has designated the month of October 1988 as "Pregnancy and Infant Loss Awareness Month" and authorized and requested the President to issue a proclamation in observance of this month.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the month of October 1988 as Pregnancy and Infant Loss Awareness Month. I call upon the people of the United States to observe this month with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of October, 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 thirteenth.

Ronald Reagan

[FR Doc. 88-25055
Filed 10-26-88; 11:13 am]
Billing code 3195-01-M

Rules and Regulations

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 1, 2, 7, 9, 15, 19, 20, 21, 30, 35, 40, 50, 51, 53, 55, 60, 61, 70, 71, 72, 73, 74, 75, 81, 100, 110, 140, 150, 170 and 171

Relocation of NRC's Public Document Room; Other Minor Nomenclature Changes

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to indicate that its Public Document Room has moved to a new location in the District of Columbia. The hours remain unchanged: 7:45 a.m. to 4:15 p.m. weekdays. These amendments are being made to inform NRC licensees and members of the public of this relocation. This rule also makes minor nomenclature changes in NRC organization to reflect new internal organizational titles.

EFFECTIVE DATE: October 27, 1988.

FOR FURTHER INFORMATION CONTACT: Donnie H. Grimsley, Director, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-7211.

SUPPLEMENTARY INFORMATION: On September 9, 1988 (53 FR 35135), the NRC published in the **Federal Register** a general notice announcing that as of September 19, 1988, the NRC's Public Document Room, formerly located in the Matomic Building at 1717 H Street NW., Washington, DC, will be relocated at the Gelman Building, 2120 L Street NW., Lower Level, Washington, DC, 20555. These amendments reflect that relocation.

In addition, these amendments reflect a change to the name of an organizational unit that has changed since the final rule revising the NRC's Statement of Organization and General Information was published in the **Federal Register** on August 21, 1987 (52 FR 31601), to reflect the reorganization of the agency.

Because these amendments deal solely with the organization and relocation of agency personnel, the notice and comment provisions of the Administrative Procedure Act do not apply under 5 U.S.C. 553(b)(A). These amendments are effective upon publication in the **Federal Register.** Good cause exists to dispense with the usual 30-day delay in the effective date, because these amendments are of a minor and administrative nature, dealing with the organization and relocation of agency personnel.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

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 Parts 1, 2, 7, 9, 15, 19, 20, 21, 30, 35, 40, 50, 51, 53, 55, 60, 61, 70, 71, 72, 73, 74, 75, 81, 100, 110, 140, 150, 170 and 171.

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 1.3 [Amended]

2. In § 1.3, in paragraph (a), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 1.5 [Amended]

3. In § 1.5, in the introductory text of paragraph (a), remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.," and remove paragraph (a)(5) and redesignate paragraphs (a)(6) through (a)(10) as paragraphs (a)(5) through (a)(9).

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

4. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 2.4 [Amended]

5. In § 2.4, in paragraph (k), remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

§ 2.101 [Amended]

6. In § 2.101, in paragraphs (a)(2) and (g)(1), remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

§ 2.206 [Amended]

7. In § 2.206, in paragraph (a)(1), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 2.701 [Amended]

8. In § 2.701, in paragraph (a)(1), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 2.802 [Amended]

9. In § 2.802, in paragraph (g), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 7—ADVISORY COMMITTEES

10. The authority citation for Part 7 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 7.17 [Amended]

11. In § 7.17, in paragraph (a), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 9—PUBLIC RECORDS

12. The authority citation for Part 9 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, amended (42 U.S.C. 5841).

§ 9.21 [Amended]

13. In § 9.21, in paragraph (b), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 9.23 [Amended]

14. In § 9.23, in paragraph (a)(1), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 9.35 [Amended]

15. In § 9.35, in paragraph (a)(1), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 9.107 [Amended]

16. In § 9.107, in paragraph (d)(1), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 15—DEBT COLLECTION PROCEDURES

17. The authority citation for Part 15 continues to read as follows:

Authority: Sec.161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 15.3 [Amended]

18. In § 15.3, in the second sentence, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 19—NOTICES, INSTRUCTIONS, AND REPORTS TO WORKERS: INSPECTIONS

19. The authority citation for Part 19 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 19.5 [Amended]

20. In § 19.5, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 20—STANDARDS FOR PROTECTION AGAINST RADIATION

21. The authority citation for Part 20 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 20.7 [Amended]

22. In § 20.7, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 21—REPORTING OF DEFECTS AND NONCOMPLIANCE

23. The authority citation for Part 21 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.SC. 5841)

§ 21.5 [Amended]

24. In § 21.5, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 30— RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

25. The authority citation for Part 30 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 30.6 [Amended]

26. In § 30.6 paragraph (a)(2)(i), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 35—MEDICAL USE OF BYPRODUCT MATERIAL

27. The authority citation for Part 35 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 35.632 [Amended]

28. In § 35.632, in paragraph (d), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

29. The authority citation for Part 40 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 40.5 [Amended]

30. In § 40.5, paragraph (a)(2)(i), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

31. The authority citation for Part 50 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 50.34 [Amended]

32. In § 50.34, in paragraph (f)(3)(v)(A)(2) remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 50.44 [Amended]

33. In § 50.44, in paragraph (c)(3)(iv)(C), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 50.55a [Amended]

34. In § 50.55a, in paragraph (b), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

Appendix G—[Amended]

35. In Appendix G, in the third undesignated paragraph under I., remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

Appendix H—[Amended]

36. In Appendix H, in the second undesignated paragraph under I., remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

Appendix J—[Amended]

37. In Appendix J, in the first footnote under paragraph III.A.3.(a), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

Appendix Q—[Amended]

38. In Appendix Q, in paragraph 4, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

39. The authority citation for Part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 51.52 [Amended]

40. In § 51.52, in the first footnote under paragraph (c) Summary Table S–4, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 51.62 [Amended]

41. In § 51.62, in paragraph (a), remove the words "1717 H Street, NW.," and

add in their place the words "2120 L Street NW.,".

§ 51.120 [Amended]

42. In § 51.120, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 51.123 [Amended]

43. In § 51.123, in paragraph (a), remove the words "Division of Technical Information and Document Control" and add in their place the words "Division of Information Support Services".

PART 53—[AMENDED]

44. The title of Part 53 is revised to read as follows:

PART 53—CRITERIA AND PROCEDURES FOR DETERMINING THE ADEQUACY OF AVAILABLE SPENT NUCLEAR FUEL STORAGE CAPACITY

45. The authority citation for Part 53 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 53.11 [Amended]

46. In § 53.11, in paragraph (c), remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

§ 53.29 [Amended]

47. In § 53.29, in paragraph (c), remove the words "1717 H Street NW.," and add in their place the word "2120 L Street NW.,".

PART 55—OPERATOR'S LICENSES

48. The authority citation for Part 55 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 55.5 [Amended]

49. In § 55.5, paragraph (a)(2)(i), remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

§ 55.23 [Amended]

50. In § 55.23, in the introductory text, remove the words "Publication Services Section, Document Management Branch, Division of Technical Information and Document Control, and add in their place the words "Records and Reports Management Branch, Division of Information Support Services,".

§ 55.31 [Amended]

51. In § 55.31, in paragraph (a)(1), remove the words "Publication Services Section, Document Management Branch, Division of Technical Information and Document Control," and add in their place the words "Records and Reports Management Branch, Division of Information Support Services,".

§ 55.45 [Amended]

52. In § 55.45, in paragraph (b)(2)(iii), remove the words "Publication Services Section, Document Management Branch, Division of Technical Information and Document Control," and add in their place the words "Records and Reports Management Branch, Division of Information Support Services,".

PART 60—DISPOSAL OF HIGH-LEVEL WASTES IN GEOLOGICAL REPOSITORIES; LICENSING PROCEDURES

53. The authority citation for Part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246, (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); sec. 121, Pub. L. 97–425, 96 Stat. 2228 (42 U.S.C. 10141).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 60.10, 60.71 to 60.75 are issued under sec. 1610, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

§ 60.2 [Amended]

54. In § 60.2, in the definition for "Public Document Room", remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

§ 60.4 [Amended]

55. In § 60.4, second sentence, remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

56. The authority citation for Part 61 is revised to read as follows:

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246, (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); Tables 1 and 2, §§ 61.3, 61.24, 61.25, 61.27(a), 61.41 through 61.43, 61.52, 61.53, 61.55, 61.56, and 61.61 through 61.63 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201)(b)); §§ 61.9a, 61.10 through 61.16, 61.24 and 61.80 are issued under sec. 1610, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

§ 61.4 [Amended]

57. In § 61.4, second sentence, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

58. The authority citation for Part 70 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 70.5 [Amended]

59. In § 70.5, in paragraph (a)(2)(i), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 71—PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

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

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 71.1 [Amended]

61. In § 71.1, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 72—LICENSING REQUIREMENTS FOR THE STORAGE OF SPENT FUEL IN AN INDEPENDENT SPENT FUEL STORAGE INSTALLATION (ISFSI)

62. The authority citation for Part 72 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 72.4 [Amended]

63. In § 72.4, second sentence, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 72.16 [Amended]

64. In § 72.16, second sentence in paragraph (a), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

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

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 73.4 [Amended]

66. In § 73.4, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 74—MATERIAL CONTROL AND ACCOUNTING OF SPECIAL NUCLEAR MATERIAL

67. The authority citation for Part 74 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 74.6 [Amended]

68. In § 74.6, paragraph (b)(1), remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

PART 75—SAFEGUARDS ON NUCLEAR MATERIAL—IMPLEMENTATION OF US/IAEA AGREEMENT

69. The authority citation for Part 75 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 75.2 [Amended]

70. In § 75.2, in paragraph (b), remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

§ 75.6 [Amended]

71. In § 75.6, paragraph (c), remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

PART 81—STANDARD SPECIFICATIONS FOR THE GRANTING OF PATENT LICENSES

72. The authority citation for Part 81 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 81.3 [Amended]

73. In § 81.3, second sentence, remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

PART 100—REACTOR SITE CRITERIA

74. The authority citation for Part 100 is revised to read as follows:

Authority: Secs. 103, 104 161, 182, 68 Stat. 936, 937, 948, 953, as amended (42 U.S.C. 2133, 2134, 2201, 2232); sec. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

§ 100.11 [Amended]

75. In § 100.11, in the Note under paragraph (b)(3), in the second complete undesignated paragraph, remove the words "1717 H Street, NW.," and add in their place the words "2120 L Street NW.,".

PART 110—EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

76. The authority citation for Part 110 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 110.2 [Amended]

77. In § 110.2, in the definition for "Public Document Room", remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

PART 140—FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

78. The authority citation for Part 140 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 140.5 [Amended]

79. In § 140.5, second sentence, remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

80. The authority citation for Part 150 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 150.4 [Amended]

81. In § 150.4, second sentence, remove the words "1717 H Street NW.," and add in their place words "2120 L Street NW.,".

PART 170—FEES FOR FACILITIES AND MATERIALS LICENSES AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

82. The authority citation for Part 170 continues to read as follows:

Authority: 31 U.S.C. 9701, 96 Stat. 1051; sec. 301, Pub. L. 92-314, 86 Stat. 222 (42 U.S.C. 2201(w)); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 170.5 [Amended]

83. In § 170.5, second sentence, remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

PART 171—ANNUAL FEE FOR POWER REACTOR OPERATING LICENSES

84. The authority citation for Part 171 is revised to read as follows:

Authority: Sec. 7601, Pub. L. 99-272, 100 Stat. 146; sec. 301, Pub. L. 92-314, 86 Stat. 222, (42 U.S.C. 2201(w)); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 171.9 [Amended]

85. In § 171.9, second sentence, remove the words "1717 H Street NW.," and add in their place the words "2120 L Street NW.,".

Dated at Rockville, Maryland, this 14th day of October 1988.

For the Nuclear Regulatory Commission.

Victor Stello, Jr.,

Executive Director for Operations.

[FR Doc. 88-24742 Filed 10-26-88; 8:45 am]

BILLING CODE 7590-01-M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards; Modification of Size Standards for Research and Development on Aircraft; Aircraft Parts; Aircraft Engines; Guided Missiles and Space Vehicles, Their Parts, Auxiliary Equipment, Propulsion Units and Propulsion Unit Parts

AGENCY: Small Business Administration (SBA).

ACTION: Final rule.

SUMMARY: The SBA is modifying the size standards applicable to firms engaged in research and development (R&D) for aircraft; aircraft parts; aircraft engines; guided missiles and space vehicles, their parts, propulsion units and propulsion unit parts, and their auxiliary equipment to conform with the size standards for these services in existence prior to January 1, 1987. Due to a reassignment in the Standard Industrial Classification (SIC) System by the Office of Management and Budget (OMB), these services became subject to a much lower size standard. The standards are being reinstated by this rule because the contractual requirements for these services necessitate a higher size than that for other types of research and development.

This final rule establishes a size standard of 1,500 employees for aircraft

research and development, and a size standard of 1,000 employees for all other aforementioned research and development within SIC code 8731 (Commercial Physical and Biological Research). These size standards are the same standards for similar R&D activities within the manufacturing SIC codes 3721, 3724, 3728, 3761, 3764, and 3769.

DATE EFFECTIVE: October 27, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. Norman Salenger, Size Standards Staff, (202) 653–6373.

SUPPLEMENTARY INFORMATION: Effective January 1, 1987, the Office of Management and Budget (OMB) revised the Standard Industrial Classification (SIC) System and, at that time, published the industry titles with a limited descriptioin for most industries. The SBA issued an emergency interim rule, effective January 1, 1987, to set size standards for the revised SIC system.

In its notice of January 6, 1987, SBA stated that the modification was "to make its size standards compatible with the new SIC system, not to initiate any size standard changes" (52 FR 397). In September 1987, the SIC Manual was published describing each SIC industry in greater detail. At that time, it first became generally known that research and development (R&D) on aircraft; aircraft engines; aircraft parts; guided missiles and space vehicles, their propulsion units, parts and auxiliary equipment had been partially reclassified. When a firm performs such R&D, but is not a manufacturer of these items, the firm is no longer classified along with manufacturing firms under the manufacturing SIC codes 3721, 3724, 3728, 3761, 3764, and 3769 (which have a 1,500-employee size standard for aircraft (SIC code 3721) and a 1,000-employee size standard for the others), but is classified under SIC code 8731, Commercial Physical and Biological Research, which has a 500-employee size standard.

This reassignment by OMB of these activities inadvertently changed the size standards on small business set-aside contracts for the aforementioned R&D services. Under § 121.5(b)(1) of the SBA's size regulations, a size standard for a procurement is selected from the SIC industry category most closely associated with the product or service being procured. Consequently, the reclassification of nonmanufacturing aircraft, guided missile and space vehicle R&D firms to a service industry division also changed the SIC designation for such R&D contracts to the service SIC code 8731 with its lower size standard of 500 employees. The lower size standard applies to any firm bidding on such R&D contracts, irrespective of whether the firm is primarily a manufacturer or nonmanufacturer. The reclassification of nonmanufacturing firms to a service industry with a lower size standard than the previously applicable manufacturing industry also affects their eligibility for assistance through other SBA programs, such as the direct and guarantee financial assistance programs. Since the comment period for the January 6, 1987, Emergency Interim Rule ended on March 9, 1987, and the SIC Manual indicating the reclassification of firms engaged in R&D activities from their former SIC codes was first published in September 1987, the affected firms did not have adequate opportunity to comment on the new size standard.

The SBA received numerous complaints from affected firms and Federal agencies concerning the adverse effect of the lowering of the size standard for these activities. The size of many firms active in Federal procurement of R&D on aircraft, guided missiles, space vehicles, and related equipments falls between the current and previous size standards. Firms above the 500-employee size standard were not given an opportunity to provide SBA with information on the appropriateness of retaining higher size standards. Federal agencies were particularly concerned about the feasibility of continuing to set aside these types of R&D procurements at the 500-employee size standard.

As a result of these complaints and concerns, the SBA published in the **Federal Register**, on March 30, 1988, an emergency interim final rule to restore, on a temporary basis, the size standards applicable prior to the SIC revision of these R&D activities. This interim rule provided for a 60-day comment period so that interested parties could express their views and provide information on the suitability of the interim size standards or the suitability of adopting the size standard of 500 employees for these services, the same as applicable to R&D contracts for other services within SIC code 8731.

A total of 10 comments was received, seven from firms, one from an association, and two from Federal Government agencies. Six firms supported the interim size standards of 1,000 and 1,500 employees. Five of the six firms stated reasons for supporting a higher standard, but did not provide data or other information to substantiate their position. One firm failed to give a reason for its support of the higher standards.

Two firms said that the R&D contracts in the affected fields require personnel with numerous technical disciplines in order to compete with large firms. One firm stated that the Government is issuing more umbrella type contracts which require firms to hire additional employees to be able to perform on the contracts. Two firms and one association supported the interim standard, citing only that the SIC reclassification resulted in an inadvertent size standard reduction.

Comments from two Air Force agencies were in support of the interim standards. The Air Force Ballistic Missile Office, headquartered at Norton Air Force Base, said that firms with less than 500 employees have difficulty demonstrating an ability to successfully compete for efforts of such magnitude as their R&D contracts. Also, it said that at a 1,000-employee size standard a small R&D firm has the opportunity to compete and survive against major aerospace firms. The Air Force Space Division commented that a 1,000-employee threshold for R&D on space systems and boosters is the minimum standard that allows participation by small businesses as prime contractors and that allows them to perform at least 50 percent of the effort with their own work force (Section 921(c) of Pub. L. 99–591 requires that at least 50 percent of the effort on a service contract be performed by the contractor's own work force). The Space Division said that, recently, three projects totaling $102 million would not have been set aside for small business if not for the 1,000-employee size standard.

One respondent opposed adopting the size standards of 1,000 and 1,500 employees for the subject R&D. The comment came from a large R&D firm with the argument that R&D contracts for aerospace issued under SIC code 8731 are closely related to engineering services for aerospace under SIC code 8711. It stated that procurements under both SICs require similar skills and often comparable facilities and that often the same firm receives contracts under both SIC classifications. It pointed out that a firm with 500 employees would have approximately $24 million in revenue, almost twice that of the size standard of $13.5 million for SIC code 8711. To raise the size standard for SIC code 8731 contracts in these fields to 1,000 or 1,500 employees would widen the gap which it argued is already inequitable. It further argued that firms of less than 500 employees are already at a great disadvantage when forced to compete with firms two or three times their size and that SBA's assistance

should be directed at these smaller firms.

Based on our analysis of all comments, it is the position of the SBA that a 500-employee size standard would not be sufficient to meet the requirements for contracts for R&D in the aircraft, missile and space fields. A requirement necessary for all contracts set aside for small business is that there be at least two responsive bidders, capable of performing the work at reasonable prices. Furthermore, section 921(c) of Pub. L. 99-591 requires that on service contracts (R&D is a service) at least 50 percent of the effort must be by the prime contractor's own work force. The comments indicate that a 1,000-employee size standard is appropriate for R&D in the missile and space fields. No comment specifically addressed the need for a 1,500-employee size standard for aircraft R&D. However, R&D firms in this activity face the same problems discussed by firms involved in guided missile and space vehicle R&D. In response to the one comment that firms with a R&D capability also do the less complicated engineering work, Federal data show the scope of R&D contracts to be substantially larger than for engineering services. For example, in fiscal year 1987 the average size R&D contract awarded was $37,076,000 for aircraft and $16,483,000 for guided missiles, space vehicles and related items. These contracts are significantly larger than contracts for military equipment and weapons and aerospace equipment engineering which average $1,437,000. Thus a larger size standard is supported for R&D work as opposed to engineering. In addition, the size standard applicable to any service contract is for the services being procured and is not based on the variety of services any contractor can supply. It is the responsibility of the contracting officer to properly classify the contract as R&D or as engineering services, as the case may be. Should a misclassification occur, it can be corrected through the established appeal procedure.

Supportive of the restoration of the 1,000 and 1,500-employee size standards are data on Federal procurements for fiscal years 1986 and 1987. These data show that under the size standards of 1,500 employees for aircraft R&D and 1,000 employees for missile and space R&D less than 4 percent of the total contract dollars was awarded to small business. Of that awarded to small business, slightly over 60 percent was through set-aside and 8(a) procurements. The percentage of small firm participation is low enough to indicate that a size standard of 500 employees would eliminate a substantial portion of these small R&D firms as sources for Federal procurements and reduce the small business share from the already low 4 percent. Currently, the Congress has expressed interest in small business increasing its participation in industries where low participation rates prevail. Implementing the higher R&D size standards will ensure that small business participation will continue in the R&D field. Procurement data for fiscal years 1986 and 1987, during which the 1,500 and 1,000-employee size standard was in affect, are shown on the following tables.

TABLE 1.—RESEARCH AND DEVELOPMENT PROCUREMENTS FOR AIRCRAFT, MISSILE AND SPACE SYSTEMS

[Thousands of dollars]

	Total procurement	From small business	Small business set-asides	8(a) contracts
Aircraft R&D:				
FY 1986	$3,030,794	$11,366	$3,017	$842
FY 1987	3,373,935	20,780	6,176	0
Missile and Space R&D:				
FY 1986	5,313,890	173,658	80,975	24,219
FY 1987	5,867,962	226,657	101,488	48,248

Source: Federal Procurement Data Center (FPDC).

TABLE 2.—SMALL BUSINESS PERCENTAGE OF ALL PROCUREMENTS

	Aircraft R&D, Percent	Missile and space R&D, Percent
FY 1986	0.38	3.27
FY 1987	0.62	3.86

Source: FPDC.

TABLE 3.—SET-ASIDE AND 8(a) PERCENTAGE OF SMALL BUSINESS SHARE

	Aircraft R&D, Percent	Missile and space R&D, Percent
FY 1986	33.95	60.57
FY 1987	29.72	66.06

Source: FPDC.

Compliance With Executive Order 12291, Regulatory Flexibility Act and Paperwork Reduction Act

This final rule defines which firms engaged in research and development work in the aircraft, missile and space fields are eligible to receive SBA's assistance, including eligibility to bid on Federal contracts set aside for exclusive small business bidding. SBA has determined that this regulation is a major rule as defined by Executive Order 12291, because it could have an economic impact of $100 million or more per year. This impact is due to the potential awards of over $100 million in total value to one group of firms instead of another group of firms. Because of the absence of statistics below the four-digit SIC level, summary data on R&D firms cannot be presented. The following discussion analyzes the impact on procurement and financial assistance programs of the restored size standards.

This regulation restores the size definition of a small R&D firm engaged in aircraft, space and missile R&D to the same size definition that existed prior to the 1987 revision of the SIC manual. As a result of that 1987 revision, these firms were shifted to an industry with a lower size standard. Thus those firms with over 500 employees no longer were eligible to bid on contracts set aside for small business. The benefits to restoring the previous size standards can be assessed in terms of contract awards reserved for small business. In FY 1987 there were $107,664,000 worth of contracts awarded to small firms for aircraft, space and missile R&D through the set-aside program. Additionally, this

size standard also affects the eligibility of small firms owned by socially and economically disadvantaged persons in SBA's 8(a) program. In FY 1987, there were $48,248,000 in contracts for the subject R&D awarded through the 8(a) program.

The supplementary information above describes why this action is being taken as it applies to Federal procurements. This rule also applies to eligibility for SBA's financial assistance. However, the impact of the change on financial assistance is estimated to be none because of two factors. SBA's loan limit is $500,000 to any firm and the firm must not be able to obtain financing from conventional sources. As a result of these two restrictions, very few, if any, loans are made in any year to firms in any industry with 500 or more employees. In FY 1987, 98.8 percent of the firms that received an SBA loan had less than 100 employees. It is very unlikely that any R&D firm of over 500 employees would receive an SBA's loan in any year.

SBA certifies that this rule would not be likely to result in a major increase in costs or prices to the Federal government or the firms involved, nor would it have a significant adverse effect on the United States economy.

SBA certifies that this rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* According to the United States Establishment and Enterprise Microdata File (USEEM), there are nine R&D firms with 500 to 999 employees. Additionally, there is only a small number of other firms, primarily in the manufacturing industries, with a capability for R&D on aircraft, space vehicles and guided missiles that would lose eligibility as a small business without this rule. The available data do not permit the exact number of the latter to be ascertained.

The legal basis for this final rule in sections 3(a) and 5(b)(6) of the Small Business Act, 15 U.S.C. 632(a) and 634(b)(6). There are no Federal rules which will duplicate, overlap or conflict with this final rule.

SBA certifies that this rule contains no reporting or recordkeeping requirements which are subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs-business, Loan programs-business, Recording and recordkeeping requirement, Small business.

Accordingly, Part 121 of 13 CFR is amended as follows:

PART 121—[AMENDED]

1. The authority citation for Part 121 continues to read as follows:

Authority: Secs.3(a) and 5(b)(6) of the Small Business Act, 15 U.S.C. 632(a) and 634(b)(6), and Public Laws 99–591 and 99–661.

§ 121.2 [Amended]

2. Table 2 in § 121.2(d)(2) is amended by revising the column headings and revising SIC code 8731 under "Major Group 87—Miscellaneous Services" to read as follows:

SIC (* = New SIC Code in 1987, Not Used in 1972)	Description (N.E.C. = Not elsewhere classified)	Size standards in number of employees or millions of dollars
8731*	Commercial Physical and Biological Research:[19].	
	Aircraft	1,500
	Aircraft Parts, and Auxillary Equipment, Aircraft Engines and Engines Parts.	1,000
	Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Unit Parts, and their Auxiliary Equipment and Parts.	1,000
	Other Commerical Physical and Biological Research.	500

3. Footnote 19 in § 121.2 is revised to read as follows:

[19] SIC–8731: For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard to use is that of the manufacturing industry in which the specific product is classified.

Research and development, as defined in the SIC Manual, means laboratory or other physical research and development on a contract or fee basis. Research and development for purposes of size determinations does not include the following: Economic, educational, engineering, operations, systems, or other nonphysical research or computer programming, data processing, commercial and/or medical laboratory testing.

For purposes of the Small Business Innovation and Research (SBIR) program, SBA has adopted a different definition. See § 121.7 of these regulations.

Research and development for guided missiles and space vehicles includes evaluation and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

James Abdnor,

Administrator, U.S. Small Business Administration.

Date: August 23, 1988.

[FR Doc. 88–24692 Filed 10–26–88; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88–ANM–7]

Alteration of Transition Area; Laramie, WY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action provides controlled airspace for aircraft executing a new instrument approach procedure to the General Breese Field, Laramie, Wyoming. This action does not change the existing 700 foot transition area. The area will be depicted on aeronautical charts for pilot reference, and is intended to segregate aircraft operating in Instrument Flight Rules conditions from other aircraft which are operating in Visual Flight Rules conditions.

EFFECTIVE DATE: 0901 U.T.C, December 15,1988.

FOR FURTHER INFORMATION CONTACT: Robert L. Brown, ANM–535, Federal Aviation Administration, Docket No. 88–ANM–7, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168; Telephone: (206) 431–2536.

SUPPLEMENTARY INFORMATION:

History

On July 6, 1988, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by amending the Laramie, Wyoming Transition Area (53 FR 25346).

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. Except for editorial changes, this amendment is the same as that proposed in the notice. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations provides additional controlled airspace in the Laramie, Wyoming transition area. The additional area is needed to encompass a new approach procedure to General Breese Field, Wyoming. The area will be depicted on aeronautical charts for pilot reference enabling pilots to remain clear of controlled airspace or otherwise comply with Instrument Flight Rules.

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 Federal Aviation Regulations (14 CFR Part 71) is amended 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; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Laramie, Wyoming [Amended]

On the seventh line after "VORTAC", add the following description: * * * that airspace extending upward from 1,200 feet above the surface bounded by a line beginning at Latitude 41°53'00" N., Longitude 105°51'00" W.; to Latitude 41°53'00" N., Longitude 105°08'00" W.; to Latitude 41°13'00" N., Longitude 105°08'00" W.; to Latitude 41°13'00" N., to Longitude 105°51'00" W.; thence to point of beginning excluding all other controlled airspace which overlaps.

Issued in Seattle, Washington, on October 5, 1988.

Temple H. Johnson, Jr.,

Manager, Air Traffic Division, Northwest Mountain Region.

[FR Doc. 88-24804 Filed 10-26-88; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 97

[Docket No. 25722; Amdt. No. 1385]

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 for 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 in SIAP.

For Purchase

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA-200), 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 as 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 requie 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 Oreder 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.

Robert L. Goodrich,

Acting Director, Flight Standards Service.

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)).

By amending: § 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 December 15, 1988

Cordova, AK—Cordova-Mile 13, ILS/DME RWY 27, Amdt. 7
West Palm Beach, FL—Palm Beach Intl, VOR RWY 31, Amdt. 2
Rome, GA—Richard B. Russell, VOR/DME RWY 1, Amdt. 7
Rome, GA—Richard B. Russell, VOR/DME RWY 19, Amdt. 6
Rome, GA—Richard B. Russell, LOC/DME RWY 1, Amdt. 2
Rome, GA—Richard B. Russell, NDB-A, Amdt. 5
Mount Carmel, IL—Mount Carmel Muni., VOR RWY 22, Amdt. 6
Mount Carmel, IL—Mount Carmel Muni., NDB RWY 4, Amdt. 2
Pickneyville, IL—Pickneyville-Du Quoin, NDB RWY 18, Amdt. 1
Lafayette, IN—Purdue University, RNAV TWY 28, Amdt. 4
Grinnell, IA—Grinnell Municipal, NDB RWY 13, Orig.
Grinnell, IA—Grinnell Municipal, NDB RWY 31, Orig.
Grinnell, IA—Grinnell Municipal, VOR/DME RWY 31, Amdt. 1
Martha's Vineyard, MA—Martha's Vineyard, VOR RWY 24, Amdt. 12
Detroit, MI—Detroit Metropolitan Wayne County, VOR RWY 9, Amdt. 12, CANCELLED
Iron Mountain/Kingsford, MI—Ford, VOR RWY 1, Amdt. 11
Iron Mountain/Kingsford, MI—Ford, VOR/DME RWY 1, Orig., CANCELLED
Iron Mountain/Kingsford, MI—Ford, VOR RWY 19, Amdt. 5, CANCELLED
Iron Mountain/Kingsford, MI—Ford, VOR/DME RWY 19, Orig., CANCELLED
Iron Mountain/Kingsford, MI—Ford, VOR RWY 31, Amdt. 13
Iron Mountain/Kingsford, MI—Ford, VOR/DME RWY 31, Orig., CANCELLED
Iron Mountain/Kingsford, MI—Ford—LOC/DME BC RWY 19, Amdt. 9
Iron Mountain/Kingsford, MI—Ford, ILS RWY 1, Amdt. 8
Jackson, MI—Jackson County-Reynolds Field, VOR RWY 6, Amdt. 18
Jackson, MI—Jackson County-Reynolds Field, VOR RWY 14, Amdt. 17
Jackson, MI—Jackson County-Reynolds Field, VOR RWY 24, Amdt. 19
Jackson, MI—Jackson County-Reynolds Field, VOR RWY 32, Amdt. 16
Jackson, MI—Jackson County-Reynolds Field, NDB RWY 24, Amdt. 12
Jackson, MI—Jackson County-Reynolds Field, ILS RWY 24, Amdt. 12
Minneapolis, MN—Minneapolis-St. Paul Intl/Wold-Chamberlain, ILS RWY 11L, Amdt. 1
Fairmont, NE—Fairmont State Airfield, NDB RWY 35, Orig.
Sidney, NE—Sidney Muni, VOR RWY 12, Amdt. 5
Sidney, NE—Sidney Muni, VOR/DME or TACAN RWY 12, Amdt. 2
Sidney, NE—Sidney Muni, VOR RWY 30, Amdt. 5
Sidney, NE—Sidney Muni, VOR/DME or TACAN RWY 30, Amdt. 2
Wayne, NE—Wayne Muni, NDB RWY 22, Amdt. 3
Rock Hill, SC—Rock Hill Muni/Bryant Field, NDB-C, Amdt. 4
College Station, TX—Easterwood Field, VOR or TACAN RWY 10, Amdt. 16
College Station, TX—Easterwood Field, VOR RWY 28, Amdt. 8
College Station, TX—Easterwood Field, LOC BC RWY 16, Amdt. 2
College Station, TX—Easterwood Field, NDB RWY 34, Amdt. 8
College Station, TX—Easterwood Field, ILS RWY 34, Amdt. 8
Madison, WI—Morey, RNAV RWY 12, Amdt. 2

. . . Effective November 17, 1988

Siloam Springs, AR—Smith Field, RNAV RWY 18, Orig.
Cleveland, OH—Cleveland-Hopkins Intl, NDB RWY 5L, Amdt. 2
Cleveland, OH—Cleveland-Hopkins Intl, NDB RWY 5R, Amdt. 3
Cleveland, OH—Cleveland-Hopkins Intl, ILS RWY 5R, Amdt. 13
Cleveland, OH—Cleveland-Hopkins Intl, ILS RWY 23L, Amdt. 13
Indianapolis, IN—Indianapolis Terry, ILS RWY 36, Amdt. 3
Augusta, ME—Augusta State, NDB-B, Amdt. 7, CANCELLED
Southbridge, MA—Southbridge Muni, VOR-A, Amdt. 2, CANCELLED

. . . Effective October 5, 1988

Covington, GA—Covington Muni, VOR/DME RWY 9, Amdt. 2

The FAA published an Amendment in Docket No. 25711, Amdt. No. 1384 to Part 97 of the Federal Aviation Regulations (VOL 53 FR No. 195 Page 39453; dated Friday October 7, 1988) under Section 97.27 effective December 15, 1988, which is hereby amended as follows:

Ottawa, OH—Putnam County, NDB RWY 27, Amdt. 3, CANCELLED
Wadsworth, OH—Wadsworth Muni, NDB RWY 2, Amdt. 2, effective date should read November 17, 1988

[FR Doc. 88-24805 Filed 10-26-88; 8:45 am]
BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 773 and 799

[Docket No. 80863-8163]

Computers; Exports Under Special Licenses

AGENCY: Bureau of Export Administration, U.S. Department of Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Export Administration is amending the processing data rates (PDR) for electronic computers that may be exported to certain countries under the Distribution License (DL) procedure.

This final rule changes the current maximum PDR for computers that may be shipped under the DL to destinations in countries listed in Supplement Nos. 2 or 8 to Part 773 from 1000 to 2000 million bits per second. It also changes the maximum PDR for destinations listed in Supplement No. 3 to Part 773 from 250 million bits per second (with case-by-case approval for individual requests up to a PDR of 500 million bits per second) to a PDR of 500 million bits per second.

Formerly, for destinations in countries not listed in Supplement Nos. 2, 3, or 8 to Part 773, the DL authorized shipments of computers having a *floating point* PDR of 20 million bits per second or less. This final rule establishes a new maximum limit of a *total* PDR of 200 million bits per second for shipments of computers under the Distribution License to these countries.

The new PDR levels are established to maintain consistency with other licensing policies and to increase the use of the Distribution License by increasing the thresholds for computer eligibility consistent with nuclear non-proliferation concerns and other export control requirements. Moreover, this change is consistent with the continuing initiative by the Department of Commerce to reform the U.S. export control system and ensure that export licensing requirements are justified in light of escalating worldwide levels of computer technology and ever growing foreign availability of computers.

Finally, this rule removes the prohibition against exporting electronic computers under the Project License procedure to conform with the Office of Export Licensing's practice of routinely waiving this prohibition.

EFFECTIVE DATE: This rule is effective October 27, 1988.

FOR FURTHER INFORMATION CONTACT: Eileen Albanese, Special Licensing Division, Bureau of Export Administration, Telephone: (202) 377-3287.

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.*). These collections have been approved by the Office of Management and Budget under Control Numbers 0694-0002, 0694-0006, and 0694-0015.

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

4. 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.

5. 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.

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 Parts 773 and 799

Exports, Reporting and recordkeeping requirements.

Accordingly, Parts 773 and 799 of the Export Administration Regulations are amended as follows:

1. The authority citation for 15 CFR Parts 773 and 799 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 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 773—[AMENDED]

§ 773.3 [Amended]

2. In § 773.3, paragraphs (d)(4) and (l)(4)(ix) are removed.

3. In Supplement No. 1 to Part 773, footnotes 8, 9, and 10 are removed, footnote 11 is redesignated as footnote 8, the first 1565 entry immediately following the 1555 entry is revised to read as set forth below, and the second 1565 entry is removed.

Supplement No. 1 to Part 773—Commodities Excluded From Certain Special License Procedures

* * * * *

1565 Electronic computers exceeding the following specified limits for the following destinations. This includes any device, apparatus, or accessory that upgrades an electronic computer to exceed the following limits.

A. *Destinations listed in Supplement Nos. 2 and 8 to Part 773.* A "total processing data rate" of 2000 million bits per second;

B. *Destinations listed in Supplement No. 3 to Part 773.* A "total processing data rate" of 500 million bits per second;

C. *Destinations not listed in Supplement Nos. 2, 3, or 8 to Part 773.* A "total processing data rate" of 200 million bits per second.

* * * * *

PART 799—[AMENDED]

Supplement No. 1 to § 799.1—[Amended]

4. In Supplement No. 1 to Part 799.1 (the Commodity Control List), Commodity Group 5 (Electronics and Precision Instruments), ECCN 1565A, the *Special Licenses Available* paragraph is revised to read as set forth below and the two Notes between the *Technical Data* paragraph and the *GFW Eligibility* paragraph are removed.

1565A Electronic computers, "related equipment," equipment or systems containing electronic computers; and specifically designed components and accessories.

Special Licenses Available: None available for commodities under foreign policy controls for nuclear weapons delivery purposes (§ 776.18(c)). Under the Distribution License procedure, electronic computers having a total processing data rate of 2000 million bits per second or less may be exported to approved destinations listed in Supplement Nos. 2 or 8 to Part 773; electronic computers having a total

processing data rate of 500 million bits per second or less may be exported to approved destinations listed in Supplement No. 3 to Part 773; and electronic computers having a total processing data rate of 200 million bits per second or less may be exported to any other approved destinations. The Service Supply License procedure may be used to service electronic computers that do not exceed the limits for the specific destinations listed above as eligibile for the Distribution License.

* * * * *

Supplement No. 1 to § 799.2—[Amended]

5. In Supplement No. 1 to § 79.2, Interpretation No. 1, in paragraphs (b)(1) and (2) the number "1000" is revised to red "2000", in paragraph (b)(3) the number "250" is revised to read "500", and in paragraph (b)(4) the words "floating point" are revised to read "total".

Dated: October 21, 1988.

Michael E. Zacharia,

Assistant Secretary for Export Administration.

[FR Doc. 88-24740 Filed 10-26-88; 8:45 am]

BILLING CODE 3510-DT-M

RAILROAD RETIREMENT BOARD

20 CFR Part 365

Enforcement of Nondiscrimination on the Basis of Handicap in Railroad Retirement Board Programs

AGENCY: Railroad Retirement Board.

ACTION: Final rule.

SUMMARY: This regulation provides for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs or activities conducted by the Railroad Retirement Board. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for individual with handicaps and qualified individual with handicaps, and establishes a complaint mechanism for resolving allegations of discrimination. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal executive agencies.

EFFECTIVE DATE: December 27, 1988.

FOR FURTHER INFORMATION CONTACT: Michael C. Litt, 844 Rush Street, Chicago, Illinois 60611. (312) 751-4929, TDD (312) 751-4650. Copies of this notice will be made available on tape for persons with impaired vision who request them. They may be obtained at the above address.

SUPPLEMENTARY INFORMATION:

Background

The Railroad Retirement Board administers two major programs: It pays retirement and disability benefits under the Railroad Retirement Act (45 U.S.C. 231 *et seq.*) and unemployment and sickness benefits under the Railroad Unemployment Insurance Act (45 U.S.C. 351 *et seq.*). The former replaces the social security system with respect to employees in the railroad industry. The latter replaces various state unemployment compensation laws with respect to employees in the railroad industry. The Board also administers or has administered a number of smaller benefit programs with regard to displaced workers of various bankrupt railroads. The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Railroad Retirement Board. Section 504 states, in pertinent part, that:

> No otherwise qualified individual with handicaps in the United States, * * * shall, solely by reasons of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*
>
> (29 U.S.C. 794 (1978 amendment italicized).)

On December 16, 1987, the Board published Part 365 as a proposed rule and invited comments for 60 days ending February 16, 1988 (52 FR 47601-47610). The Board received one comment from the Eastern Paralyzed Veterans Association which pointed out that § 365.103 provides that the regulations do not apply to federally assisted programs and consequently, that if the Board administers any such programs, the Board should adopt regulations applying the subject matter of Part 365 to those programs. The Board does not administer any such programs; accordingly, no such regulations are needed.

Section 504 requires that regulations that apply to the programs and activities of Federal Executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Board is submitting this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and to the House Committee on Education and Labor and its Subcommittee on Select Education. This regulation will become effective on December 27, 1988.

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. *See* 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); *id.* at 38,552 (remarks of Rep. Sarasin).

There are, however, some language differences between this rule and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. *See Dopico* v. *Goldschmidt*, 687 F. 2d 644 (2d Cir. 1982); *American Public Transit Association* v. *Lewis*, 655 F. 2d 1272 (D.C. Cir. 1981) (*APTA*); *see also Rhode Island Handicapped Action Committee* v. *Rhode Island Public Transit Authority*, 718 F. 2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in *Alexander* v. *Choate*, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its *Davis* decision, the Court explained that section 504

requires only "reasonable" modifications, *id.* at 300, and explicitly noted that "[t]he regulations implementing section 504 (for federally assisted programs) are consistent with the view that *reasonable* adjustments in the nature of the benefit offered must at times be made to assure meaningful access" (*id.* at 301 n. 21) (emphasis added).

Incorporation of these changes, therefore, makes this section 504 federally conducted regulation consistent with the Federal Government's section 504 federally assisted regulations as interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the judicial interpretations of *Davis*, subsequent lower court cases interpreting *Davis*, and *Alexander*; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the agency believes that there are no significant differences between this regulation for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies.

This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared.

This regulation does not impose any requirements for information collections within the meaning of the Paperwork Reduction Act.

The Railroad Retirement Board is not an "agency" within the meaning of the Regulatory Flexibility Act and, accordingly, the requirements of that Act are not applicable to the Board.

Section-by-Section Analysis

Section 365.101 Purpose.

Section 365.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Services.

Section 365.102 Application.

This regulation applies to all programs or activities conducted by the agency. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: Those involving general public contact as part of ongoing agency operations and those directly administered by the agency for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the agency's facilities. Activities in the second category include programs that provide Federal services or benefits. This regulation does not, however, apply to programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

Section 365.103 Definitions.

"Agency." For purposes of this regulation "agency" means the Railroad Retirement Board.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in an enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by § 365.160(a)(1), they may also be necessary to meet other requirements.

"Board" Board means the three-member governing body of the agency. See §§ 365.170(i) and 365.170(j), 45 U.S.C. 231f(a).

"Chief Executive Officer." The Chief Executive Officer is the chief operating officer of the agency.

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary because the 120 day period for the agency's investigation (see § 365.170(g)) begins when the agency receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted to clarify its coverage. The phrase, "or interest in such property," is deleted because the term "facility," as used in this regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "facility" is used in §§ 365.149, 365.150, and 365.170(f).

"Individual with handicaps." The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps." The definition of "qualified individual with handicaps" follows the definition of "qualified handicapped person" with respect to services that appears in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Under this definition a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits under a program or activity administered by the Board.

Paragraph (2) of this definition explains that "qualified individual with handicaps" means "qualified handicapped person" as the term is defined for purposes of employment in the Equal Employment Opportunity Commission's regulation at 29 CFR 1613.702(f), which is made applicable to this part by § 365.140. Nothing in this part changes existing regulations applicable to employment

"Section 504." This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 365.110 Self-evaluation.

The agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evalution requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

Section 365.111 Notice.

Section 365.111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of the rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 365.130 General prohibitions against discrimination.

Section 365.130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 365.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also have violated one of the general prohibitions found in § 365.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its programs simply because the person is handicapped. The agency must pay benefits under the entitlement programs it administers to any individual who meets the statutory requirements for those programs. The agency may not afford an individual with handicaps access to assistance in obtaining benefits under any program which it administers that is not equal to the access afforded to others.

Paragraph (b)(1)(iii) requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (§§ 365.149–365.151) and communications (§ 365.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to take the necessary actions to obtain benefits under the programs administerd by the agency.

Paragraph (b)(4) specifically applies the prohibition enunciated in § 365.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps, or a given class of individuals with handicaps, may be limited to those individuals with handicaps.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, *i.e.*, in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

Section 365.140 Employment.

Section 365.140 prohibits discrimination on the basis of handicap in emplyment by the agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner* v. *Morris*, 752 F. 2d 1271, 1277 (8th Cir. 1985); *Smith* v. *United States Postal Service*, 742 F. 2d 257, 259–260 (6th Cir. 1984); *Prewitt* v. *United States Postal Service*, 662 F. 2d 292, 302–04 (5th Cir. 1981). Contra *McGuiness* v. *United States Postal Service*, 744 F. 2d 1318, 1320–21 (7th Cir. 1984); *Boyd* v. *United States Postal Service*, 752 F. 2d 410, 413–14 (9th Cir. 1985).

Courts uniformly have held that in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Morgan* v. *United States Postal Service*, 798 F. 2d 1162, 1164–65 (8th Cir. 1986), *Smith*, 742 F. 2d at 262; *Prewitt*, 662 F. 2d at 304. Accordingly, § 365.140 (Employment) of this rule adopts the definitions, requirements,

and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. In addition to this section, § 365.170(b) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

Responsibility for coordinating enforcement of Federal Laws prohibiting discrimination in employment is assigned to the EEOC by Excutive Order 12067 (3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. While this rule could define terms with respect to employment and enumerate what practices are covered and what requirements apply, the agency has adopted EEOC's recommendation that to avoid duplicative, competing, or conflicting standards with respect to Federal employment, reference in these regulations to the government-wide EEOC rules is sufficient. The class of Federal employees and applicants for employment covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Section 365.149 Program accessibility: Discrimination prohibited.

Section 365.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 365.150 and 365.151.

Section 365.150 Program accessibility: Existing facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, § 365.150 requires that the services and assistance which the agency provides to those individuals seeking benefits under programs administered by the agency, when viewed in their entirety, be readily accessible to and usable by individuals with handicaps.

Although all facilities, except for the Board's headquarters building in Chicago, in which the agency operates are either owned or leased by and under the control of the General Services Administration (GSA), the agency recognizes its obligation to request the GSA to make any structural changes which the agency determines are necessary to ensure program accessibility. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (§ 365.150(a)(1)). However, § 365.150, unlike 28 CFR 41.56–41.57, places explicit limits on the agency's obligation to ensure program accessibility (§ 365.150(a)(2)).

Paragraph (a)(2) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the agency is not required to take, or request the GSA to take, any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in § 365.160(c). This provision is based on the Supreme Court's holding in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. *See, e.g., Dopico* v. *Goldschmidt*, 687 F. 2d 644 (2d Cir. 1982); *American Public Transit Association* v. *Lewis (APTA)*, 655 F. 2d 1272 (D.C. Cir. 1981). This interpretation is also supported by the Supreme Court's decision in *Alexander* v. *Choate*, 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation (*id.* at 299).

Relying on *Davis*, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the grantee offers" (*id.* at 301) and that "*reasonable adjustments* in the nature of the benefit being offered must at times be made to assure meaningful access." (*id.*, n. 21) (emphasis added). However, section 504 does not require " 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration(s) in the nature of a program' " (*id.*, n. 20) (citations omitted). *Alexander* supports the position, based on *Davis* and the earlier lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus the failure to include such an "undue burden" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the agency of all obligations to individuals with handicaps. Although the agency is not required to take or request the GSA to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take or request the GSA to take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with § 365.150(a) would in most cases not result in undue financial and administrative burdens on the agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with § 365.150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the Chief Executive Officer and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the Chief Executive Officer's decision or failure to make a decision may file an appeal under the compliance procedures established in § 365.170(h).

Paragraph (b) indicates that in general the agency will comply with the requirements of § 365.150 by making

home visits. Paragraph (b) also sets forth a number of other means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member). The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make or, where applicable, request the GSA to make, any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, the agency will develop or, where applicable, request the GSA to develop a transition plan within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 365.151 Program accessibility: New construction and alterations

Overlapping coverage exists with respect to new construction under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). Section 365.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101–19.600 to 101–19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in § 365.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of § 365.151.

Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In *Rose* v. *United States Postal Service*, 774 F. 2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The *Rose* court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 365.160 Communications

Section 365.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under § 365.160(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (§ 365.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 365.160(c). That paragraph limits the obligation of the agency to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (*see, supra*, preamble § 365.150(a)(2)). Unless not required by § 365.160(c), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

It is our view that compliance with § 365.160 would, in most cases, not result in undue financial and administrative burdens on the agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with § 365.160 would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the Chief Executive Officer and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the Chief Executive Officer's decision or failure to make a decision may file an appeal under the compliance procedures established in § 365.170(h).

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (*e.g.*, a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. Then, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to make clear to the public (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective

communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (§ 365.160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Paragraph (b) requires the agency to take appropriate steps to provide information to individuals with handicaps concerning accessible services, activities, and facilities and to ensure that information regarding section 504 rigths and protections that is supplied to employees, applicants, participants, beneficiaries, and other interested persons under § 365.111 is effectively communicated to individuals with handicaps.

Section 365.170 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The agency is required to accept and investigate all complete complaints (§ 365.170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal government (§ 365.170(e)).

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (§ 365.170(g)). One appeal within the agency shall be provided (§ 365.170(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (§ 365.170(i)).

Paragraph (l) permits the agency to delegate its authority for investigating complaints to other Federal agencies. Under this paragraph the agency may have any required investigation performed by a non-government investigator under contract with the agency. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

List of Subjects in 20 CFR Part 365

Blind, Buildings, Civil rights, Employment, Equal employment opportunity, Federal Buildings and facilities, Government employees, Handicapped.

For the reasons set forth in the preamble, Chapter II, Title 20 of the Code of Federal Regulations is amended by adding Part 365 to Subchapter F to read as follows:

PART 365—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE RAILROAD RETIREMENT BOARD

Sec.

Authority: 9 U.S.C. 794.

§ 365.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 365.102 Application.

This regulation (§§ 365.101–365.170) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§365.103 Definitions.

For purposes of this part, the term—

"Agency" means Railroad Retirement Board.

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf person (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Board" means the three-member board, appointed pursuant to 45 U.S.C. 231f, which heads the agency.

"Chief Executive Officer" means the Chief Executive Officer of the Railroad Retirement Board. This individual is the chief operating officer of the agency.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's actions in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs: cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means—

(1) An individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, a program or activity.

(2) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 365.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955); the Rehabilitation Act Amendments of 1986, (Pub. L. 99–506, 100 Stat. 1810), and the Civil Rights Restoration Act of 1987 (Pub. L. 100–259, 102 Stat. 28 (1988)). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 365.104–365.109 [Reserved]

§ 365.110 Self-Evaluation.

(a) The agency shall, by December 27, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until at least three years following the completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 365.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

§§ 365.112–365.129 [Reserved]

§ 365.130 General Prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or service to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others.

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving benefits under any programs administered by the Board.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purposes or effect of which would:

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap;

(ii) Deny qualified individuals with handicap assistance in obtaining benefits under any program administered by the agency; or

(iii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would:

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive Order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive Order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 365.131-365.139 [Reserved]

§ 365.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 365.141-365.148 [Reserved]

§ 365.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 365.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 365.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity when viewed in its entirety is readily accessible to and usable by individuals with handicaps. Although all facilities in which the agency operates, except for the headquarters building, are either owned or leased by and under the general control of the General Services Administration (GSA), the agency recognizes its obligation to request the GSA to make space reassignments or any structural changes which the agency determines are necessary to ensure program accessibility. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take or to recommend to the GSA any action that the agency can demonstrate would result in a fundamental alteration in the nature of a program or activity or result in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 365.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chief Executive Officer after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens that would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* In general the agency will comply with this section by making home visits. The agency may also comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aids to beneficiaries, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make or request the GSA to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making or requesting space reassignments or alterations to existing buildings, shall ensure that accessibility requirements, to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it are met. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by February 27, 1989, except that where structural changes in facilities are undertaken, the agency will make such changes or, where applicable, request the GSA to make such changes by December 27, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop or, where applicable, request the GSA to develop, by June 27, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 365.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C.

4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 365.152-365.159 [Reserved]

§ 365.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall take appropriate steps to provide individuals with handicaps with information as to the existence and location of accessible services, activities, and facilities and information regarding their section 504 rights under the agency's programs or activities.

(c) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 365.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chief Executive Officer after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 365.161–365.169 [Reserved]

§ 365.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency;

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Except with respect to complaints arising under § 365.170(b), responsibility for implementation and operation of this section shall be vested in the Chief Executive Officer.

(d) The Chief Executive Officer shall accept and investigate all complete complaints for which he or she has jurisdiction. All complete complaints must be filed within 90 days of the alleged act of discrimination. The Chief Executive Officer may extend this time period for good cause.

(e) If the Chief Executive Officer receives a complaint over which the agency does not have jurisdiction, he or she shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Chief Executive Officer shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility used by the agency that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 120 days of the receipt of a complete complaint under § 365.170(d) for which the agency has jurisdiction, the Chief Executive Officer shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 45 days of receipt from the Chief Executive Officer of the letter required by § 365.170(g). The Chief Executive Officer may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Board.

(j) The Board shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Board determines that it needs additional information from the complainant, it shall have 30 days from the date it receives the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies except that the authority for making the final determination may not be delegated to another agency.

§§ 365.171–365.999 [Reserved]

Dated: October 18, 1988.

By Authority of the Board.

For the Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 88–24561 Filed 10–26–88; 8:45 am]

BILLING CODE 7905–01–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

Pennsylvania Permanent Regulatory Program; Approval of Amendments

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule.

SUMMARY: OSMRE is announcing the approval of proposed amendments submitted by the Commonwealth of Pennsylvania as modifications to its permanent regulatory program (hereinafter referred to as the Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendments consist of revisions to Pennsylvania's Inspection and Enforcement Policy and Civil Penalty Program for coal mining. Section II.J of the Inspection and Enforcement Policy is revised to (1) clarify that an individual civil penalty assessment is one of the alternative enforcement actions available to the State, (2) designate the withholding or

denying of license renewal as an additional alternative enforcement option, and (3) clarify that the State is not restricted to one type of alternative enforcement action, but may pursue one or more of the alternative enforcement actions available. Section II.2 of the Civil Penalty Program is revised to (1) establish a 60-day timeframe to initiate alternative enforcement action(s) subsequent to issuance of a failure-to-abate cessation order (FTA–CO) in those cases where the mandatory $750 daily penalty is capped at 30 days, and (2) clarify that an individual civil penalty action can be initiated separately or in conjunction with other alternative enforcement options as deemed necessary to gain compliance.

EFFECTIVE DATE: October 27, 1988.

FOR FURTHER INFORMATION CONTACT: Robert Biggi, Director, Harrisburg Field Office, Office of Surface Mining Reclamation and Enforcement, Third Floor, Suite 3C, Harrisburg Transportation Center, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone (717) 782–4036.

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Interior conditionally approved the Pennsylvania program on July 31, 1982. Information pertinent to the general background, revisions, modifications and amendments to the proposed permanent program submission, as well as the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Pennsylvania program can be found in the July 30, 1982 **Federal Register** (47 FR 33050–33083). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 938.11, 938.12, 938.15 and 938.16.

II. Discussion of Amendments

By letter dated April 14, 1987 (Administrative Record No. PA 638), Pennsylvania proposed to amend its program to satisfy the requirements of 30 CFR 938.16 (g) and (h), as specified in the September 8, 1986 **Federal Register** (51 FR 31945–31946). The revisions to the Inspection and Enforcement Policy clarify that individual civil penalties are an alternative enforcement option and that Pennsylvania can use each alternative enforcement option independently or in concert with other types of alternative enforcement actions, as required by 30 CFR 938.16(g). In addition, bond forfeiture has been deleted as an acceptable form of alternative enforcement.

As required by 30 CFR 938.16(h), the Civil Penalty Program has been revised to establish a time period subsequent to the prescribed abatement date by which one or more of the alternative enforcement options must be initiated should assessment of the mandatory $750 daily civil penalty for failure to abate a violation be terminated.

The July 2, 1987 **Federal Register** announced receipt of the proposed amendments and invited public comment on their adequacy (52 FR 25037). The public comment period ended August 3, 1987. The public hearing scheduled for July 27, 1987, was no held since no person requested an opportunity to testify at the hearing.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendments to the Pennsylvania program.

1. Inspection and Enforcement Policy

As revised, Section II.J requires The Department of Environmental Resources (DER) to initiate one or more of six listed types of alternative enforcement actions within 60 days of the expiration of the prescribed abatement period if assessment of the mandatory $750 daily civil penalty for failure to abate a violation is restricted to 30 days. The previous language appeared to limit DER to initiation of only one such action. The revised version also includes individual civil penalties as an alternative enforcement option that can be used singularly or in concert with other alternative enforcement actions. This provision satisfies 30 CFR 938.16(g), which required that Pennsylvania clarify that individual civil penalties are an alternative enforcement action, and that the Commonwealth has the authority to pursue any number of the enforcement options enumerated in Section II.J.

Prior to this amendment, Pennsylvania last revised this portion of its Inspection and Enforcement policy on May 22, 1986. OSMRE subsequently disapproved Section II.J to the extent that it allowed bond forfeiture, license withholding or denial of license renewal to be used as alternative enforcement actions when terminating assessment of failure-to-abate penalties (51 FR 31942, September 8, 1986). The current amendment no longer includes bond forfeiture as an acceptable alternative enforcement action; however, it retains license withholding and denial of license renewal as available options.

Before an action can be approved as alternative enforcement, it must be no less stringent than the four statutory provisions listed in 30 CFR 845.15(b)(2) in ensuring that abatement occurs or that there will not be a recurrence of the failure to abate. Since a permittee cannot conduct surface mining anywhere in Pennsylvania without a surface mine operator's license, denial or withholding of license renewal for an operator with an active surface mining operation would be an action no less stringent than permit suspension or revocation provided the license is due for renewal during the time period when the alternative enforcement action must be initiated.

However, as explained in the September 8, 1986 **Federal Register** notice, OSMRE originally disapproved this portion of the policy because it did not specify that more than one alternative enforcement option could be selected and did not link the timing of the withholding or denial of license renewal to the time period within which alternative enforcement must be initiated. If Pennsylvania's chosen alternative enforcement action was license withholding or denial of renewal, no action could be taken during the specified time period and the operator would not have an immediate additional incentive to abate the violation. Similarly, withholding or denying a license renewal of an operator not intending to continue mining would be unproductive. As stated in the preamble to the Federal rule, the regulatory authority must take whatever enforcement action or actions would most likely result in abatement of the violation in the most expeditious manner possible (45 FR 58782, September 4, 1980).

The April 14, 1987 amendment now under consideration remedies the discrepancy by revising section II.J. to require the Department to initiate one or more of the listed alternative enforcement actions within 60 days of the expiration of the prescribed abatement period. Thus, if the permittee's license does not fall due for renewal within the 60-day period for initiating alternative enforcement, or if the operator does not need or desire license renewal, the regulatory authority can and must select one or more of the other alternative enforcement options. However, if the permittee is licensed and is actively operating and if the license renewal date coincides with the period within which alternative enforcement must be initiated, denial or withholding of the renewal would be a highly effective action, no less stringent than permit suspension or revocation.

one of the four alternative enforcement actions specified in 30 CFR 845.15(b)(2).

Therefore, for the reasons discussed above, the Director finds that revised Section II.J of Pennsylvania's Inspection and Enforcement Policy is no less effective than the corresponding Federal rule at 30 CFR 845.15(b)(2), provided it is implemented in the manner described.

2. Civil Penalty Program

As required by 30 CFR 938.16(h), Pennsylvania has revised Section II.2 of its Civil Penalty Program to establish a time period within which DER is required to initiate one or more of the alternative enforcement options listed in Section II.J of DER's Inspection and Enforcement Policy. This amendment requires DER to intitiate one or more alternative enforcement actions whenever assessment of the mandatory $750 daily civil penalty for a FTA–CO is limited to 30 days. Such alternative enforcement action(s) may be initiated at any time after the FTA–CO is issued, but must be initiated within 60 days of the FTA–CO issuance date. This 60-day period is equivalent to two 30-day periods listed in the corresponding Federal regulation at 30 CFR 845.15(b)(2), which requires initiation of alternative enforcement within 30 days after assessment of the FTA–CO penalty ceases. Therefore, the Director now finds Section II.2 of the State's Civil Penalty Program to be a no less effective than and procedurally similar to the Federal regulation.

IV. Public and Agency Comments

Pursuant to section 503(b) of SMCRA and 30 CFR 732.17(h)(11)(i), comments were solicited from various Federal agencies with an actual or potential interest in the Pennsylvania program. No substantive comments were received.

The Director solicited public comments in the July 2, 1987 **Federal Register** (52 FR 25037). No comments were received during or after the comment period which closed on August 3, 1987. Since no one requested an opportunity to testify, the public hearing scheduled for July 27, 1987, was cancelled.

V. Director's Decision

As discussed in the findings above, the Director has determined that the amendments submitted to OSMRE on April 14, 1987, incorporate penalties and sanctions no less stringent than those set forth under sections 518 and 521 of SMCRA and no less effective than the regulations set forth in 30 CFR Part 845 and that they contain the same or similar procedural requirements relating thereto. He is therefore approving the amendments, provided they are implemented in the manner discussed in the findings. Since the amendments satisfy the requirements of 30 CFR 938.16 (g) and (h) and either delete or correct provisions disapproved previously, the Director is also removing 30 CFR 938.16 (g) and (h) and the partial disapproval of Section II.J of the Inspection and Enforcement Policy recorded at 30 CFR 938.12 and 938.15(l).

The Federal rules at 30 CFR Part 938 codifying decisions concerning the Pennsylvania program are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to conform their programs to the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

1. National Environmental Policy Act

The Secretary has determined that, pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

2. Executive Order No. 12291 and the Regulatory Flexibility Act

On July 12, 1984, the Office of Management and Budget (OMB) granted OSMRE an exemption from sections 3, 4, 7 and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, for this action, OSMRE is exempt from the requirement to prepare a Regulatory Impact Analysis and this action does not require regulatory review by OMB.

The Department of Interior has determined that this rule will not have significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will 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 938

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Richard O. Miller,

Acting, Deputy Director.

Date: October 24, 1988.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T, Part 938 of the Code of Federal Regulations is amended as set forth below:

PART 938—PENNSYLVANIA

1. The authority citation for Part 938 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 938.12 [Removed]

2. Section 938.12 is removed.

3. In § 938.15, paragraph (l) is revised and a new paragraph (o) is added to read as follows:

§ 938.15 Approval of regulatory program amendments.

* * * * *

(l) The amendments to the following sections of the Pennsylvania State program which were submitted to OSMRE on September 30, 1985, and May 22, 1986 are approved effective September 8, 1986.

Civil Penalty Program

Section I
Section II.2
Section II.4
Section II.8

Inspection and Enforcement Policy

Section II.B.2.a.(4) and (5)
Section II.E
Section II.J

* * * * *

(o) The following amendments to the Pennsylvania program as submitted to OSMRE by letter dated April 14, 1987, are approved effective October 27, 1988. Revisions to Section II.J of the Inspection and Enforcement Policy and Section II.2 of the Civil Penalty Program, both of which concern the use of alternative enforcement actions for failure to abate a violation.

§ 938.16 [Amended]

4. Section 938.16 is amended by removing paragraphs (g) and (h).

[FR Doc. 88–24870 Filed 10–26–88; 8:45 am]

BILLING CODE 4310–05–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 86-508; RM-5593]

Radio Broadcasting Services; Liberal, KS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allocates Channel 286C2 to Liberal, Kansas, as that community's fourth FM broadcast service, in response to a petition filed by Thunderbird Broadcasting, Inc. The coordinates used for the allotment of Channel 286C2 at Liberal are 37–02–30 and 100–55–24. With this action, this proceeding is terminated.

DATES: Effective December 5, 1988; the window period for filing applications will open on December 6, 1988, and close on January 5, 1989.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 86–508, adopted September 28, 1988, and released October 21, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Kansas is amended by adding Channel 286C2 at Liberal.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88–24863 Filed 10–26–88; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-152; RM-6291]

Radio Broadcasting Services; Denison, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 285C2 for Channel 285A at Denison, Texas, and modifies the license of Station KMKT–FM to specify operation on the higher class co-channel, at the request of Sunbelt Wireless Company. The upgrade could provide the community with its first wide coverage area FM service. A site restriction of 21.0 kilometers (13.0 miles) east of the community is required at coordinates are 33–45–22 and 96–46–22. With this action, this proceeding is terminated.

EFFECTIVE DATE: December 5, 1988.

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 88–152, adopted September 30, 1988, and released October 21, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended, under Texas, by removing Channel 285A and adding Channel 285C2 at Denison.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88–24864 Filed 10–26–88; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 87-534; RM-6067]

Radio Broadcasting Services; Lubbock, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 293C2 for Channel 292A at Lubbock, Texas, and modifies the permit of Station KESJ(FM) to specify operation on the higher class channel, at the request of Barton Broadcasting Company. The channel substitution could provide Lubbock with its seventh expanded radio service. A site restriction of 12.4 kilometers (7.7 miles) east of the city is required at coordinates 33–35–34 and 101–42–36. With this action, this proceeding is terminated.

EFFECTIVE DATE: December 5, 1988.

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 87–534, adopted September 30, 1988, and released October 21, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended, under Texas, by removing Channel 292A and adding Channel 293C2 at Lubbock.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88–24865 Filed 10–26–88; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 87-617; RM-6087]

Radio Broadcasting Services; Lufkin, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 257C2 for Channel 257A at Lufkin, Texas, and modifies the license of Station KUEZ(FM) to specify operation on the higher class co-channel, at the request of Darrell E. Yates. This action could provide a second wide coverage area FM service at Lufkin. The station's current transmitter site will have to be relocated to a site approximately 7.5 kilometers (4.6 miles) northwest of the community at coordinates 31–23–54 and 94–46–31. With this action, this proceeding is terminated.

EFFECTIVE DATE: December 5, 1988.

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 87–617, adopted September 30, 1988, and released October 21, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended, under Texas, by removing Channel 257A and adding Channel 257C2 at Lufkin.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88–24866 Filed 10–26–88; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 87–546; RM–6068, RM–6258]

Radio Broadcasting Services; Marble Falls and Johnson City, TX.

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 300C2 to Johnson City, Texas, as that community's first FM service, at the request of Hawkins Broadcasting, Inc. The allotment requires a site restriction of 18. 9 kilometers (11.7 miles) west of Johnson City, at coordinates 30–13–30 and 98–35–50. In addition, this action dismisses a mutually exclusive petition proposing the allotment of Channel 300A to Marble Falls, Texas at the request of the petitioner, Don Werlinger, d/b/a The Broadcast Development Group, Inc. With this action, this proceeding is terminated.

DATES: Effective December 5, 1988; The window period for filing applications will open on December 6, 1988, and close on January 5, 1989.

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order MM Docket No. 87–546, adopted September 29, 1988, and released October 21, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments, is amended under Texas, by adding Channel 300C2, Johnson City.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88–24867 Filed 10–26–88; 8:45 am]

BILLING CODE 6712–01–M

Proposed Rules

Federal Register
Vol. 53, No. 208
Thursday, October 27, 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

Rural Electrification Administration

7 CFR Part 1709

Rural Development

AGENCY: Rural Electrification Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Electrification Administration (REA) proposes to amend 7 CFR Chapter XVII by adding a new Part 1709, Rural Development, and adding Subpart B, Rural Economic Development Loan and Grant Program. The new Part will contain REA's policies, requirements and procedures covering rural development programs. The new subpart will establish policies, requirements and procedures to implement a rural economic development loan and grant program established by section 313 of the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 *et seq.*) (the "RE Act"). The program will provide zero interest loans and grants to RE Act borrowers for the purpose of promoting rural economic development and job creation projects.

DATE: Public comments concerning this proposed rule must be received by REA no later than November 28, 1988.

ADDRESS: Comments may be mailed to Blaine Stockton, Jr., Assistant Administrator—Management, Rural Electrification Administration, Room 4063–South Building, U.S. Department of Agriculture, Washington, DC 20250. Comments received may be inspected in Room 4063 between 8:15 a.m. and 4:45 p.m.

FOR FURTHER INFORMATION CONTACT: Blaine Stockton, Jr., Assistant Administrator—Management, Rural Electrification Administration, Room 4063-South Building, U.S. Department of Agriculture, Washington, DC. 20250, telephone number (202) 382–9552. The Draft Regulatory Impact Analysis describing the options considered in developing this rule and the impact of implementing the proposed rule is available on request from the above office.

SUPPLEMENTARY INFORMATION: This rule is issued in conformity with Executive Order 12291, Federal Regulations. This action will not (1) have an annual effect on the economy of $100 million or more; (2) result in a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) result in significant adverse effects on competition, employment, investment or productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, this rule has been determined to be "not major."

This action does not fall within the scope of the Regulatory Flexibility Act. REA has concluded that promulgation of this rule would not represent a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.* (1976) and, therefore, does not require an environmental impact statement or an environmental assessment.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.853, Rural Economic Development Loan and Grant Program. For the reasons set forth in the final rule related Notice to 7 CFR Part 3015, Subpart V (50 FR 47034, November 14, 1985), this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Public reporting burden for this collection of information is estimated to average 1.7 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Agriculture, Clearance Office, OIRM, Room 404–W, Washington, DC 20250; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Background

On December 21, 1987, Section 313, Cushion of Credit Payments Program, was added to the RE Act. Section 313 establishes a Rural Economic Development Subaccount and authorizes the Administrator of REA to utilize funds in this subaccount to provide zero interest loans or grants to RE Act borrowers for the purpose of promoting rural economic development and job creation projects.

Comments

On April 7, 1988, REA published an advance notice of proposed rulemaking in an effort to obtain public comments on all aspects of this new program. REA received a total of 54 written comments and several comments over the telephone. Nine organizations in the propane industry opposed the new program while forty-five organizations comprised of RE Act borrowers, electric and telephone trade organizations, and several economic development organizations supported the new program.

Organizations in the propane industry opposed the program on principle even though it is established by law. Many stated that they objected to their competition, the electric utilities, getting taxpayer money at zero percent or as a grant. Other propane industry organizations said they favored rural economic development but did not feel it should be controlled by electric utilities. One organization said REA had fulfilled its mission. Another believed a problem in rural America is loans that have gone bad. Throughout these nine comments was a general belief that the rural economic development program would put the propane industry at a competitive disadvantage with electric utilities. Despite the propane industry's adamant opposition, REA must proceed with implementing this program since it is established by law.

Many of the organizations commenting in favor of the program supplied specific suggestions that were incorporated into the proposed rule. These comments will be addressed in the following paragraphs which discuss major provisions of the proposed rule.

The section of the proposed rule setting forth REA's policy stresses that borrowers are encouraged to promote rural economic development that is

based on sound economic and financial analysis. Many organizations mentioned the importance of sound analysis to the long-term success of rural development.

A large number of organizations addressed the issue of eligibility of borrowers to receive zero interest loans or grants and, in particular, whether or not eligibility should be dependent on making cushion of credit payments. Most organizations said a borrower should not have to make cushion of credit payments (also called advance payments) that lead to credits in the Rural Economic Development Subaccount in order to be eligible for funds under this program. Several organizations took the opposite position, saying that it would only be fair to establish some connection between eligibility and cushion of credit payments. One organization suggested that a borrower should receive grant or zero interest loan funds in an amount equal to the amount of funds generated as a result of its cushion of credit payments. The proposed rule establishes no requirement that a borrower must make cushion of credit payments to be eligible for funds under this program. The only restriction is that a borrower that is not current in its payments on All RE Act financing or is in bankruptcy proceedings is not eligible.

REA received many suggestions on the particular type of rural economic development project this program should help finance. The proposed rule does not attempt to define specific types of projects that are eligible for funds but rather provides for the Administrator to exercise broad discretion in selecting projects. To provide guidance to borrowers applying for loan or grant funds, the rule contains a list of important selection factors the Administrator will consider.

Many of the selection factors were mentioned in the comments. There was strong support for encouraging the use of supplemental or matching funds from other sources to leverage the loan or grant funds provided under this program. This is included as a selection factor. Some other selection factors suggested were a comparison of the unemployment rates to a national or state level, a comparison of jobs to be created to the amount of the investment and support for projects that improve marketable skills. Since REA believes that the nature of this program leads naturally to encouraging demonstration projects, we have included a commitment to being a demonstration project as a factor. Also, REA and many organizations which commented believe that local community support and planning will be crucial to the success of this program. Accordingly, REA will consider endorsements and sponsorship to be an important indicator of the potential for the ultimate success of the project. Several other factors will be considered such as the location of the project, organizational characteristics, probability of long-term success and finally whether or not a borrower has made cushion of credit payments.

Whether or not a borrower has made cushion of credit payments does not determine eligibility in any manner; however, the Administrator is required to encourage borrowers to make voluntary payments. REA believes it is appropriate to at least weigh in a borrower's commitment to generating funds for the program along with all the other selection factors.

REA did consider including an objective ranking procedure based on assigning a given number of points for each of the selection factors. One organization suggested instituting this type of ranking procedure as a way to ensure equitable treatment of all applicants. REA invites your comments on this point.

Several organizations suggested that the Administrator select the mixture of zero interest loans and grants to make out of available funds based on a preference for zero interest loans over grants. They argued that the principal of zero interest loans is repaid into the Subaccount and can be recycled into new projects. REA supports this argument. The rule does not preclude making a certain amount of grants but rather indicates a preference for zero interest loans.

REA has established the minimum dollar amount of a zero interest loan or grant at $10,000 mainly for administrative purposes. No maximum level is proposed although REA did consider establishing a maximum amount based on a percentage of the total amount available in the Subaccount. REA believes the Administrator should have a considerable amount of discretion in determining the maximum amount available for a particular project.

The pre-proposal notice asked for suggestions on establishing the terms for zero interest loans to the borrower. The most common suggestions were that REA recognize the start-up nature of many projects and allow for flexibility. The proposed rule reflects these suggestions.

The security for the zero interest loan will be based on necessary legal agreements between REA and the borrower as well as a requirement that REA approve all agreements between the borrower and the project. The proposed rule was deliberately written to allow flexibility in devising the security and controls necessary for the long-term success of the program.

The proposed rule contains a section stating that a rural economic development project must not result primarily in the transfer of existing employment or business activity from one area to another. It is not the intention of this provision to be restrictive to rural development but rather to prevent criticism of the program. REA believes, for example, that this program should not be used to finance business moves that take jobs away from those currently employed elsewhere. REA recognizes that this type of determination can be difficult at times which is the reason the language stresses that is must not result primarily in such a transfer.

Several organizations commented on the method of processing loan and grant applications. REA has attempted to minimize the amount of paperwork and forms borrowers need to submit. We have established both a preapplication and application stage in the process. It obviously makes sense for a borrower to only go through the extra effort of an application if its project has been selected. One organization recommended a periodic selection process. We have incorporated this recommendation by establishing four application periods throughout the year. This will provide both timely action on an preapplication and equitable treatment to all borrowers.

Many organizations stressed the need for streamlined procedures for this program and our regulations reflect this desire. This loan and grant program is a Federal program subject to various laws, regulations and executive orders. REA wishes to point out that there is a considerable difference between the requirements placed on borrowers receiving grants versus the requirements placed on borrowers receiving zero interest loans under this program. The differences result from the standardized Federal regulations covering grant programs that apply as well to the grant portion of this program. The Federal regulations on grants are quite extensive. Most requirements are found in the Code of Federal Regulations (CFR) under 7 CFR Part 3015 and 7 CFR Part 3016. The proposed rule contains several references to these regulations. Zero interest loans are not covered by

these government-wide regulations. The zero interest loan program will follow, to the extent possible, a streamlined version of the current RE Act loan procedures and requirements. A required difference in handling grants and zero interest loans is mainly evident in two sections, one is the section on the disbursement of funds and the other is the section on review and other requirements of borrowers.

The proposed rule requires the borrower to monitor the project. REA believes close coordination between the borrower and the project is essential for the success of this program.

List of Subjects in 7 CFR Part 1709

Community development, Grant programs, Loan programs, Rural areas.

In view of the above, REA proposes to amend 7 CFR Chapter XVII by adding the following new Part 1709 to read as follows:

PART 1709—RURAL DEVELOPMENT

Subpart A—[Reserved]

Sec.

1709.1–1709.9 [Reserved]

Subpart B—Rural Economic Development Loan and Grant Program

Authority: 7 U.S.C. 901 et seq.; Title I, Subtitle D, Section 1403, Omnibus Budget Reconciliation Act of 1987, Pub. L. 100–203; Delegation of Authority by the Secretary of Agriculture, 7 CFR 2.23; Delegation of Authority by the Under Secretary for Small Community and Rural Development, 7 CFR 2.72.

Subpart A—[Reserved]

§§ 1709.1–1709.9 [Reserved]

Subpart B—Rural Economic Development Loan and Grant Program

§ 1709.10 Purpose.

This subpart sets forth the Rural Electrification Administration's (REA's) policies and procedures for making zero interest loans and grants to Borrowers in accordance with the Cushion of Credit Payments Program authorized in section 313 of the Act. The zero interest loans and grants are to be provided for the purpose of promoting rural economic development and rural job creation projects.

§ 1709.11 Policy.

(a) It is REA's policy to encourage Borrowers to make deposits voluntarily into cushion of credit accounts of the Rural Electrification and Telephone Revolving Fund. Borrowers are also encouraged to use the Rural Economic Development Loan and Grant Program to promote rural economic development and rural job creation projects that are based on sound economic and financial analysis.

(b) REA will maintain liaison with officials of other federal, state, regional and local rural development agencies to coordinate rural economic development programs.

§ 1709.12 Definitions.

(a) "Act"—the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 *et seq.*).

(b) "Administrator"—the Administrator of the Rural Electrification Administration.

(c) "Associated Utility Organization"—state or regional utility organizations, utility trade organizations or other professional utility organizations of which the Borrower proposing the Project is a member.

(d) "Borrower"—a borrower of funds under the act.

(e) "Demonstration Project"—a Project for which the owner agrees to provide REA with detailed information on the steps it takes in organizing and operating the Project, will permit REA and REA's guests to make reasonable visits to the Project, and honor any other reasonable REA request to disseminate information on the Project.

(f) "Employee Ownership"—owned by the employees of the organization.

(g) "Project"—a rural economic development project or rural job creation project which a Borrower proposes and the Administrator approves to receive benefits of the Rural Economic Development Loan and Grant Program.

(h) "REA"—the Rural Electrification Administration.

(i) "Rural Area"—a rural area as defined in section 13 of the Act.

(j) "Technical Assistance"—Market research, product and/or service improvement, feasibility studies, environmental studies, and similar activities that benefit rural economic development or rural job creation projects.

§ 1709.13 Source of funds.

All funds for zero interest loans and grants provided under this program shall come from interest differential credits to the Rural Economic Development Subaccount (Subaccount), any other funds made available to the Subaccount and from the repayment of zero interest loans into the Subaccount.

§ 1709.14 Eligibility.

Zero interest loans and grants may be made to any Borrower that is current in its payments on financing provided under the Act, as determined by the Administrator, and is not in bankruptcy proceedings.

§ 1709.15 Purposes of zero interest loans and grants.

Zero interest loans and grants shall be provided to promote rural economic development and/or job creation projects, including, but not limited to, project feasibility studies, start-up costs, incubator projects, and other reasonable expenses for the purpose of fostering rural economic development.

§ 1709.16 Selection of recipients of zero interest loans and grants.

The selection and approval of applications for zero interest loans and/or grants rests solely within the discretion of the Administrator. In making this determination, the Administrator will cosider, among other factors, the following:

(a) The amount of supplemental grant or loan funds provided for to be provided to the Project from private sources, state and local government sources, federal government sources, the Borrower(s) or other sources of funds.

(b) A comparison of the unemployment rate in the rural area where the Project will be located to the state and National unemployment rates.

(c) A comparison of the Per Capita Personal Income in the rural area where the Project will be located to state and National income levels.

(d) A comparison of the number of jobs that the Project will create in rural

areas to the amount of grant and zero interest loan funds requested.

(e) Projects that lead directly to improving marketable skills.

(f) Commitment from the owner(s) of the Project that the Project will be a Demonstration Project.

(g) Projects that will be located in Rural Areas or will provide greater benefit to Rural Areas than other areas.

(h) Projects that have received the endorsement or sponsorship of businesses, local business and community leaders, Associated Utility Organizations, or local, state or federal governmental organizations.

(i) Projects that have received the endorsement of Certified Development Companies approved by the U.S. Small Business Administration.

(j) Projects that will be organized or reorganized on a not-for-profit basis or to provide full or majority Employee Ownership.

(k) Projects that in REA's best judgment have the greatest probability of success as measured by long-term job creation or retention and rural economic development.

(l) Applications submitted by Borrowers that have made deposits into the Subaccount.

§ 1709.17 Preference for zero interest loans over grants.

Selection of applications shall be based on a preference for providing Borrowers zero interest loans rather than grants under this program.

§ 1709.18 Limitation on use of zero interest lona and grant funds.

(a) Zero interest loans and grants shall not be used:

(1) To fund or assist projects of which any director, officer, or owner of the Borrower, or close relative thereof, is an owner, or which would create a conflict of interest or would create the appearance of a conflict of interest; provided, however, cooperative members are not to be considered owners of the Borrower in this determination;

(2) For any costs incurred on the Project prior to approval of the Project by REA, except for any costs approved by REA as necessary for the initiation of the Project;

(3) For payment to any owner, partner or beneficiary of any property, building, equipment acquired for the Project when such person will retain any interest in the Project or is an owner, director or officer of the Borrower; provided, however, cooperative members are not to be considered owners of the Borrower in this determination; or

(4) For any purpose not reasonably related to the Project as determined by the Administrator.

(b) A Borrower may not charge the Project interest for the use of the proceeds of the zero interest loan provided under this program; however, it may charge the Project reasonable loan servicing charges.

(c) A Borrower must calculate any costs to charge the Project for the use of or in connection with the grant proceeds provided under this program based on 7 CFR Part 3015 and 7 CFR Part 3016.

(d) A Borrower may not make a profit from any zero interest loan or grant provided from the Subaccount.

(e) The Borrower may temporarily deposit the zero interest loan funds into a separate Federally insured account. However, all interest earned on temporarily deposited funds in excess of $250 per year must be passed on to the Project.

(f) The Borrower may temporarily deposit the grant funds in accordance with 7 CFR Part 3015 and 7 CFR Part 3016.

§ 1709.19 Size of zero interest loans and grants.

The minimum dollar amount of a zero interest loan or grant provided to the Borrower under this program shall be $10,000.

§ 1709.20 Terms of zero interest loan repayment.

(a) REA shall determine the terms and repayment schedule of the zero interest loan to the Borrower based on the nature of the Project. In general, the repayment terms the Borrower sets on zero interest loan proceeds provided to the Project must be at least as generous as the zero interest loan provided to the Borrower but, with the Administrator's approval, may be more generous.

(b) Generally, the term of the zero interest loan shall not exceed 10 years. The first principal repayment installment on the zero interest loan may be deferred two years or until the Project generates sufficient cash to begin repaying its loan to the Borrower, whichever comes first as determined by the Administrator, provided in equivalent deferred repayment schedule is provided on the loan to the Project. The terms of the zero interest loan to the Borrower may provide for either equal periodic principal payments or, if the Administrator determines that it is necessary, a graduated repayment schedule where the first principal repayment will be equal to some fraction of the last principal repayment. If the Borrower receives a graduated principal repayment schedule it shall provide a comparable graduated repayment schedule to the Project. Ordinarily, monthly principal payments will be established on the note to the Borrower.

§ 1709.21 Agreements and security for funds.

(a) The Borrower and REA shall execute agreements, including all necessary security agreements, covering the repayment of funds from this program.

(b) REA must approve all agreements between the Borrower and the Project, including all (1) grant, loan and security agreements, (2) loan notes, and (3) all subsequent revisions or amendments thereof.

§ 1709.22 Transfer of employment or business.

The Project must not result primarily in the transfer of any existing employment or business activity from one area to another, as determined by the Administrator.

§ 1709.23 Environmental requirements.

(a) Prospective recipients of zero interest loans or grants must consider the potential environmental impacts of their applications at the earliest planning stages and develop plans and Projects that minimize the potential to adversely affect the quality of the environment.

(b) *Application for Technical Assistance zero interest loans or grants.* The application for a Technical Assistance zero interest loan or grant is generally covered by 7 CFR 1794.31(b) (13) and (14). Consequently, normally no Borrower's Environmental Report or other environmental documentation is required to support such an application. No zero interest loan or grant funds will be available for Technical Assistance for any Project, any portion of which, lies within an area designated for protection under the Coastal Barrier Resources Act.

(c) *Application for zero interest loans or grants other than Technical Assistance.* REA will review supporting materials in the application and initiate its environmental review process pursuant to 7 CFR Part 1794. This process will focus on any environmental concerns or problems that are associated with the Project. The level and scope of environmental review required will be determined in accordance with the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), the Council on Environmental Policy for Implementing the Procedural Provisions of NEPA (40 CFR Parts 1500–

1508), 7 CFR Part 1974 and other relevant Federal environmental laws, regulations, and Executive Orders. No activity related to the Project that would have an adverse affect on the environment shall be undertaken prior to completion of REA's environmental review process.

§ 1709.24 Other considerations.

(a) *Equal opportunity and nondiscrimination requirements.* All zero interest loans and grants made under this Subpart are subject to certain provisions in 7 CFR Part 1790 (or REA Bulletin 320–19, Nondiscrimination Among Beneficiaries of the REA Program) and 7 CFR Part 1791 (or REA Bulletin 320–15(20–15), Equal Employment Opportunity in Construction Financed with REA Loans) depending on the dollar amount involved and other characteristics.

(b) *Architectural Barriers Act of 1968.* All facilities financed with REA zero interest loans or grants which are accessible to the public or in which physically handicapped persons may be employed or reside must be developed in compliance with this law.

(c) *Flood hazard area precautions.* In accordance with 7 CFR Part 1788, if the Project is in an area subject to flooding, flood insurance must be provided to the extent available and required under the National Flood Insurance Act of 1968, as amended by the Flood Disaster Protection Act of 1973 (Pub. L. 93–231). The insurance shall cover, in addition to the buildings, any machinery, equipment, fixtures, and furnishings contained in the buildings. REA shall comply with Executive Order 11988, Floodplain Management, in considering the application for the Project.

(d) *Real property acquisition.* Any acquisition of real property in connection with this program is subject to 7 CFR Part 21, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs. These regulations require that owners of real property to be acquired for Federal or federally-assisted programs and persons displaced from their dwellings, businesses, or farms as a result of such acquisition be provided fair, consistent, and equitable treatment.

§ 1709.25 Preapplications and applications.

(a) Borrowers may file a preapplication during any quarterly preapplication period. The quarterly preapplication periods will cover the official working days from January 1 to January 14, from April 1 to April 14, from July 1 to July 14, and from October 1 to October 14 of each year.

(b) Preapplications shall consists of:

(1) An application form, "Application for Federal Assistance," Standard Form 424;

(2) A board resolution requesting zero interest loan or grant, specifying any commitment from the Borrower to the owner of the proposed Project, and stating that the proposed Project will not violate the limitations in Section 1709.18, Limitation on use of zero interest loan and grant funds; and

(3) A brief written narrative containing, but not limited to, the following:

(i) Proposed rural economic development and job creation Project including location, primary beneficiaries, and number and type of jobs to be created;

(ii) Amount of zero interest loan and/or grant requested;

(iii) General description of conditions and terms to be placed on ultimate recipient of funds, including collateral;

(iv) Source and amount of any supplemental grant or loan funds to be provided to the Project from private sources, governments, the Borrower or any other source. The conditions, terms, interest rate, etc. of the supplemental funds shall be detailed;

(v) Any commitment from the owner of the Project that the Project will be a Demonstration Project;

(vi) Any endorsements of Associated Utility Organizations, businesses, local leaders, local or state governments, SBA-approved Certified Development Company and any specific commitments, either financial or otherwise, from these parties;

(vii) Depending on the stage of development of the Project, any budgets, pro forma operating reports and balance sheets, market research, etc.;

(viii) Description of the entity which will own, construct or operate the Project, including but not limited to: (A) the form of organization (i.e., corporation, nonprofit corporation, partnership, sole proprietor), (B) the owners and officers and (C) any Employee Ownership; and

(ix) Any other information that the Borrower believes is relevant.

(c) REA may request additional information from the Borrower deemed relevant.

(d) During the preapplication review process, the Borrower may change the amount of the zero interest loan or grant funds requested, if approved by the Administrator.

(e) REA will prepare a written notification for each preapplication indicating whether or not it has been selected. Selected applicants will be provided with environmental information, requirements and guidelines for filing a complete application. A Borrower that submitted a preapplication that was not selected will be asked whether it desires to be considered the next quarter. The Borrower may modify its preapplication after it has been considered without resubmitting all material required in a preapplication. If the Borrower so desires, REA will consider a preapplication that has not been substantially modified or updated, as determined by the Administrator, for up to one year. A Borrower may submit new or updated preapplications as often as it desires.

The information collection requirements contained in paragraph (b)(1) were approved by the Office of Management and Budget under control number 0348–0043

§ 1709.26 Application processing.

Upon selection of a Project to receive a zero interest loan and/or grant, REA will prepare a Letter of Conditions outlining conditions under which the zero interest loan or grant will be made and send it to the Borrower. The Borrower will sign a copy of the letter, stating its intent to meet the conditions, and return the copy to REA. The Letter of Conditions will include, among other things, the maximum amount of zero interest loan or grant, Project description and approved use of zero interest loan and/or grant funds, supplemental funds to be provided, any agreements or conditions the Borrower proposed in the preapplication, any special conditions REA establishes, and a copy of the loan/grant agreement or other legal documents the Borrower will be required to sign.

§ 1709.27 Zero interest loan and grant approval.

All zero interest loans and grants made under this subpart will be approved by the Administrator, or designee.

§ 1709.28 Disbursement of zero interest loan and grant funds.

REA shall disburse grant funds to the Borrower and the Borrower shall

disburse grant proceeds to the Project in accordance with the provisions of 7 CFR Part 3015 and 7 CFR Part 3016. REA shall disburse zero interest loan funds to the Borrower and the Borrower shall disburse zero interest loan proceeds to the Project in accordance with REA regulations.

§ 1709.29 Review and other requirements.

(a) REA will review Borrowers receiving zero interest loans or grants, as necessary, to ensure that funds are expended for approved purposes. Borrowers receiving zero interest loans or grants shall monitor the Project to the extent necessary to ensure the Project is in compliance with all applicable regulations, including ensuring that funds are expended for approved purposes.

(b) Borrowers receiving zero interest loans shall have prepared, as an exhibit to their annual audit, a financial report and general accounting of all zero interest loan funds in accordance with the provisions of 7 CFR Part 1789.

(c) Grants provided under this program will be administered under and are subject to 7 CFR Part 3015 and 7 CFR Part 3016, as appropriate. The Borrower that receives a grant shall be subject to requirements under these regulations which cover, among other things, financial reporting, accounting records, budget controls, record retention and audits.

[The information collection and the recordkeeping and recording requirements contained in paragraph (c) were approved by OMB under the following control numbers: Budget Information—Nonconstruction, Standard Form 424A [OMB control number 0348–0044], Budget Information—Construction, Standard Form 424C [OMB control number 0348–0041], Assurances—Nonconstruction, Standard Form 424B [OMB control number 0348–0040], Assurances—Construction, Standard Form 424D [OMB control number 0348–0042], Financial Status Report—Long Form, Standard Form 269 [OMB control number 0348–0039], Financial Status Report—Short Form, Standard Form 269A [OMB control number 0348–0039], Request for Advance and Reimbursement, Standard Form 270 [OMB control number 80–R0183], Outlay Report and Request for Reimbursement for Construction Programs, Standard Form 271 [OMB control number 80–R0181], Federal Cash Transactions Report, Standard Form 272 [OMB control number 80–R0182].

Dated: October 24, 1988.

Jack Van Mark,

Acting Administrator.

[FR Doc. 88–24885 Filed 10–26–88; 8:45 am]

BILLING CODE 3410–15–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88–ASO–19]

Proposed Revocation of Transition Area; Forest, MS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to revoke the transition area, "Forest, Mississippi Transition Area." The transition area was established to accommodate Instrument Flight Rule (IFR) operations at the Forest Municipal Airport. At the time the transition area was established, a nonfederal, Nondirectional Radio Beacon (NDB) with a Standard Instrument Approach Procedure (SIAP) had been planned for the airport. The airport authority has since abandoned plans to commission the NDB and publish the NDB SIAP.

DATE: Comments must be received on or before November 25, 1988.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, ASO–530, Manager, Airspace and Procedures Branch, Docket No. 88–ASO–19, P.O. Box 20636, Atlanta, Georgia 30320.

The official docket may be examined in the Office of the Regional Counsel, Room 652, 3400 Norman Berry Drive, East Point, Georgia 30344, telephone: (404) 763–7646.

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:

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–ASO–19." 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 avaialble for examination in the Office of the Regional Counsel, Room 652, 3400 Norman Berry Drive, East Point, Georgia 30344, 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, Manager, Airspace and Procedures Branch (ASO–530), Air Traffic Division, P.O. Box 20636, Atlanta, Georgia 30320. 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 revoke the Forest, Mississippi transition area. The transition area was established to afford airspace protection for Instrument Flight Rule (IFR) aircraft executing a Standard Instrument Approach Procedure (SIAP) based on a planned non-federal Nondirectional Radio Beacon (NDB). The airport authority has since abandoned plans to commission the NDB and publish the NDB SIAP. Therefore, a need does not exist for the transition area. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in FAA 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 area.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Rgulations (14 CFR Part 71) 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; Executive Order 10854; 49 U.S.C. 106(g) (Revised Public Law 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Forest, MS [Removed]

Issued in East Point, Georgia, on October 13, 1988.

William D. Wood,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 88-24806 Filed 10-26-88; 8:45 am]

BILLING CODE 4910-13-M

FEDERAL TRADE COMMISSION

16 CFR Part 435

Mail Order Merchandise Rule; Advance Notice of Proposed Rulemaking

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking and request for comments.

SUMMARY: This notice requests comments on whether the Commission should initiate a proceeding to amend the Mail Order Merchandise Trade Regulation Rule, 16 CFR Part 435 ("the Rule"), to include shipment of merchandise ordered by telephone or any other means. The Commission also seeks comments on whether the Rule's definition of a "properly completed order" for credit sales should be amended to mean the time the seller receives sufficient information to charge the buyer's account.

DATE: The Commission shall accept written comments until December 27, 1988.

ADDRESS: Send comments to Federal Trade Commission, Washington, DC 20580. Comments should be addressed: Attention: Advance Notice of Proposed Rulemaking/Amendment of the Mail Order Merchandise Rule.

FOR FURTHER INFORMATION CONTACT: Joel N. Brewer, Attorney, Federal Trade Commission, Bureau of Consumer Protection, Division of Enforcement, 601 Pennsylvania Avenue NW., Room 4632, Washington, DC 20580. Telephone: (202) 326-2967.

SUPPLEMENTARY INFORMATION:

Part A—Background Information

On October 22,1975, the Federal Trade Commission published, at 40 FR 49492, the Trade Regulation Rule relating to Mail Order Merchandise, 16 CFR Part 435. A Statement of Basis and Purpose for the Rule was published November 5, 1975, at 40 FR 51582. The Rule became effective on February 2, 1976. Under the Rule a mail order seller who is unable to ship merchandise within the time stated in the solicitation of the order or within thirty days of receipt of a properly coupleted order if no time is stated, must provide the buyer with a notice of delay. If the delay is thirty days or less, the notice must give the buyer the option to cancel the order. If the delay is more than thirty days or is indefinite, the seller must notify the buyer that, unless the buyer expressly consents to such a delay, the order will be automatically cancelled. If the buyer agrees to the delay date given in the first notice but the seller cannot meet the new shipping date, the seller must send out a second notice of delay. The order will then be cancelled automatically unless the buyer signs a consent on the second notice and returns it to the seller.

The Rule also requires sellers to have a reasonable basis for claims they make about shipping time. Where no claim is made, there is an implied claim that merchandise will be shipped within thirty days. When a refund is required by the Rule, a seller is allowed one billing cycle to take specified action where there is a credit sale, and seven working days to mail a refund where the buyer has made a cash, check or money order payment.

At the time the rulemaking record was developed, it was not generally the practice of the direct marketing industry to solicit consumer orders of merchandise by telephone. Since then, the popularity of this form of solicitation has grown considerably. Moreover, other electronic methods of ordering merchandise, such as interactive cable systems which are presently largely experimental, give promise of someday being more widespread.

Our experience enforcing the Mail Order Rule suggests that many of the problems that led to the promulgation of the Rule have surfaced in the burgeoning telemarketing industry as well. Although these problems cannot be pursued as violations of the Rule, they may be considered violations of section 5 of the FTC Act. *See*, e.g., *U.S.* v. *Network Marketing, et al.*, 86 Civ. 6927 (RJW) (S.D.N.Y., Consent Decree filed September 12, 1986) (in soliciting telephone orders, every solicitation treated as though it were a solicitation for an order of mail order merchandise covered by the Rule); *cf., Jay Norris Corp. et al.*, 91 F.T.C. 751, 850 (1978), *affirmed*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979).

This experience has prompted our consideration of whether a need exists to expand the Rule to cover telephone sales by adding the word "or by telephone," or "or telephone order," or words of similar import after the words "by mail," or "mail order," or the like as appropriate wherever they appear in the present Rule. The Commission wishes to solicit comment on this issue.

Additionally, the Commission wishes to seek comment on whether the Rule should be further broadened to include newly developing telemarketing technologies that may play an increasingly important role in the solicitation of sales in the future. This could be accomplished by adding the words "or by telephone or by any other means," or "telephone order or order by any other means," or words of similar import after the words "by mail" or "mail order" or the like as appropriate wherever they appear in the present Rule. Importantly, the Mail Order Rule is premised on the unfair or deceptive practice of failing to provide for the timely shipment of merchandise. The means by which the merchandise is ordered does not appear to be material to such an unfair or deceptive practice.

If the Commission should decide to proceed with either of these alternatives, an amendment to the Rule would raise an additional issue. Currently, credit sales represent a small percentage of sales covered by the Rule. Most mail order merchandise is paid by check or money order. However, the preponderant means of payment for

telephonically ordered merchandise is by credit card. Extending the Rule's coverage to include telemarketing would dramatically increase the volume of credit transactions that fall within the Rule.

Section 435.2(b)(1) of the Rule defines the term "receipt of a properly completed order" in the credit sale context as being the time the seller charges the buyer's charge account. This definition provides the starting point from which the Rule measures the timeliness of shipment.[1] Under this definition, it is possible for merchants to hold orders without notice to the buyers and without providing them any options to cancel as long as they did not charge the buyers' charge accounts. The Commission is concerned that by increasing the volume of credit transactions covered by the Rule without changing this definition, it could open a major gap in coverage. When the Commission originally adopted the Rule, it stated that:

> While the consumer who paid in advance may feel more oppressed when faced with non-delivery or late delivery of merchandise, all consumers who order mail order merchandise are the victims of unfair or deceptive practices when the seller who solicited their orders lacked a reasonable basis for expecting to be able to ship within 30 days of receipt of the orders or within the time stated in the solicitations. *Statement of Basis and Purpose* accompanying the Rule, 40 FR 51582, 51594 (November 5, 1975).

Therefore, the Commission also desires to solicit comment on whether it would be appropriate to revise § 435.2(b)(1) to parallel more closely § 435.2(b)(2) by providing that a properly completed order is one in which the seller receives sufficient information to charge the buyer's account.

The Commission invites public comment on the foregoing issues. In addition, the Commission invites public comment on whether there are fair and feasible alternatives to the proposed amendments under consideration. Finally, pursuant to section 22(a)(1) (A), (B), and (C) of the FTC Act, the Commission invites public comment on whether the alternative amendments to the Rule under consideration by the Commission's staff (1) will have an annual effect on the national economy of $1,000,000,000 or more; (2) will cause a substantial change in the cost or price of goods or services which are used extensively by particular industries, which are supplied extensively by particular geographic regions, or which are required in significant quantities by the Federal Government, or by state or local governments; or (3) will have a significant impact upon persons subject to regulation under such amendment and upon consumers.

[1] However, if an express shipping representation is made in the advertising that solicits the order, the starting point becomes the time the seller receives all information necessary to process and ship the order, regardless of whether the sale is a credit transaction or not.

Part B—Objectives

The objective of the Commission's action in this area is to consider whether conditions in the direct marketing practices industry support broadening the scope of the Mail Order Rule. The principal question the Commission wishes to explore is what evidence is there that an amendment of the Rule is necessary.

Further, what evidence is there indicating that any amendment should include additional marketing technologies. Finally, is there any evidence that an expanded Rule would have a negative impact.

Part C—Regulatory Alternatives Under Consideration

The Commission currently has no regulatory alternatives under consideration other than the proposed Advanced Notice of Proposed Rulemaking.

Part D—Rulemaking Procedures

If the Commission determines that any of the amendments under consideration, or any other possible amendment proposed in response to the Advance Notice of Proposed Rulemaking, is appropriate, a notice of proposed rulemaking asking for public comment on a specific proposed amendment or amendments will be published in the Federal Register. The Commission may utilize expedited rulemaking procedures pursuant to § 1.20 of the Commission's Rules of Practice.

Part E—Request for Comments

The Commission has not reached any conclusions concerning any of the issues raised herein. The Commission wishes to receive public comments on the various alternative courses of action discussed. The Commission believes that such public comment would greatly enhance its understanding of the issues that need to be considered. Interested persons are invited to address any issues of fact, law, policy, or procedure, and to suggest any alternative course of action which they believe should be considered by the Commission.

List of Subjects in 16 CFR Part 435

Mail Order Merchandise Trade Practices.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 88-24854 Filed 10-26-88; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 916

Abandoned Mine Land Reclamation Program; Public Comment Period and Opportunity for Public Hearing on an Amendment to the Kansas Abandoned Mine Land Reclamation Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule.

SUMMARY: On September 30, 1988, the State of Kansas submitted to the Office of Surface Mining Reclamation and Enforcement (OSMRE) a proposed amendment to its Abandoned Mine Land Reclamation (AMLR) Plan (hereinafter referred to as the Kansas Plan). Kansas is proposing to assume responsibility for administering an emergency reclamation program and has submitted a plan outlining the procedures for administration of such a program.

This notice sets forth the times and location that the Kansas Plan and proposed amendments will be 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 a public hearing, if one is requested.

DATES: Written comments must be received on or before 4:00 p.m. November 28, 1988. If requested, a public hearing on the proposed amendments will be held on November 21, 1988. Requests to present oral testimony at the hearing must be received on or before 4:00 p.m., on November 14, 1988.

ADDRESSES: Written comments and requests for a hearing should be mailed or hand carried to Mr. William J. Kovacic at the address listed below. Copies of the Kansas Plan, the proposed amendment to the plan, and all written comments received in response to this notice will be available for public review and copying at addresses listed below during normal business hours Monday through Friday, excluding

holidays. Each requester may receive, free of charge, one copy of the proposed amendment by contacting the OSMRE Kansas City Field Office.

Mr. William J. Kovacic, Kansas City Field Office, Office of Surface Mining Reclamation and Enforcement, 1103 Grand Avenue, Room 502, Kansas City, Missouri 64106—Telephone: (816) 374–6405

Office of Surface Mining Reclamation and Enforcement, Administrative Records Office, Room 5215, 1000 L Street NW., Washington, DC 20240—Telephone: (202) 343–5492

Kansas Department of Health and Environment, Surface Mining Section, Bureau of Waste Management, 107 W. 11th, P.O. Box 1418, Pittsburgh, Kansas 66762—Telephone: (314) 231–8615.

FOR FURTHER INFORMATION CONTACT: Mr. William J. Kovacic, Director, Kansas City Field Office, at the address or telephone number listed in **"ADDRESSES."**

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Interior conditionally approved the Kansas AMLR program on February 1, 1982. Information pertinent to the general background, revisions, and amendments to the initial program submission, as well as the Secretary's findings and the disposition of comments can be found in the February 1, 1982, **Federal Register** (47 FR 4513). Deficiencies that result in the conditional approval were corrected by the State, and on June 3, 1983, all conditions of approval were removed by the OSMRE. The Secretary's findings can be found in the June 3, 1983 **Federal Register** (48 FR 24874).

Information concerning the previously approved plan and the proposed amendments may be obtained from the agency offices listed under **"ADDRESSES."**

The Secretary has adopted regulations that specify the content requirements of a State reclamation plan and the criteria for plan approval (30 CFR Part 884). The regulations provide that a State may submit to the Director proposed amendments or revisions to the approved reclamation plan. If the amendments or revisions change the scope or major policies followed by the State in the conduct of its reclamation program, the Director must follow the procedures set out in 30 CFR 884.14 in approving or disapproving an amendment or revision.

II. Discussion of Proposed Amendment

By letter dated September 30, 1988, Kansas submitted a reclamation plan amendment to OSMRE (Administrative Record No. AML–KS 93). The amendment consists of procedures to be used in the implementation and administration of emergency reclamation projects.

On September 19, 1983, OSMRE informed the State and Tribes of the opportunity to amend their reclamation plans to include responsibility for administering emergency response reclamation activities (47 FR 42729). For a State to undertake such activities as part of its reclamation program, it must demonstrate that it has the statutory authority to administer emergency reclamation activities, the technical capabilities to design and supervise emergency response work and the appropriate procurement procedures to quickly respond to emergencies either directly or through contractors. The State of Kansas has submitted material demonstrating compliance with these requirements.

III. Public Comment Procedures

OSMRE is seeking comments on the adequacy of the Kansas proposed amendments as set forth in 30 CFR 884.15, and whether the criteria for assumption of emergency response activities specified in 47 FR 42729 (September 19, 1983), have been satisfied. If approved, the amendments would become part of the Kansas Abandoned Mine Land Reclamation Plan.

Written Comments.

Written comments should be specific, pertain only to the issue proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Kansas City Field Office will not necessarily be considered in the final rulemaking 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 4:00 p.m. November 14, 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 written statements in advance of the hearing will allow OSMRE officials to prepare adequate 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 schedueld 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.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSMRE representatives to discuss the proposed amendments may request a meeting at the OSMRE office listed under "ADDRESSES" by contacting the person listed under "FOR FURTHER INFORMATION CONTACT". All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under **"ADDRESSES."** A written summary of each meeting will be made a part of the Administrative Record.

List of Subjects in 30 CFR Part 916

Coal mining, Intergovernmental relations, Surface mining, Underground mining, Abandoned mine land plans.

Date: October 17, 1988.

Raymond L. Lowrie,

Assistant Director, Western Field Operations.

[FR Doc. 88–24818 Filed 10–26–88; 8:45 am]

BILLING CODE 4310–05–M

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30 CFR Part 925

Abandoned Mine Land Reclamation Program; Public Comment Period and Opportunity for Public Hearing on an Amendment to the Missouri Abandoned Mine Land Reclamation Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule.

SUMMARY: On August 22, 1988, the State of Missouri submitted to the Office of Surface Mining Reclamation and Enforcement (OSMRE) a proposed amendment to its Abandoned Mine Land Reclamation (AMLR) Plan (hereinafter referred to as the Missouri Plan). The amendment includes a complete revision of the Missouri Plan. Substantive changes are proposed pertaining to the agency organizational

structure, the procedures for reclamation project ranking and selection, and the AMLR database. Procedures have been added pertaining to liens, appraisals, and rights of entry on private lands and for land acquisition, management, and disposal.

This notice sets forth the times and locations that the Missouri Plan and proposed amendments will be 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 a public hearing, if one is requested.

DATES: Written comments must be received on or before 4:00 p.m. November 28, 1988. If requested, a public hearing on the proposed amendments will be held on November 21, 1988. Requests to present oral testimony at the hearing must be received on or before 4:00 p.m., on November 14, 1988.

ADDRESSES: Written comments and requests for a hearing should be mailed or hand carried to Mr. William J. Kovacic at the address listed below. Copies of the Missouri Plan, the proposed amendment to the plan, and all written comments received in response to this notice will be available for public review and copying at addresses listed below during normal business hours Monday through Friday, excluding holidays. Each requestor may receive, free of charge, one copy of the proposed amendment by contacting the OSMRE Kansas City Field Office.

Mr. William J. Kovacic, Kansas City Field Office, Office of Surface Mining Reclamation and Enforcement, 1103 Grand Avenue, Room 502, Kansas City, Missouri 64106—Telephone: (816) 374–6405

Office of Surface Mining Reclamation and Enforcement, Administrative Records Office, Room 5215, 1000 L Street NW., Washington, DC 20240—Telephone: (202) 343–5492

Missouri Department of Natural Resources, Land Reclamation Program, 205 Jefferson Street, P.O. Box 176, Jefferson City, Missouri 65102—Telephone: (314) 751–4041.

FOR FURTHER INFORMATION CONTACT: Mr. William J. Kovacic, Director, Kansas City Field Office, at the address or telephone number listed in **"ADDRESSES."**

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Interior approved the Missouri AMLR program on January 29, 1982. Information pertinent to the general background, revisions, and amendments to the initial program submission, as well as the Secretary's findings and disposition of comments can be found in the January 29, 1982, **Federal Register** (47 FR 4253–4254).

Information concerning the previously approved plan and the proposed amendments may be obtained from the agency offices listed under **"ADDRESSES."**

The Secretary has adopted regulations that specify the content requirements of a State reclamation plan and the criteria for plan approval (30 CFR Part 884). The regulations provide that a State may submit to the Director proposed amendments or revisions to the approved reclamation plan. If the amendments or revisions change the scope or major policies followed by the State in the conduct of its reclamation program, the Director must follow the procedures set out in 30 CFR 884.14 in approving or disapproving an amendment or revision.

II. Discussion of Proposed Amendment

By letter dated August 22, 1988, Missouri submitted a reclamation plan amendment to OSMRE (Administrative Record No. AML–MO 59). The proposed amendment consists of a complete revision to the approved Missouri Plan as provided for by 30 CFR 884. Specifically, the following areas of the plan are being revised.

1. Organization (30 CFR 884.13(d)(2) & (2)): Missouri is proposing to update certain portions of its AMLR plan to reflect changes that have occurred in the State agency structure. The State has also submitted additional material incorporating into the plan the staffing policies outlined in the State manual of personnel procedures.

2. Project selection (30 CFR 884.13(c)(2)): Missouri has submitted revised project scoring criteria to ensure that projects involving threats to the public health and safety are addressed before lower priority problems. Missouri is also proposing a project prioritization methodology based upon the OSMRE "Abandoned Mine Land Inventory Update Manual, August 1984". Section 403 of the Surface Mining Act, 30 U.S.C. 1233, provides that expenditures from the AML Fund on eligible lands and waters reflect certain stated priorities. The first two priorities concern the protection of the public health, safety, and general welfare.

3. Reclamation on private land (30 CFR 884.13(c)(5)): Missouri has submitted procedures to clarify 10 CSR 40–9.060 regarding liens and appraisals on private lands.

4. Rights of entry (30 CFR 884.13(c)(6)): The State has submitted additional material concerning non-consensual entry requirements as specified in 30 CFR 877.13(c).

5. Coordination of Reclamation Activities (30 CFR 884.13(c)(3)): The State has proposed amending its coordination procedures to eliminate the requirement for a State Reclamation Committee. The Missouri Land Reclamation Program is the only State or Federal agency actively performing reclamation of coal mined lands with the State. Missouri has proposed procedures for coordinating with the agencies in the original State Reclamation Committee and with other interested agencies on an individual basis, in the development of construction projects.

6. Land Acquisition, Management and Disposal (30 CFR 884.13(c)(4)): Missouri has proposed adding a procedure to allow for acquisition of land through sale, donation or condemnation in accordance with the provisions outlined in 30 CFR 879, 10 CSR 40–9.040 and 10 CSR 40–9.050.

7. Database (30 CFR 884.13(f) Missouri is proposing to amend the database pertaining to eligible lands and waters incorporating approved AML inventory sites.

III. Public Comment Procedures

OSMRE is seeking comments on the adequacy of the Missouri proposed revision as set forth in 30 CFR 884.15. If approved, the revised would replace the original Missouri Abandoned Mine Land Reclamation Plan.

Written Comments

Written comments should be specific, pertain only to the issue proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Kansas City Field Office will not necessarily be considered in the final rulemaking 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 4:00 p.m. November 14, 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 written statements in advance of the hearing will allow

OSMRE officials to prepare adequate 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.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSMRE representatives to discuss the proposed amendments may request a meeting at the OSMRE office listed under **"ADDRESSES"** by contacting the person listed and under **"FOR FURTHER INFORMATION CONTACT"**. All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under **"ADDRESSES"**. A written summary of each meeting will be made a part of the Administrative Record.

List of Subjects in 30 CFR Part 925

Coal mining, Intergovernmental relations, Surface mining, Underground mining, Abandoned mine land plans.

Date: October 17, 1988.

Raymond L. Lowrie,

Assistant Director, Western Field Operations.

[FR Doc. 88-24819 Filed 10-26-88; 8:45 am]

BILLING CODE 4310-05-M

VETERANS ADMINISTRATION

38 CFR Part 17

Medical Benefits; Quality Assurance Confidentiality

AGENCY: Veterans Administration.

ACTION: Proposed regulations.

SUMMARY: The Veterans Administration (VA) proposes to amend the regulations that provide for the VA medical quality assurance program. These regulations delineate the responsibilities of the VA's Department of Medicine and Surgery (DM&S) with respect to the conduct of the Quality Assurance (AQ) program and establish standards that assure that certain quality assurance records and documents are adequately safeguarded and used only for proper purposes. These proposed amendments would redefine the medical quality assurance program to include peer review component, add occurrence screening as a quality assurance activity, and delete credentialing and privileging as a mandatory quality assurance function.

DATES: Comments must be received on or before November 28, 1988.

Comments will be available for public inspection until December 6, 1988. It is proposed to make § 17.506(16), 17.507(xvi), 17.517 and 17.518 effective Janaury 1, 1985, and the remainder of these regulations effective 30 days after final publication in the **Federal Register.**

ADDRESSES: Interested persons are invited to submit written comments, suggestions or objections to the Administrator of Veterans Affairs (271A), Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420. All written comments received will be available for public inspection only in the Veterans Services Unit, room 132 of the above address, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays) until December 6, 1988.

FOR FURTHER INFORMATION CONTACT: Robert Lubran, Chief, Systems Review Staff, Office of Quality assurance, Department of Medicine and Surgery, (202) 233-3115.

SUPPLEMENTARY INFORMATION: The Veterans Disability Compensation and Housing Benefits Amendments of 1980 (Pub. L. 96-385) amended 38 U.S.C. 3305 to require the Administrator of Veterans Affairs to specify, by regulation, activities which meet the definition of the VA's medical quality assurance program. This act explicitly precludes any activity from being designated as a quality assurance program activity for the purposes of confidentiality unless such designation has been specified in regulation. The Veterans Health Care Amendments of 1985 (Pub. L. 99-166) amended section 3305, and added sections 4151 and 4152 to 38 U.S.C., to require the Administrator to establish and conduct a quality assurance program and delineate the responsibilities of the Chief Medical Director with respect to the quality assurance program. 38 U.S.C. 4151 requires DM&S to periodically evaluate the quality of medical care provided by the Department in terms of certain measures of outcome from surgery as part of the quality assurance program. The Veterans Benefits and Services Act of 1988 (Pub. L. 100-322) directs the Administrator to "take actions to improve the operation of quality assurance programs and activities in the Veterans Administration, including * * * implementation of * * * 'occurrence screening'."

On July 28, 1981, the VA published proposed regulations (47 FR 38540) to implement 38 U.S.C. 3305. Final implementing regulations were published October 22, 1982 (47 47007), and, as codified at 38 CFR 17.500-17.540, are the existing regulations which the VA now proposes to amend. Development and refinement of the VA's quality assurance program since the publication of those Health Service Review Organization (HSRO) regulations have necessitated the need for changes.

The VA is proposing the following changes to the existing regulations:

a. General provisions. We would redefine the term Health Services Review Organization (HSRO) at § 17.500 to include three components: Systematic Internal Review (SIR), Medical District Initiated Peer Review Organization (MEDIPRO) and Systematic External Review Program (SERP). These terms describe, respectively, the VA's overall quality assurance program (HSRO); the medical facilities' quality assurance component (HSRO-SIR); the medical district initiated peer review organization HSRO-MEDIPRO); and the evaluation component (HSRO-SERP) external to the medical facility. These changes would clarify that the VA's system of medical district level clinically oriented peer review (HSRO-MEDIPRO) is an integral part of the DM&S quality assurance program. Section 17.501 would be amended to substitute the Office of Quality Assurance for the Medical Inspector and Evaluation Office which has been abolished and to include responsibilties of the regional director and medical district director. Section 17.504 would be amended to include the HSRO-MEDIPRO program with respect to the conduct of VA employees and others involved in quality assurance.

b. Quality Assurance Program. We would add occurrence screening as the 16th element under the function of continuous monitoring in §§ 17.506(a) and 17.507(a)(4). Occurrence screening is intended to supplement patient incident reporting under the Patient Injury Control function, § 17.508, by screening patient care through an evaluation of patients records to identify potentially adverse events. Indentification of such potential findings would be confirmed through a medical facility peer review process. This change would implement section 201(a)(2) of the Veterans Benefits and Services Act of 1988. Sections 17.506(e), 17.515, and 17.518(f) relating to credentialing and delineation of clinical privileges, would be removed from the 17.500 series and placed elsewhere in 38 CFR Part 17. Sections 17.511-17.513 would be reserved. A new § 17.514 would require a written HSRO-

MEDIPRO plan, mandate that DM&S medical districts undertake peer review and would describe HSRO–MEDIPRO program activities. Section 17.516 would be redesignated as § 17.515.

c. Designation and description of confidential records and documents. Section 17.516 would be amended to cover records and documents pertaining to the HSRO program which are generated for the Agency by a consultant or contractor, and to provide for protection of records covered under other statutes. Sections 17.517 and 17.518 would be redesignated as §§ 17.516 and 17.517, respectively. Section 17.517 would be amended to include reports and documents created by individuals as well as those created by committee and study teams in the paragraph that concerns continuous monitoring and utilization review documents. This is necessary because the occurrence screening process often generates documents which contain the deliberations of individual health care evaluators. A new § 17.518 would describe the types of HSRO-MEDIPRO quality assurance documents and records, whether created before or after the final publication of these regulations, which are confidential and provileged under 38 U.S.C. 3305 and these regulations. Provision has been made in § 17.518 for the disclosure to Congress of aggregate statistical data on facility-specific mortality and morbidity rates and related quality of care evaluations, as required by 38 U.S.C. 4151 and 4152. Section 17.520 would be amended to reflect redesignation of the above paragraphs. Section 17.523 would broaden existing disclosure authorities to include the medical district director, regional director and Chief Medical Director; § 17.524 would be modified to conform with the requirements set forth in the previous section. These authorities reflect the appropriate role of DM&S officials in the disclosure of confidential HSRO records and documents. Section 17.527 which covers access to HSRO records within the agency would require VA officials at each medical district, region and the central office to establish certain practices for ensuring that adequate controls are in place to limit access to HSRO-MEDIPRO and other confidential quality assurance records and that such records are available to VA officials. Section 17.527(h) would be amended to specify that HSRO-SIR confidential and privileged records and documents would be subject to disclosure to HSRO-MEDIPRO. The penalty and fine for unauthorized disclosure of confidential information would not be amended.

The VA is proposing to make § 17.506(16), Occurrence screening, § 17.507(xvi), Occurrence screening, § 17.514, HSRO-MEDIPRO, and § 17.518, HSRO-MEDIPRO records and documents, effective January 1, 1985. If these regulations were not retroactive, the VA would be required to maintain these records in two categories, those created before and those created after the effective date of these regulations which would be confusing and impractical.

The VA has determined that these proposed regulations are not major as defined by Executive Order 12291, Federal Regulation. They will not have an effect on the economy of $100 million and will not result in any major increases in costs or prices for anyone; nor will they have significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States-based enterprises to compete with foreign based enterprises in domestic or export markets.

The Administrator hereby certifies that these proposed regulations will not, when promulgated, 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. Pursuant to 5 U.S.C. 605(b), these regulations are, therefore, exempt from the regulatory analysis requirements of 5 U.S.C. 603 and 604. The reason for this certification is that the regulations govern only the internal VA handling of a small category of confidential VA records. These regulations concern the Agency's implementation of its medical quality assurance program, and impose no regulatory burdens on small entities.

List of Subjects in 38 CFR Part 17

Alcoholism, Claims, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Health care, Health facilities, Health professions, Medical devices, Medical research, Mental health programs, Nursing home care, Philippines, Veterans.

Approved: September 26, 1988.

Thomas K. Turnage,

Administrator.

38 CFR, Part 17, Medical, is proposed to be amended as follows:

PART 17—[AMENDED]

1. Section 17.500 is amended by revising paragraph (b), (c) and (d) to read as follows:

§ 17.500 General.

* * * * *

(b) HSRO is a three faceted program:

(1) Health Services Review Organization—Systematic Internal Review (HSRO–SIR) is an integrated quality assurance process that is internal to each VA medical facility.

(2) Health Services Review Organization—Medical District Initiated Peer Review Organization (HSRO–MEDIPRO) is a clinically oriented, medical district based, peer review system of quality of care and resource utilization assessment external to the medical facility.

(3) Health Services Review Organization—Systematic External Review Program (HSRO–SERP) is a systemwide VA review mechanism external to each VA medical facility in which health care evaluators review clinical and administrative aspects of the quality of care in VA medical facilities and the effectiveness of their HSRO–SIR programs. HSRO–SERP may include a review of the effectiveness of HSRO–MEDIPRO programs.

(c) Corrective action on all medical facility problems or recommendations identified by a HSRO–SIR, HSRO–MEDIPRO or HSRO–SERP review will be initiated and implemented at the lowest possible organizational level through existing lines of authority.

(d) HSRO–SIR, HSRO–MEDIPRO and HSRO–SERP program activities will be established, conducted and maintained at DM&S organizational levels as prescribed in these regulations and VA policy.

(Authority: 38 U.S.C. 3305)

2. Section 17.501 is revised to read as follows:

§ 17.501 Departmental responsibility.

(a) The Chief Medical Director is responsible for the implementation, maintenance, and enforcement of these regulations and will ensure that each DM&S organizational element maintains an effective and efficient HSRO program as specified in VA policy.

(b) The Director, Office of Quality Assurance, will provide guidance, oversight, and recommendations to the Chief Medical Director concerning the effectiveness of the HSRO program and the need to make improvements.

(c) Each regional director will ensure that HSRO–MEDIPRO is operational in the region and that clinical care and resource utilization problems unresolved at the district level are acted upon. The regional director will monitor and evaluate the implementation of district HSRO–MEDIPRO plans; review HSRO–MEDIPRO minutes and reviews; approve HSRO–MEDIPRO reports;

provide necessary followup on HSRO–MEDIPRO program documents; and approve HSRO–MEDIPRO Board appointments.

(d) Each medical district director is responsible for implementing and supervising the HSRO–MEDIPRO program within the district and for providing administrative and analytical support. The authority for day-to-day planning, coordinating, implementing and monitoring compliance with policies and procedures is delegated to the HSRO–MEDIPRO coordinator. Supervision of the HSRO–MEDIPRO staff will be by the medical district director or designee.

(Authority: 38 U.S.C. 3305)

3. Section 17.504 is revised to read as follows:

§ 17.504 Conduct.

(a) Any VA employee participating in HSRO–SIR, HSRO–MEDIPRO or HSRO–SERP activities or having access to confidential and privileged quality assurance records and documents will comply with the requirements of these regulations. Participating employees will exercise prudent and diligent care and act in good faith while gathering and analyzing factual information prior to making any judgment which may reflect adversely on another VA employee or a VA medical facility. Employees will perform their duties in accordance with prevailing standards and procedures to ensure the safety and welfare of VA beneficiaries and others.

(b) Only those employees in supervisory, executive, or HSRO capacities who have sufficient job related needs to study or otherwise use confidential and privileged records and documents should have access to patient or provider specific identification information or to the confidential coding system. Access to HSRO records within the agency is governed by § 17.527 of this part.

(c) VA employees, upon voluntary or involuntary termination of VA employment for any reason, will not disclose to any person or organization any HSRO records or documents which are designated as confidential and privileged by 38 U.S.C. 3305 and these regulations.

(Authority: 38 U.S.C. 3305)

4. In § 17.506, paragraph (a)(16) is added to read as follows:

17.506 Mandatory HSRO-SIR functions and elements.

* * * * *

(a) * * *

(16) Occurrence screening.

* * * * *

5. In § 17.506, paragraph (e) is removed.

6. In § 17.507, paragraph (a)(4)(xvi) is added to read as follows:

§ 17.507 Description of continuous monitoring.

* * * * *

(a) * * *

(4) * * *

(xvi) *Occurrence screening.* This involves screening cases against a predetermined list of criteria concerning the provision of care to patients. Those cases which involve one or more of the occurrences will be reviewed to identify possible problems in patient care. When appropriate, action will be taken to correct the problems identified in the individual case. In addition, cases meeting the criteria will be entered into an ongoing occurrence screening data base which will be regularly reviewed and analyzed to identify patterns which may be problematic.

7. Section 17.514 is added to read as follows:

§ 17.514 HSRO–MEDIPRO.

(a) Each medical district, in accordance with any directives from the Chief Medical Director, will develop and establish a written MEDIPRO plan which establishes responsibilities, defines policy and describes procedures and mechanisms necessary to maintain an effective HSRO–MEDIPRO program. The plan will be reviewed annually by the HSRO–MEDIPRO board, updated as appropriate and will address the following subjects:

(1) Purpose of HSRO–MEDIPRO program.

(2) Program objectives.

(3) HSRO–MEDIPRO board structure and functions.

(4) Use of physician/dental advisors.

(5) HSRO–MEDIPRO staff roles and responsibilities.

(6) Meeting schedule and protocol.

(7) Review process.

(8) Plans for periodic reliability checks on HSRO–MEDIPRO staff and physician/dental advisors.

(9) Reporting.

(10) Relationship to other district councils.

(b) HSRO–MEDIPRO provides a means for representative VA health care professionals to evaluate VA medical facility, patient and practitioner records and documents to assess the quality of care and appropriateness of resource utilization. The goal of the HSRO–MEDIPRO program is to foster quality care under a prospective resource allocation methodology. HSRO–MEDIPRO is designed to function as a data driven system which combines data analysis and subsequent chart review to focus peer review activities. HSRO–MEDIPRO is intended to augment and not duplicate existing VA quality assurance activities including HSRO–SIR and HSRO–SERP.

(c) Each HSRO–MEDIPRO program, in accordance with any directives from the Chief Medical Director, will establish uniform procedures and conduct peer review activities including, but not limited to, the following:

(1) Analyzing data to identify potential problems in quality of care or validity of data and to develop and review objectives on a regular basis. VA data sources include, but are not limited to, Patient Treatment File (PTF), records maintained on the Decentralized Hospital Computer Program (DHCP), tort claims, incident reports, and Automated Management Information System (AMIS). Problem areas may be indicated by statistically significant variations between appropriate medical district, regional or national peer group patterns of care. The following categories are examples of potential problem areas for the purpose of HSRO–MEDIPRO data analysis and focused review and these regulations:

(i) Mortality.

(ii) Interhospital transfers.

(iii) Interservice transfers.

(iv) Inpatient admissions/readmissions.

(v) Applicants found not in need of care.

(vi) One-day inpatient stays.

(vii) Length of stay by Diagnostic Related Group (DRG).

(viii) Discharge planning.

(ix) Appropriateness of levels of care such as acute care, long-term care, and ambulatory care.

(x) Ancillary services.

(2) Selecting topics for focused review. HSRO-MEDPRO boards, in accordance with any directives from the Chief Medical Director, will select and prioritize topics for review based on medical district, regional and national considerations. Such considerations may include, for example, topics which reflect deviations of clinical indicators from VA system norms; topics which reflect large numbers of patients or serious consequences such as death or disability; topics which are likely to reflect systemwide problems related to resource allocation systems and other VA cost containment efforts; and topics which lend themselves to intervention at the medical center level.

(3) Generating clinical hypotheses and study objectives. Each HSRO-MEDIPRO board and staff will generate clinical

hypotheses and study objectives for focused review topics.

(4) Developing criteria. HSRO-MEDIPRO board and staff will develop and/or use specific, objective criteria to guide records review and analysis. A variety of resources may be used in the development of criteria including previously developed criteria and physician and dental advisor expertise.

(5) Conducting focused review and, as necessary, referring records and other documents to physician/dental advisors for peer review. Focused review refers to the review of a well-defined, limited or structured topic by a health professional peer in order to evaluate a potential quality of care problem or opportunity for improvement. Peer review refers to an assessment by health care practitioners of services ordered or furnished by other practitioners in the same professional field.

(6) Sharing findings with VA medical facilities. HSRO-MEDIPRO will provide medical facilities with information relative to quality of care and practice patterns. Such information may include practitioner-specific and aggregate district, region and national data. VA medical facilities will use these findings in their HSRO-SIR program to document satisfactory or superior quality of care and to identify areas where attention should be directed. If necessary, medical centers will take action to correct identified problems or make improvements through appropriate interventions such as education and training of VA medical staff or management. Other HSRO-MEDIPRO information that may be provided to medical facilities includes study criteria, data validation information, HSRO-MEDIPRO study summaries pertaining to the medical center, HSRO-MEDIPRO minutes and quarterly reports, and letters of observation indicating potential problems found in areas other than the topic under consideration for focused review.

(7) Resolving facility disagreement with HSRO-MEDIPRO study findings. Medical facilities may communicate in writing to the HSRO-MEDIPRO board where there is a disagreement over the findings of a HSRO-MEDIPRO study. The HSRO-MEDIPRO board will review all such medical facility documents; unresolved issues will be referred to the appropriate regional director for action.

(8) Providing HSRO-MEDIPRO board followup as necessary. HSRO-MEDIPRO boards, in accordance with any directives from the Chief Medical Director, will conduct followup evaluations of medical center actions after an appropriate period of time has elapsed.

(9) Integrating findings with the appropriate DM&S organizational elements. HSRO-MEDIPRO will report periodically on its findings and followup actions to the respective regional director and to the Director, Office of Quality Assurance. Where study findings have implications for planning or resource allocation purposes, communication should occur with the appropriate organizational unit, e.g., the District Planning Board or the District Executive Council.

(d) The VA may conduct a health care review(s) of HSRO-MEDIPRO to determine the effectiveness of the HSRO-MEDIPRO program in meeting its objectives, assess compliance with relevant policies and procedures, validate medical record reviews and to accomplish other similar objectives.

(e) Each medical district will have an HSRO-MEDIPRO board consisting of clinically active VA physicians and dentists to conduct HSRO-MEDIPRO activities. The membership and selection process for the HSRO-MEDIPRO boards will be determined by VA policy directive(s).

(Authority: 38 U.S.C. 3305)

§ 17.515 [Removed]

§§ 17.516 and 17.517 [Redesignated as §§ 17.515 and 17.516]

8. a. Section 17.515 is removed, and § 17.516 and § 17.517 are redesignated § 17.515 and § 17.516, respectively.

b. Newly-designated § 17.515 is revised and newly-designed § 17.516 is amended by adding paragraphs (c) and (d) to read as follows:

§ 17.515 HSRO-SERP.

(a) HSRO-SERP is an ongoing review program concerned principally with the quality of patient care provided at each VA medical facility and the effectiveness of its HSRO-SIR program. HSRO-SERP evaluates each VA medical facility service as well as the facility as a whole. The HSRO-SERP review includes a periodic assessment conducted at each VA medical facility by a multidisciplinary peer review team of VA health care professionals. Team members are selected from other VA medical facilities for their expertise in their respective disciplines and their evaluation skills. The HSRO-SERP review may also address the effectiveness of the HSRO-MEDIPRO program.

(b) HSRO-SERP also includes reviews and analyses of HSRO-SIR, HSRO-SERP and HSRO-MEDIPRO documents by VA central office officials.

(c) The HSRO-SERP program is intended to complement other evaluations, reviews and surveys of VA medical facilities that utilize standards and criteria which may be unrelated to the quality of patient care. Such activities are conducted by a variety of agencies and organizations including the VA Department of Medicine and Surgery, accrediting bodies such as the Joint Commission on Accreditation of Healthcare Organizations, Federal regulatory agencies, e.g., Nuclear Regulatory Commission, and veterans organizations.

(Authority: 38 U.S.C. 3305)

§ 17.516 HSRO records and documents.

* * * * *

(c) When used in the HSRO program, confidential records protected by statutes such as 38 U.S.C. 3305; 5 U.S.C. 552a, the Privacy Act; 38 U.S.C. 4132 (drug and alcohol abuse and sickle cell anemia treatment records); and 38 U.S.C. 3301 (veterans names and addresses), retain whatever confidentiality protection they have under these laws and applicable regulations and will be handled accordingly. To the extent that information protected by 38 U.S.C. 3301 or 4132 is incorporated into HSRO records, the information in the HSRO records is still protected by these statutes.

(d) Records and documents generated by a contractor or consultant in the course of conducting an HSRO program activity or function as specified in these regulations or an evaluation of any HSRO program as specified in these regulations shall be confidential and privileged to the same extent that the records and documents would be confidential and privileged if created by the Agency under these regulations.

§ 17.518 [Redesignated as § 17.517]

9. Section 17.518 is redesignated § 17.517.

10. Newly-designated § 17.517 is amended by revising paragraph (c) to read as follows:

§ 17.517 HSRO-SIR records and documents.

* * * * *

(c) Continuous monitoring and utilization review functions generate individual, committee or study team minutes, notes, reports, and memoranda produced in the process of deliberations by health care evaluators. Such documents are confidential and privileged in their entirety. Individual continuous monitoring and utilization review documents comparing one or

more patient's treatment with objective criteria or norms would be such a confidential document. Other memoranda and study documents or records prepared for review by HSRO–SIR committees are confidential and privileged only if they reveal the identity, even by implication, of individual VA employees or other individuals involved in the quality assurance process or the results or outcomes of HSRO–SIR reviews or studies. Summary documents or records which only identify study topics, the period of time covered by the study, criteria, norms, interpretive comments and major overall findings, but which do not identify health care providers, even by implication, are not considered confidential and privileged documents or records under 38 U.S.C. 3305 and these regulations.

* * * * *

11. In newly-designated § 17.517, paragraph (f) is removed.

12. Section 17.518 is added to read as follows:

§ 17.518 HSRO–MEDIPRO records and documents.

(a) Those records and documents generated by HSRO–MEDIPRO activities in accordance with § 17.514 of this part are confidential and privileged.

(b) HSRO–MEDIPRO records and documents made confidential and privileged as provided by 38 U.S.C. 3305 include the following:

(1) Records and documents which reveal the actual results or outcomes of studies of individual patient care and treatment as compared with clinical criteria or norms or which may identify, even by implication, individual VA patients or employees or other individuals involved in peer review activities. Such studies are based on analyses of data from such sources as the PTF, records maintained on the DHCP and medical records. Those records and documents which are maintained in personnel or similar files are not made confidential and privileged by 38 U.S.C. 3305. 38 U.S.C. 3305 makes confidential and privileged the minutes, notes, reports and other documents produced in the process of deliberations by the HSRO–MEDIPRO board when it reviews the performance of a medical facility or health care professional for the purpose of peer review.

(2) HSRO–MEDIPRO notes, working papers, staff reports and memoranda that contain the deliberations of health care evaluators.

(3) HSRO–MEDIPRO board minutes, memoranda, deliberations, reports, letters, studies or other documents pertaining to HSRO–MEDIPRO peer review activities.

(c) Other documents concerning HSRO–SIR reviews or studies prepared for review by HSRO–MEDIPRO staff or board are confidential and privileged only if they reveal the identity, even by implication, of VA employees or others involved in the quality assurance process or the results or outcomes of HSRO–SIR reviews or studies, as provided in § 17.517.

(d) Summary documents or records, other than those discussed in paragraphs (a), (b), and (c) of this section, which only identify study topics, the period of time covered by the study, criteria, norms or a summary of findings, and which do not identify VA patients or employees or others involved in peer review activities, even by implication, are not considered confidential and privileged documents or records under 38 U.S.C. 3305 and these regulations.

(e) Records and documents, to the extent that they are aggregations of statistical data and do not identify, even by implication, individual VA employees or other individuals involved in the peer review process, are not confidential or privileged. Nothing in these regulations shall be construed to authorize or require the withholding of such aggregate statistical data or information from disclosure.

(f) HSRO–MEDIPRO documents must not be filed in a manner by which they can be retrieved by reference to an individual identifier.

(Authority: 38 U.S.C. 3305)

13. Sections 17.523 and 17.524 are revised to read as follows:

§ 17.523 Disclosure authorities.

(a) The VA medical facility director is authorized to disclose any confidential and privileged HSRO–SIR records or documents to other agencies, organizations, or individuals where these regulations expressly provide for disclosure.

(b) The VA medical district director is authorized to disclose any confidential and privileged HSRO–MEDIPRO records or documents to other agencies, organizations, or individuals where these regulations expressly provide for disclosure.

(c) The VA regional director is authorized to disclose any confidential and privileged HSRO–SERP records or documents to other agencies, organizations, or individuals where these regulations expressly provide for disclosure.

(d) The VA Chief Medical Director is authorized to disclose any confidential and privileged HSRO records or documents to other agencies, organizations, or individuals where these regulations expressly provide for disclosure.

(Authority: 38 U.S.C. 3305)

§ 17.524 Appeal of decision to deny disclosure.

When a request for records or documents subject to these regulations is denied by the VA medical facility director, medical district director, regional director or Chief Medical Director, the VA official denying the request will notify the requestor of the right to appeal this decision to the Administrator of the Veterans Affairs within 60 days. The Administrator's decision is the agency's final decision.

(Authority: 38 U.S.C. 3305)

14. Section 17.527 is amended by revising paragraphs (b), (d), (g), and (h), to read as follows:

§ 17.527 Access to HSRO data within the agency.

* * * * *

(b) No individual shall be permitted physical access to privileged and confidential HSRO records and documents identified in §§ 17.517, 17.518 and 17.519 of this part unless such individual has received adequate training and has been informed of the penalties for unauthorized disclosure. Any misuse of confidential and privileged HSRO records or documents shall be reported through the HSRO confidentiality officer to the appropriate DM&S official.

* * * * *

(d) A list should be maintained at each medical facility, medical district, region and the central office of those VA employees or others who are authorized access to confidential and privileged HSRO records and documents. Each authorized individual will sign a statement that he or she is aware of the requirements for confidentiality and will not divulge any information in any way to any source or person except in accordance with these regulations.

* * * * *

(g) Confidential and privileged HSRO records and documents shall be maintained in secure filing cabinets and locked when not under personal supervision. A security system for storing, processing, accessing and retrieving automated data will be developed and maintained at each medical facility, medical district, region and VACO. Such security systems will include procedures and internal controls to identify individuals who have

authorized access to those data and at what time such access occurred. Adequate internal controls will be developed and maintained so that confidential and privileged data, including automated data, may not be retrieved by an individual identifier(s). Each VA medical facility, medical district, region and the VACO will provide for the periodic review of confidential and privileged HSRO records and documents, including data, to determine whether security is adequate and which, if any, records and documents shall be retained. In general, confidential and privileged HSRO records and documents will be maintained for a minimum of 3 years and may be held longer if needed for HSRO research studies, legal purposes, or related quality assurance purposes.

(h) HSRO–SIR records and documents, as defined in § 17.517 of this part, will be available to HSRO–MEDIPRO staff and board members, the medical district director and other medical district management officials, regional directors and HSRO–SERP team members. HSRO–SIR, HSRO–MEDIPRO and HSRO–SERP records and documents will be available to VA central office management officials working in HSRO functions, service and staff office directors, and assistant chief medical directors.

* * * * *

15. Section 17.534 is amended by revising paragraph (f) to read as follows:

§ 17.534 Authorized disclosure: non VA requests.

* * * * *

(f) In general, Joint Commission (Joint Commission on Accreditation of Healthcare Organizations) survey teams and similar national accreditation agencies or boards and other organizations requested by the VA to consult, assess or evaluate the effectiveness of HSRO–SIR, HSRO–MEDIPRO or HSRO–SERP program activities are entitled to full disclosure of any and all privileged and confidential HSRO records or documents with the following qualifications:

(1) Accreditation agencies which are charged with assessing all aspects of medical facility patient care, e.g., Joint Commission, may have access to all confidential HSRO records and documents.

(2) Accreditation agencies charged with more narrowly focused review (e.g., College of American Pathologists, American Association of Blood Banks, Nuclear Regulatory Commission, etc.) may have access only to such confidential and privileged HSRO records and documents as are relevant to their respective focus.

* * * * *

[FR Doc. 88–24798 Filed 10–26–88; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF TRANSPORTATION

Urban Mass Transportation Administration

49 CFR Part 661

[Docket No. 88–G; RIN 2132–AA15]

Buy America Requirements; Amendments

AGENCY: Urban Mass Transportation Administration, DOT.

ACTION: Extension of comment period for proposed rule.

SUMMARY: On August 29, 1988, the Urban Mass Transportation Administration issued a Notice of Proposed Rulemaking to implement changes to the "Buy America" requirements made by section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987. A number of parties have requested that the comment period be extended. The purpose of this document is to extend the comment period until November 14, 1988.

DATE: Comments should be received by November 14, 1988.

ADDRESS: Comments should be addressed to: Department of Transportation, Urban Mass Transportation Administration, Office of the Chief Counsel, Docket No. 88–G, 400 Seventh Street, SW., Room 9316, Washington, DC 20590. Comments will be available for review by the public at this address from 9:00 am to 5:00 pm, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Edward J. Gill, Jr., Assistant Chief Counsel for Programs, Office of the Chief Counsel, Room 9316, UMTA, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–4063.

SUPPLEMENTARY INFORMATION: On August 29, 1988, UMTA published a Notice to Propose Rulemaking to implement the statutory changes to its "Buy America" requirements made necessary by section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987. Comments were due to be submitted by October 28, 1988. UMTA has received a number of requests from individual companies that the comment period be extended. In addition, the American Iron and Steel Institute and the Railway Progress Institute, both of which represent a number of entities that could possibly be affected by the proposed regulations, have requested an extension because of the complexity of the proposed regulations.

All parties have requested a 30 day extension. While UMTA reconized that the proposed regulations are complex, it is felt that an extension of 30 days would unduly delay the publication of the final rule, especially in light of the 60 day comment period that was already provided. However, because of the importance of receiving comments from all parties that may be affected by the proposed regulations, it has been determined that it is reasonable to extend the closing date of UMTA Docket No. 88–G from October 28, 1988 to November 14, 1988.

Dated: October 24, 1988.

Theodore A. Munter,

Deputy Chief Counsel.

[FR Doc. 88–24862 Filed 10–26–88; 8:45 am]

BILLING CODE 4910–57–M

Notices

Federal Register
Vol. 53, No. 208
Thursday, October 27, 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

Forms Under Review by Office of Management and Budget

October 21, 1988.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) An indication of whether section 3504(h) of Pub. L. 96–511 applies; (9) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, Room 404–W Admin. Bldg., Washington, DC 20250, (202) 447–2118.

Comments on any of the items listed should be sumbitted directly to: Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attn: Desk Officer for USDA.

If you anticipate commenting on a submission but find that preparation time will prevent you from doing so promptly, you should advise the OMB Desk Officer of your intent as early as possible.

Revision

• Office of Finance and Management.

Uniform Administrative Requirements for Grants and Cooperative Agreements SF–424, SF–269, SF–272, SF–272a, SF–270, SF–271.

Recordkeeping; On Occasion; Quarterly; Annually.

Businesses or other for-profit; Non-profit institutions; 2,767 responses; 124,040 hours; not applicable under section 3504(h).

Gerald Miske, (202) 382–1553.

Extension

• Rural Electrification Administration.

Report of Compliance and Participation.

REA Form 268.

Annually.

Small businesses or organizations; 2,000 responses; 1,340 hours; not applicable under section 3504(h).

Patricia B. Armijo, (202) 382–9500.

NEW

• Rural Electrification Administration.

7 CFR 1709.10—1709.29, Rural Economic Development Loan and Grant Program N/A.

On Occasion.

Small businesses or organizations; 430 responses; 715 hours; not applicable under 3504(h).

Mark B. Wyatt, (202) 382–0410.

Larry K. Roberson,

Acting Departmental Clearance Officer.

[FR Doc. 88–24817 Filed 10–26–88; 8:45 am]

BILLING CODE 3410–01–M

COMMISSION ON CIVIL RIGHTS

California Advisory Committee; Agenda and Notice of Public Meeting

Notice of hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that the California Advisory Committee to the Commission will convene at 7:30 p.m. and adjourn at 10:30 p.m. on November 10, 1988, at the Clarion Hotel, 700 16th Street, Sacramento, California 95814. The purpose of the meeting is to plan activities and discuss the upcoming forum on higher education.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson, Deborah Hesse or Philip Montez, Director of the Regional Division (213) 894–3437. (TDD 213/894/0508). Hearing impaired persons who will attend the meeting and require the services of sign language interpreter, should contact the Regional Division office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, October 20, 1988.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 88–24840 Filed 10–26–88; 8:45 am]

BILLING CODE 6335–01–M

Colorado Advisory Committee; Agenda and Notice of Public Meeting

Notice of hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that the Colorado Advisory Committee to the Commission will convene a meeting at 1:30 p.m. and adjourn at 3:30 p.m. on November 15, 1988, at the Radisson Hotel Denver, 1550 Court Place, Denver, Colorado 80202. The purpose of the meeting is to plan Advisory Committee activities for the fiscal year.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson, Maxine Kurtz or Philip Montez, Director of the Western Regional Division (213) 894–3437, (TDD 213/894/0508). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, October 20, 1988.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 88–24841 Filed 10–26–88; 8:45 am]

BILLING CODE 6335–01–M

Minnesota Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Minnesota Advisory Committee to the Commission will convene at 6:00 p.m. and adjourn at 9:00 p.m., on November 22, 1988, at the Holiday Inn downtown, 1313 Nicollet Mall, Minneapolis, Minnesota. The purpose of the meeting is to review the status of current Committee projects and discuss issues which are possible subjects for future activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson, Talmadge L. Bartelle, or William F. Muldrow, Acting Director of the Central Regional Division (816) 426–5253, (TDD 816/426–5009). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, October 20, 1988.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 88–24842 Filed 10–26–88; 8:45 am]

BILLING CODE 6335–01–M

Missouri Advisory Committee; Agenda And Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Missouri Advisory Committee to the Commission will convene at 10:00 a.m. and adjourn at 2:00 p.m., on November 21, 1988, at the Drury Inn Airport at 10800 Pear tree Lane, St. Louis, Missouri. The purpose of the meeting is to review the status of current Committee projects and discuss issues which are possible subjects for future activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson, Joanne M. Collins, or William F. Muldrow, Acting Director of the Central Regional Division (816) 426–5253, (TDD 816/426–5009). Hearing impaired persons who will attend the meting and require the services of a sign language interpreter, should contact the Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, October 20, 1988.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 88–24843 Filed 10–26–88; 8:45 am]

BILLING CODE 6335–01–M

Ohio Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Minnesota Advisory Committee to the Commission will convene at 9:00 a.m. and adjourn at 8:30 p.m., on November 17, 1988, at the Holiday Inn, 2429 South Reynolds Road, Toledo, Ohio. The Committee will hold a community forum on the nature and extent of issues and problems related to race relations in Toledo, Ohio.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Donald G. Prock, or William F. Muldrow, Acting Director of the Central Regional Division, (816) 426–5253, (TDD 816/426–5009). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, October 20, 1988.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 88–24844 Filed 10–26–88; 8:45 am]

BILLING CODE 6335–01–M

Utah Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that the Utah Advisory Committee to the Commission will convene at 7:00 p.m. and adjourn at 9:00 p.m., on November 16, 1988, at the Airport Holdiay Inn, 1659 West North Temple, Salt Lake City, Utah 84116. The purpose of the meeting is to conduct program planning.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee member Shu H. Cheng or Philip Montez, Director of the Western Regional Division (213) 894–3437, (TDD 213/894–0508). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, October 20, 1988.

Melvin L. Jenkins

Acting Staff Director.

[FR Doc. 88–24845 Filed 10–26–88; 8:45 am]

BILLING CODE 6335–01–M

Washington Advisory Committee; Agenda and Notice of Public Forum

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that the Washington Advisory Committee to the Commission to the Commission will convene at 1:00 p.m. and adjourn at 4:00 p.m., on November 16, 1988, at the Aladdin Motor Inn, 900 Capitol Way, Olympia, Washington 98501. The purpose of the meeting is to plan project activities for the new charter period and to discuss civil rights issues affecting the State of Washington.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson, Sharon Bumala or Philip Montez, Director of the Regional Division (213) 894–3437, (TDD 213/894–0508). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, October 20, 1988.

Melvin L. Jenkins

Acting Staff Director.

[FR Doc. 88–24846 Filed 10–26–88; 8:45 am]

BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

International Trade Administration

[C-401-056]

Viscose Rayon Staple Fiber from Sweden; Preliminary Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Department of Commerce.

ACTION: Notice of preliminary results of countervailing duty administrative review.

SUMMARY: The Department of Commerce has conducted an administrative review of the countervailing duty order on viscose rayon staple fiber from Sweden. We preliminarily determine the net subsidy to be 14.93 percent *ad valorem* for the period January 1, 1986 through December 31, 1986. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: October 27, 1988.

FOR FURTHER INFORMATION CONTACT: Cynthia Sewell or Paul McGarr, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-3337.

SUPPLEMENTARY INFORMATION:

Background

On August 31, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 32822) the final results of its last administrative review of the countervailing duty order on viscose rayon staple fiber from Sweden (48 FR 50914, November 4, 1983). On May 28, 1987, the petitioner, the U.S. Rayon Producers Committee, requested in accordance with § 355.10 of the Commerce Regulations an administrative review of the order. We published the initiation on June 19, 1987 (52 FR 23330). The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of Review

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. We will be providing both the appropriate *Tariff Schedules of the United States Annotated* ("TSUSA") item numbers and the appropriate Harmonized System ("HS") item numbers with our product descriptions. 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 Harmonized System 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 offices have reference copies and petitioners may contact the Import Specialist at their local Customs office to consult the schedule.

Imports covered by the review are shipments of Swedish regular viscose rayon staple fiber and high-wet modulus ("modal") viscose rayon staple fiber. Such merchandise is currently classifiable under TSUSA item numbers 309.4320 and 309.4325. These products are currently classifiable under HS item numbers 5504.10.00-2 and 5504.90.00-2.

The review covers the period January 1, 1986 through December 31, 1986 and three programs. The only known Swedish exporter of this merchandise to the United States is Svenska Rayon, AB.

Analysis of Programs

(1) Loans/Grants for Plant Creation

Under three agreements, the Swedish government provided Svenska with interest-free loans for the creation of a modal fiber plant. The agreements provided that the Swedish government would forgive the loans in equal amounts over ten years if Svenska maintained its modal fiber production capacity for ten years. If Svenska eliminated this production capacity prior to the end of the ten-year period, the agreements also provided that the remaining amount of the outstanding principal would fall due immediately.

The first agreement, Project 77, was concluded in 1975, and the Swedish government disbursed the funds between 1975 and 1977. The second agreement, Project 81, was concluded in 1978 and the funds disbursed between 1978 and 1981. In 1979, the Swedish government provided a final interest-free loan to Svenska for pollution control improvements to the modal fiber plant.

Forgiveness of these loans began when the equipment purchased went into operation. Although Svenska had modified its modal fiber plant to produce regular fiber, it maintained the modal fiber production facilities through the latter part of 1985. Accordingly, the Swedish government forgave ten percent of the total disbursements to Svenska under Project 77 in each year from 1978 through 1985. Similarly, the Swedish government forgave ten percent of the total disbursement under Project 81 in each year from 1981 through 1985 and ten percent of the environmental loan in each year from 1980 through 1985.

In our previous reviews of this order, we treated each ten-percent forgiveness as a grant and considered the benefit stream from each grant to be the remaining life of the loan. We treated the unforgiven portions of these loans as contingent liabilities because Svenska's yearly ten-percent forgiveness was contingent upon its maintaining modal fiber production capacity. (*See*, the preliminary results of review on rayon staple fiber from Sweden (51 FR 29145, August 15, 1986).)

In late 1985, however, Svenska permanently discontinued all modal fiber production and closed the modal fiber plant designed and developed for production of such fiber. In 1986, the Swedish Government concluded negotiations with Svenska which resulted in forgiveness of Svenska's remaining indebtedness from the plant creation and pollution control. The effective date for forgiveness was May 28, 1986.

If we had known that the contingency for forgiveness originally imposed by the Swedish government would never actually be enforced (*i.e.*, the Swedish government forgave Svenska's remaining loan balances even though the company ceased to produce modal fiber), we would have from the outset considered these "loans" as outright grants, and applied a declining balance methodology to measure the benefit. That is, we would have allocated the benefits from each grant over the 10-year average useful life of assets in the rayon fiber industry, according to the "Asset Guideline Classes" of the Internal Revenue Service, and assessed countervailing duties accordingly. Since it is now apparent that these loans were in fact grants, we have retrospectively recalculated the benefit streams using the declining balance methodology. We used as discount rates the national average corporate bond rates in Sweden for the years in which each grant was received (obtained from the *Monthly Digest of Swedish Statistics*, a Swedish government publication). We consider those rates to be the best information available because we have no information on Svenska's weighted cost of capital for those years. Because our current and prior methodologies produced different benefit streams, we have adjusted our calculations to

account for benefits previously countervailed to ensure that those benefits will not be countervailed in this or subsequent reviews.

We allocated the benefits attributable to the review period over the value of Svenska's net sales during the review period. On this basis, we preliminarily determine the benefit from this program to be 10.58 percent *ad valorem.*

(2) Elderly Employment Compensation Program

The Swedish government provided a subsidy to certain companies within the textile and clothing industries through a special employment contribution for older workers. This program provided compensation to a company based upon the number of hours worked by employees over 50 years of age. A company participating in the program had to agree not to dismiss or release redundant employees of any age for any reason other than normal attrition. Payments were calculated on the basis of 28 kronor per hour for employees over age 50 who wer involved in production. The payments could not exceed 15 percent of the compnay's total labor costs.

Svenska received its last payment under this program in July 1982. In January 1983, the Swedish government excluded the rayon fiber industry, including Svenska, from this program. Using the declining balance methodology referred to above, we calculated Svenka's benefit by allocating the 1982 payment over ten years, the average useful life of assets in the rayon fiber industry. We used Svenska's 1982 weighted cost of capital as the discount rate.

We allocated the benefit attributable to the review period over the value of Svenska's net sales during the review period. On this basis, we preliminarily determine the benefit from this program to be 0.46 percent *ad valorem.*

(3) Grant for Manpower Reduction and Conditional Loan

The Swedish government concluded an agreement with Svenska in 1980 consisting of two parts: a grant for manpower reduction and a conditional loan to cover operating losses. The grant was intended to compensate the company for maintaining redundant employees longer than collective agreements and employment protection laws required, and for retraining employees to work elsewhere within the KF Industri group (the group of firms, including Svenska, owned directly or indirectly by Kooperativa Forbundet). The grant was paid through the National Labor Market Board in two installments, one in December 1980, and the other in July 1981. Svenska received no new manpower production grants during the period of review.

Using the declining balance methodology, we allocated each grant over ten years, the average useful life of assets in the rayon fiber industry. We used as a discount rate the national average corporate bond rate in Sweden for 1980, the year in which the agreement was reached.

We allocated the benefit attributable to the review period over the value of Svenska's net sales during the review period. On this basis, we preliminarily determine the benefit from this grant to be 0.59 percent *ad valorem.*

For the conditional loan part of the 1980 agreement, the terms (including the length) and conditions depended on the company's profit levels. The conditional loan was disbursed in three installments between 1980 and 1982. Under the original agreement, the Swedish government would forgive portions of the outstanding principal and interest of the loan if Svenska did not make a sufficient profit (as determined by a confidential formula concluded between the Swedish government and Svenska). If Svenska attained the requisite level of profit, it would have to repay a certain portion of the loan, including interest. Svenska did not make a sufficient profit in any year between 1983 and 1985, and the Swedish government forgave the yearly repayment of the loan in 1983, 1984 and 1985. On May 28, 1986, in conjuntion with the forgiveness of the loans/grants for plant creation, the Swedish government forgave the total outstanding balance of this loan.

Because Svenska never made any payments on this loan, which was forgiven in its entirely over four years, we have reconsidered our methodology and are treating each of the three loan installments as grants given in the year of receipt. As with the loans/grants for plant creation program, we have applied the declining balance methodology, allocating benefits from each grant over the 10-year average useful life of assets in the rayon fiber industry, and have adjusted our calculations to account for benefits previously countervailed.

We allocated the benefit attributable to the review period over the value of Svenska's net sales during the review period. On this basis, we preliminarily determined the benefit from the conditional loan to be 3.30 percent *ad valorem.*

Preliminary Results of Review

As a result of our review, we preliminarily determine the net subsidy to be 14.93 percent *ad valorem* for the period January 1, 1986 through December 31, 1986.

The Department intends to instruct the Customs Service to assess countervailing duties of 14.93 percent of the f.o.b. invoice price on all shipments of this merchandise exported on or after January 1, 1986 and on or before December 31, 1986.

Further, the Department intends to instruct the Customs Service to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, of 14.93 percent of the f.o.b. invoice price on all shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. This deposit requirement shall remain in effect until publication of the final results of the next administrative review.

Interested parties may submit written comments on these preliminary results within 30 days of the date of publication of this notice and may request disclosure and/or a hearing within 10 days of the date of publication. Any hearing, if requested, will be held 30 days after the date of publication or the last workday preceding. Any request for an administrative protective order must be made no later than 5 days after the date of publication. The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any such written comments or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.10.

Jan W. Mares,

Assistant Secretary, Import Administration.

Date: October 17, 1988.

[FR Doc. 88-24879 Filed 10-26-88; 8:45 am]

BILLING CODE 3510-DS-M

Short-Supply Review on Certain Carbon Steel Billets; 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 a short-supply determination under Article 8 of the U.S.-EC Arrangement Concerning Trade in Certain Steel Products, the U.S.-Spain Arrangement Concerning Trade in

Certain Steel Products, and the U.S.-Brazil Arrangement Concerning Trade in Certain Steel Products, with respect to certain carbon steel billets suitable for rolling into wire rod.

DATE: Comments must be submitted no later than November 7, 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.-EC Arrangement Concerning Trade in Certain Steel Products, the U.S.-Spain Arrangement Concerning Trade in Certain Steel Products, and the U.S.-Brazil 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 the following types of carbon steel billets, made in basic oxygen furnances and suitable for rolling into wire rod, with a square cross section of 5 1/8 inches on each side and a length of 50 feet:

(1) AISI grade 12L14;

(2) AISI grades 1006, 1022, 1080, and 1541, aluminum killed fine grain;

(3) AISI grades 1006, 1008, 1010, modified fully rimmed;

(4) AISI grade 1069, modified silicon killed coarse grain;

(5) AISI grade 1022, modified silicon killed fine grain; and,

(6) AISI grades 1144 (modified) and 1215 (modified).

Any party interested in commenting on this request should send written comments as soon as possible, and no later than November 7, 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 submission information should clearly so label the business proprietary portion of the submission and also provide a non-proprietary 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.

Jan W. Mares,

Assistant Secretary for Import Administration.

October 21, 1988.

[FR Doc. 88–24878 Filed 10–26–88; 8:45 am]

BILLING CODE 3510–DS–M

Applications for Duty-Free Entry of Scientific Instruments; Pennsylvania State University et al.

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR Part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with subsections 301.5(a) (3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5:00 p.m. in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC.

Docket No.: 88–086R. *Applicant:* The Pennsylvania State University Department of Chemistry, 152 Davey Laboratory, University Park, PA 16802. *Instrument:* Mass Spectrometer, Model M25SE. *Manufacturer:* Kratos Scientific Instruments, United Kingdom. Original notice of this resubmitted application was published in the **Federal Register** of February 13, 1988.

Docket No.: 88–279 and 88–280. *Applicant:* University of Hawaii, Hawaii Institute of Geophysics, 2525 Correa Road, Honolulu, HI 96822. *Instruments:* Automated Wavelength-Dispersive X-Ray Fluorescence Spectrometry System, SRS 303 and Agitating Fusion Furnace with Accessories. *Manufacturers:* Siemens Energy and Automation Inc., West Germany and Sietronics Pty. Ltd., Australia, respectively *Intended Use:* Quantitative geochemical analysis of a wide range of geologic materials including natural rocks and fluids, and possibly synthetic analogues of natural materials. The data obtained will be used to investigate process pertaining to the origin and evolution of volcanic and sedimentary materials, including the composition of sources of magma, sub-volcanic magma chamber processes, volcanic eruptive mechanisms, and sedimentary environments. In addition, the instruments will be used for educational purposes in various geology and geophysics courses. *Applications Received by Commission of Customs:* September 1, 1988.

Docket No.: 88–281. *Applicant:* University of California, Santa Barbara, Department of Chemistry, Santa Barbara, CA 93106. *Instrument:* Stopped-Flow Apparatus, Model SFA–11. *Manufacturer:* Hi Tech, United Kingdom. *Intended Use:* The instrument will be used to mix a solution of the enzyme containing potassium bromide and a suitable substrate to be brominated (i.e., monochlorodimedone) with a solution of hydrogen peroxide. Investigators will vary the concentrations of enzyme, bromide, organic substrate and hydrogen peroxide to determine how the rate of the reaction is affected. *Application Received by Commissioner of Customs:* September 1, 1988.

Docket No.: 88–282. *Applicant:* Vanderbilt University School of Medicine, T–2404 Center North, 21st Avenue at Garland, Nashville, TN 37232. *Instrument:* Automated Image Analysis Microscope System of Chromosome Analysis, Model Cytoscan CS2. *Manufacturer:* Image Recognition Systems, United Kingdom. *Intended Use:* The instrument will be used for research and diagnosis of birth defects due to chromosome anomalies. Another research application will be in-situ hybridization for the localization of genes to chromosomes which requires examination of hundreds of spreads and retrieval of the same spreads after additional treatments. Educational purposes include teaching resident physicians, fellows and researchers who rotate through or visit the cytogenetics laboratory. *Application Received by Commissioner of Customs:* September 1, 1988

Docket No.: 88–283. *Applicant:* Kansas State University, Biology Division, Ackert Hall, Manhattan, KS 66505. *Instrument:* Rapid Kinetics Accessory, Model SFA–11. *Manufacturer:* Hi-Tech Scientific, United Kingdom. *Intended Use:* The instrument will be used to study permeability of liposomes containing channel proteins from mammalian optical lens fiber cell membranes using the fluorescence quenching method. *Application Received by Commissioner of Customs:* September 1, 1988.

Docket No.: 88–284. *Applicant:* Department of the Interior, U.S. Geological Survey, Denver Federal

Center, Box 25046, Mail Stop 964, Denver, CO 80225. *Instrument:* Time-Domain Electromagnetic Prospecting System, Model TEM47. *Manufacturer:* Geonics, Canada. *Intended Use:* The instrument will be used to measure the electrical conductivity of the earth, particularly to determine the properties of geothermal systems, ground-water aquifers, and mineral deposits for research purposes. The results will be compared with other electromagnetic techniques to determine if the theoretical superiority of the TDEM exists in practice. *Application Received by Commissioner of Customs:* September 1, 1988.

Docket No.: 88–285. *Applicant:* The Johns Hopkins University, Charles and 34th Streets, Baltimore, MD 21218. *Instrument:* Stopped-Flow Accessory for Fluorimeter, Model SFA–11. *Manufacturer:* Hi-Tech Scientific Ltd., United Kingdom. *Intended Use:* The instrument will be used to study the properties of contractile proteins which will include the assembly of filaments, the association of proteins with each other and with membranes. The unit will be used to measure the time course of these reactions using fluorescence or light scattering signals recorded in an existing spectrofluorimeter. *Application Received by Commissioner of Customs:* September 2, 1988.

Docket No.: 88–286. *Applicant:* Regents of the University of California, Material Management Department, Riverside, CA 92521. *Instrument:* Particle Calorimeter—Limited Streamer Tracking Chamber System. *Manufacturer:* CERN, Switzerland. *Intended Use:* The instrument will be used for educational purposes in the course Physics 140L "Advanced Physics Laboratory" in which students will be introduced to the methods, instruments, processes, data acquisition and analysis techniques of modern physics experiments. *Application Received by Commissioner of Customs:* September 2, 1988.

Docket No.: 88–287. APPLICANT: City University of New York Medical School, 138th Street and Convent Avenue, New York, NY 10031. *Instrument:* Electron Microscope, Model JEM 100CX. *Manufacturer:* Joel Ltd., Japan. *Intended Use:* The instrument will be used for the following research purposes:

1. Structural analysis of thin sections to determine high resolution subcellular features of tissues and cells under normal and experimental conditions.
2. Molecular conformational analysis and nucleic acid hybridization using various tilting angles.
3. Determination at high resolution of the localization of cellular antigens or antigenic domains in molecules.
4. Study of tissue and cellular metabolic and transport functions under normal and experimental conditions.
5. Study of carbon replicas of freeze-etched specimens to localize intramembranous protein domains in different cell regions under normal and experimental conditions.
6. Optical diffraction analysis of periodically repeating biological structures.
7. Quantification of structural parameters of tissues and cell using stereological techniques.

Application Received by Commissioner of Customs: September 6, 1988.

Docket No.: 88–288. *Applicant:* California State University, Fullerton, Fullerton Foundation, 800 N. State College Blvd., Fullerton, CA 92634. *Instrument:* Electron Microscope, Model H–7000–3. *Manufacturer:* Hitachi Ltd., Japan. *Intended Use:* The instrument will be used to study the ultrastructural features of samples of biological origin. Cellular fine structure will be studied in tissue samples isolated from a variety of living organisms. In addition, macromolecules and/or macromolecular complexes will be studied in negatively-stained or rotary metal-shadowed preparations. The instrument will also be used for educational purposes in the course BIOL 415: Introduction to Electron Microscopy. This course exposes undergraduate and graduate students to the basic theories and practices of electron microscopy with an emphasis on their application to the study of biological phenomena. *Application Received by Commissioner of Customs:* September 6, 1988.

Docket No.: 88–289. *Applicant:* Purdue University, West Lafayette, IN 47907. *Instrument:* Electron Microprobe, Model CAMEBAX SX50. *Manufacturer:* Cameca Instruments Inc., France. *Intended Use:* The instrument will be used to investigate solid state materials predominantly those occurring as minerals, metals, ceramics and new compounds prepared for possible industrial and engineering purposes. The experiments to be conducted are essentially the measurement of x-ray intensities emitted by samples when bombarded by a focussed beam of electrons. In addition, the instrument will be used for educational purposes in various geoscience courses which will provide firm introduction to the theory and operation of an electron microprobe. *Application Received by Commissioner of Customs:* September 7, 1988.

Docket No.: 88–290. *Applicant:* University of Denver, Denver, CO 80208. *Instrument:* Electron Microscope, Model H–7000. *Manufacturer:* Hitachi Scientific, Japan. *Intended Use:* Study of macromolecules and macromolecular complexes such as the mitotic apparatus, viruses, surface antigens of cancer cells, cell surface properties of bacteria and brain cell macromolecules. *Application Received by Commissioner of Customs:* September 8, 1988.

Docket No.: 88–291. *Applicant:* Cornell University, Baker Laboratory of Chemistry, Ithaca, NY 14845–1301. *Intended Use:* Preparative Quench and Stopped-Flow Spectrofluorimeter, Model PQ/SF–53. *Manufacturer:* Hi-Tech Scientific, United Kingdom. *Instrument:* Studies of the refolding and unfolding of proteins in an effort to determine the effects that genetically engineered mutations have on the fast folding/unfolding phases of various proteins. The proteins studies are Bovine Pancreatic Ribonuclease A (RNase A), Hen Egg-White Lysozyme, and Marine Epidermal Growth factor (M–EGF). *Application Received by Commissioner of Customs:* September 8, 1988.

Docket No.: 88–292. *Applicant:* University of California, Purchasing Department, 1156 High Street, Santa Cruz, CA 95064. *Instrument:* Mass Spectrometer, Model VG Sector. *Manufacturer:* VG Isotopes, United Kingdom. *Intended Use:* The instrument will be used to measure the isotopic compositions, mainly in the Sm-Nd, Rb-Sr, and U–TH–Pb isotopic systems of rocks, sediments, and seawater. This instrument will also be used for education purposes in earth sciences and chemistry courses in which students will gain experience in applying isotopic data to the subject matter of the course (e.g., formation of igneous and metamorphic rocks, age dating of rock samples). *Application Received by Commissioner of Customs:* September 8, 1988.

Docket No.: 88–293. *Applicant:* State of New Jersey, Department of Environmental Protection, Division of Water Resources, NJ Geological Survey, CN–029, Trenton, NJ 08625. *Instrument:* Transient Electromagnetic Data Acquisition System, Model EM 37–3P. *Manufacturer:* Geonics Ltd., Canada. *Intended Use:* The instrument will be used in surface geophysical investigations related to geologics mapping for hydrogeologic evaluation and ground-water pollution delineation. The experiments will consist of surface geophysical measurements at selected sites to provide enough information for geologic interpretation. *Application*

Received by Commissioner of Customs: September 8, 1988.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 88-24876 Filed 10-26-88; 8:45 am]

BILLING CODE 3510-DS-M

Applications for Duty-Free Entry of Scientific Instruments; University of Dallas et al.

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89-651; 80 Stat. 897; 15 CFR Part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with subsections 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5:00 p.m. in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC.

Docket No.: 88-215R. *Applicant:* University of Dallas, 1845 E. Northgate Drive, Irving, TX 75062-4799. *Instrument:* Rapid Kinetics accessory, SFA-11. *Manufacturer:* Hi-Tech Scientific, Ltd., United Kingdom. Original notice of this resubmitted application was published in the **Federal Register** of June 17, 1988.

Docket No.: 88-294. *Applicant:* Northeastern University, 360 Huntington Avenue, Boston, MA 02115. *Instrument:* Low Temperature Kinetic Spectrofluorimeter, SF41. *Manufacturer:* Hi-Tech Scientific, United Kingdom. *Intended Use:* The instrument will be used to conduct low temperature kinetic measurements of the change of fluorescent signal in reactions 1 and 2. Studies of the very air-sensitive reactants $L_2Cu_2X_2$ (eq 1) and $M_4Ci_4X_4$ (eq 2) at low temperatures in an aprotic solvent to determine the manner in which the reactants of eqs 1 and 2 interact to give the products. *Application Received by Commissioner of Customs:* September 12, 1988.

Docket No.: 88-295. *Applicant:* Norfolk State University, 2401 Corprew Avenue, Norfolk, VA 23504. *Instrument:* Temperature Jump Spectrophotometer, *Manufacturer:* Hi-Tech Scientific, United Kingdom. *Intended Use:* The instrument will be used to give students experimental experience in methods of kinetics and spectroscopy in the physical chemistry laboratory. *Application Received by Commissioner of Customs:* September 12, 1988.

Docket No.: 88-296. *Applicant:* U.S. Department of the Interior, U.S. Geological Survey, 521 W. Seneca, Ithaca, NY 14850. *Instrument:* Drill-Hole Pipe Assembly and Data Acquisition Monitors. *Manufacturer:* Westbay Instruments Ltd., Canada. *Intended Use:* The instrument will be used in an hydrogeologic study to determine ground-water flow and ground-water quality characteristics of upper bedrock stratigraphy (200-500 ft.) in the Niagara Falls area. The overall objective of this study is to develop a three-dimensional mathematical ground-water flow model and a geochemical model of the upper bedrock stratigraphy of the Niagara Falls area. *Application Received by Commissioner of Customs:* September 12, 1988.

Docket No.: 88-297. *Applicant:* Methodist Medical Center, 301 W. Colorado Boulevard, Dallas, TX 75208. *Instrument:* Electron Microscope, Model EM 10CA, Carl Zeiss, West Germany. *Intended Use:* The instrument is intended to be used to provide trainee pathologists with both a scientific basis for the study of abnormal morphology (structural changes in disease) as well as experience in the diagnostic applications of electron microscopy. *Application Received by Commissioner of Customs:* September 12, 1988.

Docket No.: 88-298. *Applicant:* Rhodes College, 2000 North Parkway, Memphis, TN 38112-1690. *Instrument:* Electron Microscope, Model EM109T/TFP with Accessories. *Manufacturer:* Carl Zeiss, West Germany. *Intended Use:* The instrument will be used to study fungal cells and isolated subcellular components in order to better understand the pathway of secretion in fungal cells and the role of coated vesicles in that process. *Application Received by Commissioner of Customs:* September 14, 1988.

Docket No.: 88-299. *Applicant:* National Institutes of Standards and Technology, Contracts Office, Building 301, Gaithersburg, MD 20899. *Instrument:* Electron Back-Scatter Pattern Imaging and Analysis System EBSP 8400. *Manufacturer:* Custom Camera Design, United Kingdom. *Intended Use:* The instrument will be used for studies of polycrystalline superconducting ceramics; structural single-phase ceramics such as alumina, silicon carbide and silicon nitride; whisker, fibre and particulate reinforced ceramic-ceramic and ceramic-metal composites; and model ceramic systems, e.g., MgO doped with CoO. Investigations will be conducted to relate the crystallography, state of strain and microstructure of various ceramic and metal materials to their composition, processing and properties. *Application Received by Commissioner of Customs:* September 14, 1988.

Docket No.: 88-300. *Applicant:* University of California, Lawrence Livermore National Laboratory, P.O. Box 5012, L-650, Livermore, CA 94550. *Instrument:* Streak Camera, IMACON 500. *Manufacture:* Hadland Photonics Ltd., United Kingdom. *Intended Use:* The instrument will be used for studies of techniques for single shot analog recording of very high bandwidth signals at bandwidths heretofore not achieved. *Application Received by Commissioner of Customs:* September 14, 1988.

Docket No.: 88-301. *Applicant:* University of California, Lawrence Livermore National Laboratory, P.O. Box 5012, L-650, Livermore, CA 94550. *Instrument:* 2D CCD Image Analyzer System, Model 2D/STD. *Manufacturer:* Hadland Photonics Ltd., United Kingdom. *Intended Use:* The instrument will be used for studies of the duration of the pulses generated by laser oscillators, the duration of the pulses delivered by laser amplifier, the synchronization of laser beams at the plasma or x-ray source, and the temporal dynamics of chirped and compressed laser beams. *Application Received by Commissioner of Customs:* September 14, 1988.

Docket No.: 88-302. *Applicant:* National Bureau of Standards, Gaithersburg, MD 20899. *Instrument:* Two Monochromator Bending Devices. *Manufacturer:* Grenoble Modular Instruments, France. *Intended Use:* The instruments will be used for studies of condensed matter (e.g. high T_c superconductors, polymers, hydrogen adsorbing metals, molecular crystals, intercalated graphite, magnetic materials, materials exhibiting orientational and translational disorder, etc.). *Application Received by Commissioner of Customs:* September 14, 1988.

Docket No.: 88-303. *Applicant:* Armed Forces Radiobiology Research Instrument, NMC-NCR, Building 42, Bethesda, MD 20814-5145. *Instrument:* Electron Microscope, Model H-7000-2T. *Manufacturer:* Hitachi Ltd., Japan. *Intended Use:* The instrument will be used for studies of a variety of animal tissues (which will include intestine and lung) and isolated and purified cells (macrophages, neutrophils, mast cells and hemopoietic stem cells). The experiments will involve the investigation of the effects of radiation on these specimens. *Application*

received by Commissioner of Customs: September 16, 1988.

Docket No.: 88–304. *Applicant:* University of California, Berkeley, Purchasing Department, 2405 Bowditch Street, Berkeley, CA 94720. *Insrument:* Electron Microscope, Model JEM 1200EX/SEG/DP/DP. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* The instrument will be used to study the ultrastructure of animal and plant material obtained from diatoms, mammalian mammary epithelial cells, vertebrate retinas, rat hepatoma cell lines, frog oocytes, sea urchin embryos, murine lymphomas, a variety of tissues from fruit flies and grasshoppers, mammalian gastrointestinal epithelia, freshwater amoebae, leech embyros and mammalian brain. Various experiments will be conducted to elucidate the cellular and molecular mechanisms of embryonic development and the functioning of a number of normal and pathological adult tissues. In addition, the instrument will be used in a one-on-one basis in the training of honors students, graduate students and postdoctoral fellows. *Application Received by Commissioner of Customs:* September 19, 1988.

Docket No.: 88–305. *Applicant:* Oregon State University, Chemistry Department, Corvallis, OR 97331–4003. *Instrument:* Particle Electrophoresis, Mark II. *Manufacturer:* Rank Bros., United Kingdom. *Intended Use:* The instrument will be used for studies of the electrophoretic mobility of clays and oxides with adsorbed surfactants. *Application Received by Commissioner of Customs:* September 19, 1988.

Docket No.: 88–306. *Applicant:* Texas A&M University, Aerospace Engineering Department, Computer Science and Aerospace Engineering Building, College Station, TX 97843. *Instrument:* Jet Engine Test Set, Model GT117–2. *Manufacturer:* Gilbert Gilkes & Gordon Ltd., United Kingdom. *Intended Use:* The instrument will be used for the training of students in various aerospace courses. *Application Received by Commission of Customs:* September 22, 1988.

Docket No.: 88–307. *Applicant:* The Ohio State University, Department of Anatomy, 333 West 10th Avenue, Columbus, OH 43210. *Instrument:* Electron Microscope, Model CM12. *Manufacturer:* N.V. Philips, The Netherlands. *Intended Use:* The instrument will be used for the following varied research projects:

(1) Natural Aspects of Craniofacial Morphogenesis
(2) Spinal Cord Plasticity and Regeneration
(3) Isolation and Establishment of Gastrin Producing Cell Lines
(4) Enkephalin Fiber Growth and Specificity in the Developing Cerebellum
(5) Molecular Mechanisms of Craniofacial Epithelial Differentiation
(6) Immunocytochemical Studies of Developing Synaptic Proteins

In addition, the instrument will be used for training students and faculty in needed electron microscopy skills. *Application Received by Commissioner of Customs:* September 22, 1988.

Docket No.: 88–308. *Applicant:* Rutgers University, Procurement and Contracting, P.O. Box 6999, Piscataway, NJ 08855–6999. *Instrument:* Spectrascan Accessory to Stopped-Flow Instrument, Model MG–3000. *Manufacturer:* Hi-tech, United Kingdom. *Intended Use:* Examination of the kinetic properties of intermediates in chemical and biochemical reactions generated within msec's to determine the fundamental chemical mechanism of enzyme catalyzed reactions. *Application Received by Commissioner of Customs:* September 22, 1988.

Docket No.: 88–309. *Applicant:* Scripps Clinic and Research Foundation, 10666 North Torrey Pines Road, La Jolla, CA 92037. *Instrument:* NMR Spectrometer, Model AM–600 with Accessories. *Manufacturer:* Bruker Analytische Messtechnik, GmbH, West Germany. *Intended Use:* The instrument will be used to measure high resolution nuclear magnetic resonance spectra of a wide range of biological materials including, but not limited to, peptides, proteins and nucleic acids. The wide range of research objectives will include the following:

1. Investigation of the solution conformation and molecular motions of hemoglobins to provide an understanding of the mechanisms by which oxygen binding by hemoglobins is controlled.
2. Investigation of the conformation of antigenic peptides in solution and bound to monoclonal antibodies to provide an understanding of the processes of antigenic recognition.
3. Studies of the solution conformations of electron transfer proteins and of the interactions between them to improve an understanding of the mechanisms and pathways of biological electron transfer processes.
4. Investigation of the conformation of proteins and peptide fragments of proteins to provide an understanding of the nucleation events in protein folding.
5. Studies of the solution conformations of anaphylatoxins and viral antigens with a view to elucidation of their biological mechanisms.
6. Studies of the structure of DNA oligomers and DNA-drug complexes to gain some understanding of the effects of drugs on DNA molecules.
7. Development of NMR methods for the determination of the conformation and dynamics of biomolecules.

Application Received by Commissioner of Customs: September 29, 1988.

Docket No.: 88–310. *Applicant:* Queens Hospital Center, 82–68 164th Street, Jamaica, NY 11432. *Instrument:* Electron Microscope, Model EM 109. *Manufacturer:* Carl Zeiss, West Germany. *Intended Use:* The instrument will be used in determining the diagnosis of pathologic tissues. *Application Received by Commissioner of Customs:* September 29, 1988.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 88–24877 Filed 10–26–88; 8:45 am]

BILLING CODE 3510-DS-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Amendment of Import Levels for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Haiti

October 24, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing limits.

EFFECTIVE DATE: October 24, 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: Naomi Freeman, 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. For information on embargoes and quota re-openings, call (202) 377–3715.

SUPPLEMENTARY INFORMATION: The Governments of the United States and Haiti agreed to increase the current designated consultation levels for Categories 340/640 and 350.

A description of the textile and apparel 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 December 16, 1987). Also see 52 FR 48854, published on December 28, 1987.

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 bilateral 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

October 24, 1988.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive of December 21, 1987, concerning imports of certain cotton and man-made fiber textile products, produced or manufactured in Haiti and exported during the twelve-month period which began on January 1, 1988 and extends through December 31, 1988.

Effective on October 24, 1988, the directive of December 21, 1987 is hereby amended to increase the levels for cotton and man-made fiber textile products in the following categories[1]:

Category	Amended 12-mo. level
340/640	320,000 dozen.
350	37,000 dozen.

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. 88-24830 Filed 10-26-88; 8:45 am]

BILLING CODE 3510-DR-M

Negotiated Settlement on an Import Limit for Certain Cotton Textile Products Produced or Manufactured in India

October 24, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing a limit.

EFFECTIVE DATE: October 31, 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 this limit, 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: During consultations held May 6 and 7, 1988 between the Governments of the United States and India, agreement was reached to amend further the current Bilateral Textile Agreement.

A copy of the bilateral agreement, as amended, is available from the Textile Division, Economic Bureau, U.S. Department of State, (202) 647-1998.

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, and 53 FR 9961, published on March 28, 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 bilateral 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

October 24, 1988.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel the directive of December 30, 1987 issued to you by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of cotton, wool, 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 October 31, 1988, you are directed to count imports for consumption and withdrawals from warehouse for consumption of cotton textile products in Category 314, produced or manufactured in India and exported during the period January 1, 1988 through June 30, 1988.

The directive of December 30, 1987 is amended further to move Category 314 from Group II to Group I. All charges in Group II for Category 314 made on or after January 1, 1988 shall be removed from Group II.

Further, you are directed to establish a limit of 2,500,000 square yards [1] for Category 314 in Group I for the six-month period which began on July 1, 1988 and extends through December 31, 1988. Import charges will be made as data becomes available.

Textile products in Category 314 which have been exported to the United States prior to July 1, 1988 shall not be subject to the limit established in this directive. Further, you are directed to continue counting imports for consumption and withdrawals from warehouse for consumption of cotton textile products in Category 314, produced or manufactured in India and exported from January 1, 1987.

Textile products in Category 314 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1)(A) prior to the effective date of this directive shall not be denied entry under this directive.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that 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. 88-24831 Filed 10-26-88; 8:45 am]

BILLING CODE 3510-DR-M

Negotiated Settlement on Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in India

October 24, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending and establishing limits.

EFFECTIVE DATE: October 31, 1988.

AUTHORITY: Executive Order 11651 of March 3, 1972, as amended; section 204

[1] The limits have not been adjusted to reflect any imports exported after December 31, 1987.

[1] The limit has not been adjusted to account for any imports exported after June 30, 1988.

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: During consultations held May 6 and 7, 1988 between the Governments of the United States and India, agreement was reached to amend further the current Bilateral Textile Agreement.

A copy of the bilateral agreement, as amended, is available from the Textiles Division, Economic Bureau, U.S. Department of State, (202) 647–1998.

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, and 53 FR 9961, published on March 28, 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 bilateral 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

October 24, 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 into the United States 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 twelve-month period which began on January 1, 1988 and extends through December 31, 1988.

Effective on October 31, 1988, the directive of December 30, 1987 is amended to establish limits for cotton and man-made fiber textile products in Categories 219 and 300/301 and to adjust the Group II limit. The December 30, 1987 directive is amended further to move Category 219 from Group II to Group I. All import charges in Category 219 made on or after January 1, 1988 shall be charged to Category 219 in Group I and deducted from Group II. Categories 300/301 remain subject to the Group II limit.

Category	12-mo restraint limit [1] (Jan. 1, 1988 Dec. 31, 1988)
Level in Group I:	
219	40,000,000 square yards.
Group II:	
200, 201, 220–229, 239, 300/301, 317, 326, 330–334, 345, 349–352, 359–362, 369–S [2] 369–O [3] 600–607, 611–635, 637–652, 659, 665pt.[4], 666–670 and 831–859, as a group.	126,281,752 square yards equivalent.
Sublevel in Group II:	
300/301	6,086,957 pounds.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1987.
[2] In Category 369–S, only TSUSA number 366.2840.
[3] In Category 369–O, all TSUSA numbers except 360.2000, 360.7600, 361.5420 and 366.2840.
[4] In Category 665pt., all TSUSA numbers except 360.7800 and 361.5426.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for comsupmtion into the Commonwealth of Puerto Rico.

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. 88–24832 Filed 10–26–88; 8:45 am]

BILLING CODE 3510–DR–M

Implementation of 1989 Textile Import Controls and Visa Arrangements Based on the Harmonized System

October 24, 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).

FOR FURTHER INFORMATION CONTACT: Martin J. Walsh, International Commodity Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–3400.

SUPPLEMENTARY INFORMATION: On January 1, 1989 the United States will implement the Harmonized Tariff Schedule (HTS).

Interested parties should be advised that:

1. All textile shipments subject to U.S. import quotas which are exported in 1988 and which arrive in the United States on and after January 1, 1989, will be charged to the appropriate unfilled 1988 quota limit.

2. For countries with a correct category and correct quantity visa system, all goods exported prior to January 1, 1989, should be covered by a visa showing the correct 1988 category number and unit of measurement. Entry will not be denied to merchandise which is properly visaed and exported in 1988 but which arrives in the United States in 1989. If the applicable 1988 quota is filled, this merchandise will be charged to the applicable, HTS based, 1989 quota.

3. All goods subject to the correct category visa requirements, exported on and after January 1, 1989 must be covered by a visa showing the correct 1989 category number and unit of measure. The 1989 units of measure will be square meters for categories which are currently measured in square yards and square feet. Categories currently measured in pounds will be measured in kilograms. Attached is a list of the 1989 categories with the corresponding units of measure.

The coverage of certain categories will change under the HTS. These changes include:

(a) Playsuits, sunsuits, etc. Current Categories 337 and 637 will be merged and redesignated as Category 237.

(b) Babies' garments and clothing accessories in HTS headings 6111, 6209 and 6505 (articles for young children of a body height not exceeding 86 centimeters) will be in Categories 239 (cotton or man-made fiber), 439 (wool) and 839 (silk blends or non-cotton vegetable fibers).

(c) Category 611 will cover woven fabrics containing 85 percent or more by weight of artificial staple fibers.

(d) Suits in Categories 443, 444, 643, 644, 843 and 844 will be limited to the suits defined in HTS Chapter 61, Note 3(a), and Chapter 62, Note 3(a).

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

U.S. Textile And Apparel Category System, 1989

Categories numbered in the:

200 series are of cotton and/or man-made fiber
300 series are of cotton
400 series are of wool
600 series are of man-made fiber
800 series are of silk blends or non-cotton vegetable fibers

		Unit
Yarn:		
200	Yarns put up for retail sales, and sewing thread.	kg.
201	Specialty yarns	kg.
300	Carded cotton yarn	kg.
301	Combed cotton yarn	kg.
400	Wool yarn	kg.
600	Textured filament yarn	kg.
603	Yarn containing 85% or more by weight artificial staple fiber.	kg.
604	Yarn containing 85% or more by weight synthetic staple fiber.	kg.
606	Non-textured filament yarn	kg.
607	Other staple fiber yarn	kg.
800	Silk blends or non-cotton vegetable fiber yarn.	kg.
Fabric:		
218	Of yarns of different color	m2.
219	Duck	m2.
220	Fabic of special weave	m2.
222	Knit fabric	kg.
223	Non-woven fabric	kg.
224	Pile & tufted fabric	m2.
225	Blue denim	m2.
226	Cheesecloth, batistes, lawns, voile.	m2.
227	Oxford cloth	m2.
229	Special purpose fabric	kg.
313	Sheeting	m2.
314	Poplin & broadcloth	m2.
315	Printcloth	m2.
317	Twills	m2.
326	Sateens	m2.
410	Woven fabric	m2.
414	Other wool fabric	kg.
611	Woven fabric containing 85% or more by weight artificial staple.	m2.
613	Sheeting	m2.
614	Poplin & broadcloth	m2.
615	Printcloth	m2.
617	Twills & sateens	m2.
618	Woven artificial filament fabric.	m2.
619	Polyester filament fabric	m2.
620	Other synthetic filament fabric.	m2.
621	Impression fabric	kg.
622	Glass fiber fabric	m2.
624	MMF fabric, woven, containing more than 15% but less than 36% wool.	m2.
625	Poplin & broadcloth of staple/filament fiber combinations.	m2.
626	Printcloth of staple/filament fiber combination.	m2.
627	Sheeting of staple/filament fiber combinations.	m2.
628	Twills & sateens of staple/filament fiber combinations.	m2.
629	Other fabrics of staple/filament fiber combinations.	m2.
810	Woven fabric, silk blend & non-cotton vegetable fiber.	m2.
Apparel:		
237	Playsuits, sunsuits, etc	doz.
239	Babies' garments and clothing accessories.	kg.
330	Handkerchiefs	doz.
331	Gloves and mittens	dpr.
332	Hosiery	dpr.
333	M&B suit-type coats	doz.
334	Other M&B coats	doz.
335	W&G coats	doz.
336	Dresses	doz.
338	M&B knit shirts	doz.
339	W&G knit shirts & blouses	doz.
340	M&B shirts, not knit	doz.
341	W&G shirts & blouses, not knit.	doz.
342	Skirts	doz.
345	Sweaters	doz.
347	M&B trousers, breeches & shorts.	doz.
348	W&G trousers, breeches & shorts.	doz.
349	Brassieres & other body supporting garments.	doz.
350	Robes, dressing gowns, etc.	doz.
351	Nightwear and pajamas	doz.
352	Underwear	doz.
353	M&B down-filled coats	doz.
354	W&G down-filled coats	doz.
359	Other cotton apparel	kg.
431	Gloves and mittens	dpr.
432	Hosiery	dpr.
433	M&B suit-type coats	doz.
434	Other M&B coats	doz.
435	W&G coats	doz.
436	Dresses	doz.
438	Knit shirts & blouses	doz.
439	Babies' garments and clothing accessories.	kg.
440	Shirts & blouses, not knit	doz.
442	Skirts	doz.
443	M&B suits	no.
444	W&G suits	no.
445	M&B sweaters	doz.
446	W&G sweaters	doz.
447	M&B trousers, breeches & shorts.	doz.
448	W&G trousers, breeches & shorts.	doz.
459	Other wool apparel	kg.
630	Handkerchiefs	doz.
631	Gloves and mittens	dpr.
632	Hosiery	dpr.
633	M&B suit-type coats	doz.
634	Other M&B coats	doz.
635	W&G coats	doz.
636	Dresses	doz.
638	M&B knit shirts	doz.
639	W&G knit shirts & blouses	doz.
640	M&B shirts, non knit	doz.
641	W&G shirts & blouses, not knit.	doz.
642	Skirts	doz.
643	M&B suits	no.
644	W&G suits	no.
645	M&B sweaters	doz.
646	W&G sweaters	doz.
647	M&B trousers, breeches & shorts.	doz.
648	W&G trousers, breeches & shorts.	doz.
649	Brassieres & other body supporting garments.	doz.
650	Robes, dressing gowns, etc.	doz.
651	Nightwear and pajamas	doz.
652	Underwear	doz.
653	M&B down-filled coats	doz.
654	W&G down-filled coats	doz.
659	Other man-made fiber apparel.	kg.
831	Gloves and mittens	dpr.
832	Hosiery	dpr.
833	M&B suit-type coats	doz.
834	Other M&B coats	doz.
835	W&G coats	doz.
836	Dresses	doz.
838	Knit shirts & blouses	doz.
839	Babies' garments and clothing accessories.	kg.
840	Shirts & blouses, not knit	doz.
842	Skirts	doz.
843	M&B suits	no.
844	W&G suits	no.
845	Sweaters of non-cotton vegetable fibers.	doz.
846	Sweaters, of silk blends	doz.
847	Trousers, breeches & shorts.	doz.
850	Robes, dressing gowns, etc.	doz.
851	Nightwear and pajamas	doz.
852	Underwear	doz.
858	Neckwear	kg.
859	Other apparel	kg.
Made-Up And Miscellaneous Textiles		
360	Pillowcases	no.
361	Sheets	no.
362	Bedspreads and quilts	no.
363	Terry and other pile towels	no.
369	Other cotton manufactures	kg.
464	Blankets	kg.
465	Floor coverings	m2.
469	Other wool manufactures	kg.
665	Floor coverings	m2.
666	Other man-made fiber furnishings.	kg.
669	Other man-made fiber manufactures.	kg.
670	Flat goods, handbags, and luggage.	kg.
863	Towels	no.
870	Luggage	kg.
871	Flatgoods and handbags	kg.
899	Other silk & veg blend manufactures.	kg.

[FR Doc. 88-24834 Filed 10-26-88; 8:45 am]
BILLING CODE 3510-DR-M

Announcement of Request for Bilateral Textile Consultations With the Government of Turkey

October 24, 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: Janet Heinzen, 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 September 30, 1988, the United States Government requested the Government of Turkey to enter into consultations concerning exports to the United States of cotton and man-made fiber dresses in Categories 336/636, produced or manufactured in Turkey.

The purpose of this notice is to advise the public that, if no solution is agreed upon in consultations with Turkey, 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 dresses in Categories 336/636, produced or manufactured in Turkey and exported during the twelve-month period which began on September 30, 1988 and extends through September 29, 1989, at a leval of 109,998 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 336/636 or to comment on domestic production or availability of products included in the category, is invited to submit 10 copies of such comments or information 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 Categories 336/636. Should such a solution be reached in consultations with the Government of Turkey, further notice will be published in the **Federal Register.**

A description of the textile and apparel 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.

Turkey—Market Statement

Cotton and Man-Made Fiber Dresses (Category 336/636)

September 1988.

Summary and Conclusions

U.S. imports of cotton and man-made fiber dresses (Category 336/636) from Turkey reached 112,172 dozen during the year ending July 1988, 84 percent above the 61,052 dozen imported a year earlier. Cotton and man-made fiber dress imports from Turkey were 71,702 dozen in 1987 and 59,526 dozen in 1986. During the first seven months of 1988, imports of cotton and man-made fiber dresses (Category 336/636) from Turkey reached 91,955 dozen, a 79 percent increase above the 51,485 dozen imported during the same period of 1987.

The U.S. market for cotton and man-made fiber dresses (Category 336/636) has been disrupted by imports. The sharp and substantial increase in imports from Turkey is contributing to this disruption.

U.S. Production and Market Share

U.S. production of cotton and man-made fiber dresses (Category 336/636) has been on the decline, falling from 19,843 thousand dozen in 1982 to 15,711 thousand dozen in 1987, a decline of 21 percent. The domestic manufacturers' share of the market fell from 91 percent in 1982 to 75 percent in 1987, a drop of 16 percentage points.

U.S. Imports and Import Penetration

U.S. imports of cotton and man-made fiber dresses (Category 336/636) have increased steadily since 1982, increasing from 1,933 thousand dozen in 1982 to 5,224 thousand dozen in 1987, an average annual rate of 22 percent. During the first seven months of 1988, imports of cotton and man-made fiber dresses (Category 336/636) reached 3,666 thousand dozen, 5 percent above the level imported during the same period of 1987. The ratio of imports to domestic production increased over three times, rising from 10 percent in 1982 to 33 percent in 1987.

Duty-Paid Value and U.S. Producers' Price

Approximately 77 percent of Category 336/636 imports from Turkey during the first seven months of 1988 entered under TSUSA numbers 384.3210—women's cotton knit dresses, not ornamented; 384.4925—women's, girls' and infants' cotton woven dresses, other than those of corduroy, velveteen and those with two or more colors in the warp and/or filling, not ornamented; and 384.9425—women's man-made fiber woven dresses, other than those with two or more colors in the warp and/or the filling, not ornamented. These dresses entered the U.S. at landed duty-paid values below U.S. producers' prices for comparable dresses.

[FR Doc. 88-24833 Filed 10-26-88; 8:45 am]
BILLING CODE 3510-DR-M

COMMODITY FUTURES TRADING COMMISSION

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice information collection.

SUMMARY: The Commodity Futures Trading Commission has submitted information collection 3038-0016, Compliance with Requirement for Designation as a Contract Market, to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. The information collected pursuant to this rule provides a basis for determining that the terms and conditions of a futures contract reflect current commercial practices and that the contract serves an economic purpose.

ADDRESS: Persons wishing to comment on this information collection should contact Gary Waxman, Office of Management and Budget, Room 3228, NEOB, Washington, DC 20502, (202) 395-7340. Copies of the submission are available from Joseph G. Salazar, Agency Clearance Officer, (202) 254-9735.

Title: Compliance with Requirement for Designation as a Contract Market.
Control Number: 3038-0016
Action: Extension.
Respondents: Contract Markets.
Estimated Annual Burden: 620 total hours.

Respondents	Regulation (17 CFR)	Estimated No. of respondents	Annual responses	Est. avg. hours per response
Contract Markets	1.50	1	1	250
	5.2	1	1	250
	5.3	3	1	40

Issued in Washington, DC on October 24, 1988.

Jean A Webb,

Secretary of the Commission.

[FR Doc. 88-24861 Filed 10-26-88; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Wage Rates and Fringe Benefits; OMB Control Number 0701-0102.

Type of Request: Extension.

Average Burden Hours/Minutes Per Response: 1 hour.

Frequency of response: On occasion.

Number of Respondents: 165.

Annual Burden Hours: 165.

Annual Responses: 165.

Needs And Uses: The Service Contract Act requires Air Force contractors to pay wages and fringe benefits that are compatible with those prevailing in the local area where the work is to be performed. Section 4(c) of the Act provides that the parties to the contract may request a hearing to establish prevailing rates when negotiated wages and fringe benefits appear to be substantially at variance with local rates. The Air Force needs the Wage Rates and Fringe Benefits survey to determine prevailing local rates and, when necessary, to support its position during formal hearings.

Affected Public: State or local governments; Businesses or other for-profit; Non-profit institutions; Small businesses or organizations.

Frequency: Continuing.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Dr. Timothy Sprehe.

Written comments and recommendations on the proposed information collection should be sent to Dr. Timothy Sprehe at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

A copy of the information collection proposal may be obtained from, Mr. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302, telephone (202) 746-0933.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

October 24, 1988.

[FR Doc. 88-24893 Filed 10-26-88; 8:45 am]

BILLING CODE 3810-01-M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, And Applicable OMB Control Number: DoD FAR Supplements, Part 46, Quality Assurances and Related Clauses in Part 52.246; No Form; and OMB Control Number 0704-0233.

Type of Request: Extension.

Average Burden Hours/Minutes Per Response: 1.43 hours.

Frequency of Response: 1.

Number of Respondents: 112.

Annual Burden Hours: 14,160.

Annual Responses: 112.

Needs And Uses: Collection requirements related to Quality Assurance matters in the performance of contracts.

Affected Public: Businesses or other for-profit; Non-Profit institutions; and Small Businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ms. Eyvette R. Flynn.

Written comments and recommendations on the proposed information collection should be sent to Ms. Eyvette R. Flynn at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

A copy of the information collection proposal may be obtained from, Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302, telephone (202) 746-0933.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense. October 24, 1988.

[FR Doc. 88-24894 Filed 10-26-88; 8:45 am]

BILLING CODE 3810-01-M

Committees; Establishment, Renewal, Termination, etc.: Defense Language Institute Board of Visitors

ACTION: Renewal of the Defense Language Institute Board of Visitors.

SUMMARY: Under the provisions of Pub. L. 92-463, "Federal Advisory Committee Act," notice is hereby given that the Defense Language Institute Board of Visitors has been determined to be in the public interest and has been renewed.

The Defense Language Institute Board of Visitors provides the Commandant of the Defense Language Institute with advice on matters related to educational philosophy, program effectiveness, instructional methods, research efforts, administration policies, and relationships with other language teaching activities, for the purpose of strengthening and improving the Defense Foreign Language Program. The Board enables the Department of Defense to capitalize on the knowledge and expertise of national level government industrial, and academic leaders to assist in establishing the

Defense Language Institute as a major center for language training research.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

October 24, 1988.

[FR Doc. 88-24892 Filed 10-26-88; 8:45 am]

BILLING CODE 3810-01-M

DEPARTMENT OF ENERGY

Assistant Secretary for International Affairs and Energy Emergencies

Proposed Subsequent Arrangement

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160) notice is hereby given of a proposed "subsequent arrangement" under the Agreement for Cooperation between the Government of the United States of America and the Government of Norway concerning Peaceful Uses of Nuclear Energy, and the Agreement for Cooperation between the Government of the United States of America and the Government of Switzerland concerning Civil Uses of Atomic Energy, as amended.

The subsequent arrangement to be carried out under the above-mentioned agreements involves approval of the following retransfer: RTD/SD(NO)-2, for the transfer of 30,221 kilograms of heavy water from Norway to Switzerland for use at European Organization for Nuclear Research (CERN), Geneva, Switzerland. The heavy water is being returned to Switzerland after upgrading in Norway.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than November 14, 1988.

For the Department of Energy.

Date: October 20, 1988.

David B. Waller,

Assistant Secretary of Energy International Affairs and Energy Emergencies.

[FR Doc. 88-24897 Filed 10-26-88; 8:45 am]

BILLING CODE 6450-01-M

Proposed Subsequent Arrangement

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160) notice is hereby given of a proposed "subsequent arrangement" under the Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Uses of Atomic Energy, as amended, and the Agreement for Cooperation between the Government of the United States of America and the Government of Switzerland concerning Civil Uses of Atomic Energy, as amended.

The subsequent arrangement to be carried out under the above-mentioned agreements involves approval of the following retransfer: RTD/EU(SD)-71, for the retransfer of 11 irradiated plates containing 48 grams of uranium, enriched to 93.75 percent in the isotope uranium-235, for recovery of molybdenum-99 for use in medical applications, from Switzerland to Karlsruhe, the Federal Republic of Germany.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than November 14, 1988.

For the Department of Energy.

Date: October 20, 1988.

David B. Waller,

Assistant Secretary of Energy International Affairs and Energy Emergencies.

[FR Doc. 88-24898 Filed 10-26-88; 8:45 am]

BILLING CODE 6450-01-M

Proposed Subsequent Arrangements

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160) notice is hereby given of proposed "subsequent arrangements" under the Additional Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Uses of Atomic Energy, as amended, and the Agreement for Cooperation between the Government of the United States of America and the Government of Japan concerning Peaceful Uses of Nuclear Energy.

The subsequent arrangements to be carried out under the above-mentioned agreements involve approval of the following retransfers:

RTD/JA(EU)-44, for the transfer of a dummy fuel element and a dummy control element from the Federal Republic of Germany to Japan for hydraulic testing. The elements contain 3.370 kilograms of uranium depleted in the isotope uranium-235. The elements are designed for the JMTR research reactor.

RTD/JA(EU)-45, for the transfer of micro-miniplates from the Federal Republic of Germany to Japan for use in the JMTR research reactor. The miniplates contain 0.126 of uranium enriched to 43.8 percent in the isotope uranium-235, 0.700 grams of uranium enriched to 19.7 percent in the isotope uranium-235, and 90 grams of depleted uranium.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that these subsequent arrangements will not be inimical to the common defense and security.

These subsequent arrangements will take effect no sooner than November 14, 1988.

For the Department of Energy.

Date: October 20, 1988.

David B. Waller,

Assistant Secretary of Energy, International Affairs and Energy Emergencies.

[FR Doc. 88-24899 Filed 10-26-88; 8:45 am]

BILLING CODE 6450-01-M

Proposed Subsequent Arrangement

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160) notice is hereby given of a proposed "subsequent arrangement" under the Additional Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Uses of Atomic Energy, as amended, and the Agreement for Cooperation between the Government of the United States of America and the Government of Japan concerning Peaceful Uses of Nuclear Energy.

The subsequent arrangement to be carried out under the above-mentioned agreements involves approval of the following retransfer: RTD/JA(EU)-46, for the transfer of fuel elements for use in the JRR-3 research reactor from France to Japan. The fuel elements contain 104.739 kilograms of uranium enriched to 19.95 percent in the isotope uranium-235.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than November 14, 1988.

Date: October 20, 1988.

For the Department of Energy.

David B. Waller,

Assistant Secretary of Energy, International Affairs and Energy Emergencies.

[FR Doc. 88-24900 Filed 10-26-88; 8:45 am]

BILLING CODE 6450-01-M

Proposed Subsequent Arrangement

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160) notice is hereby given of a proposed "subsequent arrangement" under the Additional Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Uses of Atomic Energy, as amended.

The subsequent arrangement to be carried out under the above-mentioned agreement involves the approval for the sale of 84.77 grams of natural uranium to Quinta Raddison Ltd. Essex, United Kingdom, for use as standard reference material. Contract Number S-EU-944 has been assigned to this transaction.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than November 14, 1988.

Date: October 20, 1988.

For the Department of Energy.

David B. Waller,

Assistant Secretary of Energy International Affairs and Energy Emergencies.

[FR Doc. 88-24901 Filed 10-26-88; 8:45 am]

BILLING CODE 6450-01-M

[Solicitation No. DE-PS07-89ID12830]

Idaho Operations Office; Workpiece Temperature Analyzer System for Industrial Furnaces; Research and Development

AGENCY: Department of Energy.

ACTION: Solicitation for Financial Assistance, Applications for Research and Development of a Workpiece Temperature Analyzer System for Industrial Furnaces (WPTA).

SUMMARY: The U.S. Department of Energy requests applications for financial assistance for research and development of a workpiece temperature analyzer for industrial furnaces. This announcement is the complete solicitation document and no other document for this work is available. The objective of this research is to increase the energy efficiency of industrial heating processes through the development of advanced measurement systems that measure the temperature of the workpiece itself, not the temperature of the gas cavity in which it is located. Workpiece is herein defined as a solid object, either metallic or ceramic. Examples of applications may include reheating, annealing, sintering, soaking, heat treating, thermal setting, and curing. This analyzer must be a remote (non-contact) system, capable for use in moderate (>1000 F) to high temperature industrial processes in both new and retrofit applications. The temperature profile and surface temperature of the workpiece will be determined either by direct measurement or inferred by calculation from direct measurements. Control of the proposed application using information from the WPTA is not part of this solicitation but would be a natural extension of the solicited work.

The project is to consist of three phases. Phase I is anticipated to consist of development of a preliminary conceptual design(s) and concept evaluation(s) to identify potential, economic, and fuel saving benefits. Phase II is anticipated to consist of sensor system development, laboratory scale test and evaluation, full scale design, and reevaluation of the economic analysis undertaken in Phase I. Phase III is anticipated to involve fabrication, assembly and field testing of a full scale system at an industrial site.

DOE anticipates that this solicitation will result in multiple cooperative agreement awards for Phase I, one of which will likely proceed to later phases. Information gathered during Phase I will form the basis for a decision to proceed or not to proceed to Phases II and III.

The project awarded will be cost-shared by DOE and the Participant with the Participant's cost share increasing as the project proceeds through the various phases. DOE has approximately $450,000 available for all awards made in Phase I. No fee or profit will be paid to the Participant. Negotiation, award, and administration will be in accordance with DOE Financial Assistance Regulations (10 CFR Part 600). The Catalog of Federal Domestic Assistance number for this program is 81.078.

Profit-making entities, individuals, educational institutions, nonprofit institutions and other entities are eligible to submit applications in response to this solicitation. Federal agencies and/or laboratories owned, operated, or under the cognizance of the Federal Government are not eligible for award and should not submit applications. Applications which anticipate participation of such a laboratory by subcontract, use agreement, or other arrangement must include satisfactory evidence of specific authorization from the cognizant Federal agency.

All timely proposals received will be evaluated and point-scored in accordance with the following four criteria: *Criterion 1* is the technical and economic potential of the concept and is divided into two parts. *Criterion 1a* is the technical viability of the proposed technology(s). Factors considered favorable are high feasibility of the technology(s); low development cost and time needed to proceed to a commercial product(s); and high advancement of the technology relative to other systems commercially available or currently under development in terms of the potential for achieving energy savings, product cost reductions, and quality improvements. *Criterion 1b* is the applicability of the concept. Factors to be considered favorable are high potential for improvements in the proposed application(s) when the proposed technology is installed; long survivability in the expected environment; low projected operational and capital cost; low space, utility, manpower and maintenance requirements; high reliability; good likelihood of industrial acceptance; and high potential for national energy savings from commercializing the concept on a national basis. *Criterion 2* is the ability of the proposer to successfully complete all phases of the project. Factors to be considered are the proposer's knowledge of workpiece temperature measurement in general; the proposer's knowledge of the specific proposed technology involved for measuring workpiece temperature; the proposer's knowledge of the proposed industrial application and market factors effecting acceptance of a WPTA by the industry represented by the proposed application(s); the facilities available for building and testing the proposed concept; ability to complete Phases II and III; qualifications of the key individuals and the percentage of their time devoted to the project; background on the proposer's marketing channels for related products lines; and facilities and personnel for production and commercialization. *Criterion 3* is the Statement of Work relative to clarity, completeness, responsiveness, and adequacy to achieve the stated objectives of this solicitation. *Criterion 4* is the project management plan relative to the completeness and adequacy of the

work breakdown structure, the schedule (sequence of project tasks, principal milestones, decision points, and sufficiency of time to complete tasks), individual responsibilities and task assignments of each project participant, estimates of personnel effort for each of the tasks, resource and manpower availability to satisfy task requirements, and project management methods. Proposals are to be prepared for the complete project. A detailed Statement of Work and cost estimate are required for Phase I. More general descriptions and rough estimates are also required for later phases.

The criteria are listed in descending order of importance. Criterion 1 is weighted approximately four tenths the total evaluation criteria value. Criterion 1a is about twice the value of Criterion 1b. Criterion 2 is about three tenths the total value, and Criterion 3 and 4 combined weigh approximately three tenths the total value and are equal. Applications should be responsive to the criteria listed above.

In conducting the evaluation of applications, the Government may utilize assistance and advice from non-Government personnel. Applicants are therefore requested to state on the cover sheet of the application if they do not consent to an evaluation by such non-Government personnel. Applicants are further advised that DOE may be unable to give full consideration to an application submitted without such consent. Information contained in the applications shall be treated in accordance with the policies and procedures set forth in 10 CFR 600.18.

Cost considerations will not be point scored or adjectively rated. Applicants are advised, however, that the evaluated cost may be the basis for selection. In making the selection decision, the apparent advantages of individual applications will be weighed against the probable cost to the Government to determine whether better proposals, excluding cost considerations, are worth the probable cost differences.

DOE reserves the right to reject any and all applications received in response to this solicitation or to select any application as a basis for negotiation. DOE may require applications to be clarified or supplemented to the extent considered necessary either through additional written submissions or oral presentations; however, the award may be made solely on the information contained in the proposal. A description of the applicant's organization should be included in the proposal along with the most recent two years' financial statements. The Government is not liable for any costs incurred in the preparation of an application. Further, cost incurred prior to the signing of a cooperative agreement are not reimbursable.

DATES: The due date for applications is 4:00 p.m., Mountain Daylight Time, on December 16, 1988. Late applications will be handled in accordance with 10 CFR 600.13. Prospective applicants who intend to submit an application in response to this solicitation should notify the contact below of their intent in writing. Questions regarding this solicitation should also be submitted to this contact in writing by November 18, 1988. Questions and answers will be issued in writing by amendment to this solicitation. Copies of all amendments to this solicitation will be sent only to those notifying this office of their intent to submit an application. Selection is expected to be made in February 1989 and award in March 1989.

Contacts: Three copies of each proposal, including the signed original, should be submitted to: U.S. Department of Energy, Attn: Trudy A. Thorne, Contracts Management Division, Idaho Operations Office, 785 DOE Place, Idaho Falls, Idaho 83402.

Questions relating to this solicitation for Financial Assistance Applications may be directed to Trudy A. Thorne, telephone: (208) 526-9519. Issued at Idaho Falls, Idaho on October 14, 1988.

H. Brent Clark,

Director, Contracts Management Division.

[FR Doc. 88-24895 Filed 10-26-88; 8:45 am]

BILLING CODE 6450-01-M

Financial Assistance Award; Intent to Award Grant to Trent J. Parker-Uni-Frac, Inc.

AGENCY: U.S. Department of Energy.

ACTION: Notice of Non-Competitive Financial Assistance Award.

SUMMARY: The Department of Energy announces that pursuant to 10 CFR 600.14, it is making a financial assistance award based on an unsolicited application under Grant Number DE-FG01-89CE15428 to Trent J. Parker-Uni Frac, Inc., for development of his invention the "T-By Tray" which is designed for the Uni-Frac distillation column.

Scope: This grant will aid in providing confirmation of the predicted efficiency of T-By Trays as part of the Uni-Frac distillation column. Hot distillation tests will be performed with hydrocarbons at the University of Texas Separation Research Center. These tests will be followed by detailed design of a pilot system for test and demonstration purposes to be installed at an independent testing laboratory.

The purpose of this project will be to evaluate the effect of certain column and contacting stage designs on the separation efficiency of a distillation column. Distillation is the most widely used method of separating liquid mixtures.

Eligibility: Based on receipt of an unsolicited application, eligibility of this award is being limited to Trent J. Paker—Uni-Frac, Inc., a private corporation with high qualifications in this specialized field of technology. It has been determined that this project has high technical merit, representing an innovative and novel idea which has a strong possibility of allowing for future reductions in the nations energy consumption.

The term of this grant shall be from November 15, 1988 thru May 15, 1990. The estimated cost of this grant is $80,241.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Energy, Office of Procurement Operations, Attn: Phyllis Morgan, MA-453.2, 1000 Independence Avenue, SW., Washington, DC 20585.

Thomas S. Keefe,

Director, Contract Operations Division "B", Office of Procurement Operations.

[FR Doc. 88-24896 Filed 10-26-88; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. TM89-1-34-001, TQ89-1-34-001, TQ89-2-34-002]

Florida Gas Transmission Co.; Proposed Changes in FERC Tariff

October 21, 1988.

Take notice that on October 14, 1988, Florida Gas Transmission Company (FGT), tendered for filing the following tariff sheets:

TM89-1-34-000 and TQ89-1-34-000

Tariff Sheets Proposed Effective October 1, 1988, FERC Gas Tariff, First Revised Volume No. 1
Substitute 32nd Revised Sheet No. 8
FERC Gas Tariff, Original Volume No. 2
Substitute 54th Revised Sheet No. 128

TQ89-2-34-000

Tariff Sheets Proposed Effective November 1, 1988, FERC Gas Tariff, First Revised Volume No. 1
Substitute 33rd Revised Sheet No. 8
FERC Gas Tariff, Original Volume No. 2
Substitute 55th Revised Sheet No. 128

FGT states that the above referenced

tariff sheets are being filed pursuant to the Commission's Letter Order dated September 30, 1988 in Docket Nos. TM89–1–34 and TQ89–1–34.

FGT states that on Aug. 31, 1988, it filed tariff sheets to be effective Oct. 1, 1988 to remove the surcharge adjustment pursuant to the transition rules under § 154.310 of the Commission's regulations, and to reduce FGT's Annual Charge Adjustment (ACA). The filing also requested a waiver of the Commission's regulations to implement a subsequent surcharge to passthrough overcollections for the five month period immediately preceding the June 1, 1988 effective date of Order Nos. 483 and 483–A.

By Commission Letter Order dated September 30, 1988, the request for waiver was denied and the subject tariff sheets were rejected. FGT was directed to file revised tariff sheets to reflect the removal of the existing surcharge and the reduction in the ACA charge. FGT states that the instant tariff sheets have been submitted to comply with the directives of the letter order.

FGT states that the effect of the revisions is an increase of .837¢/therm for Rate Schedules G and I, and an increase of .35¢/Mcf for Rate Schedule T–3, as compared to the rates contained in TF88–8–34 effective September 1, 1988.

FGT states that a copy of its filing has been served on all customers receiving gas under its FERC Gas Tariff, First Revised Volume No. 1, Original Volume No. 2, and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capital Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before October 28, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene.

Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88–24872 Filed 10–26–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP88–240–002]

Panhandle Eastern Pipe Line Co.; Proposed Changes in FERC Gas Tariff

October 21, 1988.

Take notice that on October 19, 1988, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing the following tariff sheets to its FERC Gas Tariff Original Volume No. 1:

First Substitute Original Revised Sheet No. 3–C.7
First Substitute Original Revised Sheet No. 3–C.8
First Substitute Original Revised Sheet No. 3–C.9

Panhandle proposes a September 29, 1988 effective date.

Panhandle states that the proposed tariff sheets are being filed in compliance with the Commission's September 28, 1988 order in the above-captioned proceeding accepting Panhandle's proposed recovery of the take-or-pay charges to be billed to Panhandle by Trunkline Gas Company (Trunkline) pursuant to Trunkline's proposal to recover take-or-pay settlement costs under Order No. 500 in Docket No. RP88–239–000. The September 28 Order required Panhandle to eliminate the CD reduction adjustments to the base year sales volumes for the twelve General Service Customers and to revise the base and deficiency period sales volumes for Kokomo Gas and Fuel Company. Further, Ordering Paragraph (B) required Panhandle to track any modifications to Trunkline's take-or-pay charges. Trunkline is filing contemparaneously herewith a revision to its take-or-pay recovery mechanism in Docket No. RP88–239–000. Panhandle's filing herein satisfies the requirements of the September 28th order.

Panhandle states that copies of the filing were mailed to all of Panhandle's jurisdictional customers and interested state commissions, as well as the parties to the above-captioned proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions or protests should be filed on or before October 31, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88–24873 Filed 10–26–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP88–241–002]

Panhandle Eastern Pipe Line Co.; Proposed Changes in FERC Gas Tariff

October 24, 1988.

Take notice that on October 19, 1988, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing the following tariff sheets to its FERC Gas Tariff Original Volume No. 1:

First Substitute Sixty-Sixth Revised Sheet No. 3–A
First Substitute Forty-Third Revised Sheet No. 3–B
First Substitute Original Revised Sheet No. 3–C.4
First Substitute Original Revised Sheet No. 3–C.5
First Substitute Original Revised Sheet No. 3–C.6

The proposed effective date of these revised sheets is September 29, 1988.

First Substitute Sixty-Seventh Revised Sheet No. 3–A
First Substitute Forty-Fourth Revised Sheet No. 3–B

The proposed effective date of these revised tariff sheets is October 1, 1988.

Panhandle states that the proposed tariff sheets are being filed in compliance with the Commission's September 28, 1988 order in the above-captioned proceeding accepting Panhandle's proposed recovery of take-or-pay settlement costs under Order No. 500 in Docket No. RP88–241–000. The September 28 Order required Panhandle to remove carrying charges which pre-date the September 29, 1988 effective date, to eliminate the CD reduction adjustments to the base period sales volumes for the twelve General Service Customers, to revise the base and deficiency period sales volumes for Kokomo Gas and Fuel Company and to adjust the amounts to be recovered herein to reflect amounts payable to non-affiliates for which written or verbal commitments had been made at the time of the filing. Further, Ordering Paragraph (B) required Panhandle to eliminate any payments to producers which were affiliated with Panhandle at the time take-or-pay settlements were entered into. The revised tariff sheets

filed herewith have been adjusted to reflect the requirements of the September 28th order.

Panhandle states that copies of the filing were not sent to all of Panhandle's jurisdictional customers and interested state commissions, as well as the parties to the above-captioned proceeding and the parties to the Docket No. RP87-103 proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions or protests should be filed on or before October 31, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-24874 Filed 10-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-198-004]

Transwestern Pipeline Co.; Proposed Changes in FERC Gas Tariff

October 21, 1988.

Take notice that Transwestern Pipeline Company (Transwestern) on October 17, 1988, tendered for filing certain tariff sheets to its FERC Gas Tariff, Second Revised Volume No. 1.

Transwestern states the tariff sheets are filed in compliance with the Commission's July 22, 1988 order in Docket No. RP88-198-000, approving, with certain preconditions. Transwestern's June 24, 1988 filing to implement one of the Commission's Order 500 recovery options for take-or-pay buyout and contract reformation costs (Transition Costs). As state in the June 24, 1988 filing, Transwestern elected to: (1) absorb twenty-five percent (25%) of the total Transition Costs, (2) direct bill twenty-five percent (25%) of the total Transition Costs (TCR Fee), and (3) recover the remaining fifty percent (50%) through a Transition Cost Recovery Surcharge (TCR Surcharge).

Transwestern states that under the proposal, it will recover from jurisdictional and non-jurisdictional customers, the TCR Fee through a direct bill due thirty days after the tariff sheets become effective with the option for customers to amortize the TCR Fee over a period up to twelve months with the unpaid balance accumulating interest. The TCR Surcharge will be recovered on total throughput, amortized over five years.

Transwestern proposes to limit the instant filing to the recovery of costs incurred only through September 1, 1988 along with interest from the later of July 24, 1988 or the date of payment by Transwestern.

Transwestern requests that the Federal Energy Regulatory Commission grant any and all waivers of its rules, regulations and orders as may be necessary, specifically § 154.63 of its Regulations, so as to permit the above listed rate tariff sheets to become effective December 1, 1988 with the remaining tariff sheets to become effective July 24, 1988.

Copies of the filing were served on Transwestern's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before October 28, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-24875 Field 10-26-88; 8:45 am]

BILLING CODE 6717-01-M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

October 21, 1988.

The Federal Communications Commission has submitted the following information collection requirement to the Office of Management and Budget for review and clearance under the Paperwork Reduction Act, as amended (44 U.S.C. 3501 *et seq.*).

Copies of the submission may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037. For further information on this submission contact Jerry Cowden, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on this information collection should contact Eyvette Flynn, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503, (202) 395-3785.

OMB Number: 3060-0349

Title: Sections 76.73 and 76.75—Cable TV EEO Policy and Programs

Action: Extension

Respondents: Businesses (including small businesses)

Frequency of Response: On occasion

Estimated Annual Burden: 5,575 recordkeepers; 143,612 total hours; 8 hours to 52 hours each (average 25.76 hours)

Needs and Uses: Each cable television employment unit is required to establish, maintain, and carry out a program to ensure equal employment opportunity (EEO) in every aspect of its policy and practice. Records maintained by cable units for EEO purposes are used by cable units to complete the Annual Employment Report (Form FCC 395-A) and by Commission staff in field investigations.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 88-24869 Filed 10-26-88; 8:45 am]

BILLING CODE 6717-01-M

[Report No. 1753]

Petitions for Reconsideration and Applications for Review of Actions in Rule Making Proceedings

Petitions for reconsideration and applications for review have been filed in the Commission rule making proceeding listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of these documents are available for viewing and copying in Room 239, 1919 M Street, NW., Washington, DC, or may be purchased from the Commission's copy contractor International Transcription Service (202-857-3800). Oppositions to these petitions and applications must be filed November 14, 1988. See § 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Amendment of § 73.202(b), Table of Allotments, FM Broadcast

Stations. (Benton, Clarksville, Dardanelle, El Dorado, Hampton, Harrison, Huntsville, Mena, Ozark and Sherwood, Arkansas; Homer, Louisiana; Sallisaw and Vinita, Oklahoma; Hooks and Kilgore, Texas. (MM Docket No. 87–73, RM's 4961, 5286, 5291, 5314, 5339, 5381, 5984, 5986, 5980, 5411, 5421, 5488, 5508, 5615, 5985, 5983, 5981 & 5982).

Number of petitions received: 4.

Applications For Review

Subject: Amendment of § 73.202(b), Table of Allotments, FM Broadcast Stations. (Jennings, Erath, Mamou and Maurice, Louisiana; and Groves and Nederland, Texas) (MM Docket No. 87–104, RM's 5425, 5612, 5972, 5989 & 5990).

Number of applications received: 1.

Subject: Amendment of § 73.202(b), Table of Allotments, FM Broadcast Stations. (Lafayette, Louisiana) (MM Docket No. 87–196, RM–5492)

Number of applications received: 2.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 88–24811 Filed 10–26–88; 8:45 am]

BILLING CODE 6712–01–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.: 202–002744–063.

Title: Atlantic and Gulf/West Coast of South America Conference.

Parties:

Compania Chilena de Navigacion Interoceania, S.A.
Compania Sud Americana de Vapores
Lykes Bros. Steamship Co., Inc.
Compania Peruana de Vapores
Lineas Navieras Bolivianas S.A.M.
Naviera Neptuno, S.A.

Synopsis: The proposed modification would amend the agreement in connection with financial guarantees required of new members. The new member will not be permitted to vote until the financial guarantee is posted.

Agreement No.: 217–011215.

Title: Naviera Pacifico/N.V. CMB S.A. Space Charter Agreement.

Parties:

Naviera Pacifico C.A.
N.V. CMB S.A.

Synopsis: The proposed Agreement would authorize the parties to charter excess space from one another in the trade between the West Coast of the United States and Canada, and designated areas in Central and South America. The parties have requested a shortened review period.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: October 21, 1988.

[FR Doc. 88–24792 Filed 10–26–88; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

The Citizens and Southern Corp., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than November 17, 1988.

A. **Federal Reserve Bank of Atlanta** Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *The Citizens and Southern Corporation,* Atlanta, Georgia, and Citizens and Southern Georgia Corporation, Atlanta, Georgia; to acquire 100 percent of the voting shares of Heritage Trust, Conyers, Georgia.

B. **Federal Reserve Bank of St. Louis** (Randall C. Summer, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Jamestown Bancorp, Inc.,* Jamestown, Kentucky; to become a bank holding company by acquiring 100 percent of the voting shares of Bank of Jamestown, Jamestown, Kentucky.

C. **Federal Reserve Bank of Minneapolis** (James M. Lyon, Vice president) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Michael Bancorporation, Inc.,* Minneapolis, Minnesota; to become a bank holding company by acquiring 91.35 percent of the voting shares of Summit National Bank, St. Paul, Minnesota.

D. **Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222

1. *Moody Bank Holding Company, Inc.,* Reno, Nevada; to become a bank holding company by acquiring 24.99 percent of the voting shares of Bank of Galveston, N.A., Galveston, Texas; and 97.25 percent of the voting shares of The Moody National Bank of Galveston, Galveston, Texas.

Board of Governors of the Federal Reserve System, October 20, 1988.

James McAfee,

Associate Secretary of the Board.

FR Doc. 88–24797 Filed 10–26–88 8:45 am]

BILLING CODE 6210–01–M

Signet Banking Corp.; Application To Engage de Novo in Permissible Nonbanking Activities; Correction

This notice corrects a previous **Federal Register** notice (FR Doc. 88–18416) published at page 30870 of the issue for Tuesday, August 16, 1988.

Under the Federal Reserve Bank of Richmond, the entry for Signet Banking Corporation, is amended to read as follows:

1. *Signet Banking Corporation,* Richmond, Virginia; to engage *de novo* through its subsidiary, Signet Investment Corporation, Richmond, Virginia, in the offering of securities brokerage services and investment advisory services to retail and institutional customers. The Board has previously approved the provision of these services in *Bank of New England Corporation,* 74 Federal Reserve Bulletin 700 (1988).

Comments on this application must be received by November 11, 1988.

Board of Governors of the Federal Reserve System, October 20, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-24795 Filed 10-26-88; 8:45 am]

BILLING CODE 6210-01-M

Washington National Holdings, N.V.; Formation of; Acquisitions by; and Mergers of Bank Holding Companies; Correction

This notice corrects a previous **Federal Register** notice (FR Doc. 88-17082) published at page 28694 of the issue for Friday, July 29, 1988.

Under the Federal Reserve Bank of Richmond, the entry for Washington Bancorporation, is amended to read as follows:

1. *Washington National Holdings, N.V.*, Netherlands Antilles; acquire 100 percent of the voting shares of Washington Bancorporation, Washington, DC and thereby indirectly acquire The Washington Bank (of Maryland), Baltimore, Maryland, a *de novo* bank.

Comments on this application must be received by November 11, 1988.

Board of Governors of the Federal Reserve System, October 20, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-24796 Filed 10-26-88; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Aid to Families With Dependent Children, Medicaid, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 1989 Through September 30, 1990

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: The Federal Percentages and Federal Medical Assistance Percentages for Fiscal Year 1990 have been calculated pursuant to the Social Security Act. These percentages will be effective from October 1, 1989 through September 30, 1990. This notice announces the calculated "Federal percentages" and "Federal medical assistance percentages" that we will use in determining the amount of Federal matching in State welfare and medical expenditures. The table gives figures for each of the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. Title XIX of the Social Security Act (the Act) exists in each jurisdiction, title IV-A in all jurisdictions except the Northern Mariana Islands, titles I, X, and XIV operate only in Guam and the Virgin Islands, while title XVI (AABD) operates only in Puerto Rico. The percentages in this notice apply to State expenditures for assistance payments and medical services (except family planning which is subject to a higher matching rate). The statute provides separately for Federal matching of administrative costs.

Sections 1101(a)(8) and 1905(b) of the Act, as revised by section 9528 of Pub. L. 99-272, require the Secretary of Health and Human Services to publish these percentages each year. The Secretary is to figure the percentages, by formulas in sections 1101(a)(8) and 1905(b) of the Act, from the Department of Commerce's statistics of average income per person in each State and in the Nation as a whole. The percentages are within upper and lower limits given in those two sections of the Act. The statute specifies the percentages to be applied to Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

The "Federal percentages" are for Aid to Families with Dependent Children (AFDC) and aid to needy aged, blind, or disabled persons, and the "Federal medical assitance percentages" are for Medicaid. However, under section 1118 of the Act, States with approved Medicaid plans may claim Federal matching funds for expenditures under approved State plans for these other programs using either the Federal percentage or the Federal medical assistance percentage. These States may claim at the Federal medical assistance percentage without regard to any maximum on the dollar amounts per recipient which may be counted under paragraphs (1) and (2) of sections 3(a), 403(a), 1003(a), 1403(a), and 1603(a) of the Act.

DATES: The percentages listed will be effective for each of the 4 quarter-year periods in the period beginning October 1, 1989 and ending September 30, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. Emmett Dye, Office of Family Assistance, Family Support Administration, 370 L'Enfant Promenade SW., Washington, DC 20447, Telephone (202) 252-5047.

(Catalog of Federal Domestic Assistance Program Nos. 13.808—Assistance Payments—Maintenance Assistance (State Aid); 13.714—Medical Assistance Program)

Dated: October 21, 1988.

Otis R. Bowen,

Secretary of Health and Human Services.

FEDERAL PERCENTAGES AND FEDERAL MEDICAL ASSISTANCE PERCENTAGES, EFFECTIVE OCTOBER 1, 1989-SEPTEMBER 30, 1990 (FISCAL YEAR 1990)

State	Federal percentages	Federal medical assistance percentages
Alabama	65.00	73.21
Alaska	50.00	50.00
American Samoa	50.00	50.00
Arizona	56.66	60.99
Arkansas	65.00	74.58
California	50.00	50.00
Colorado	50.00	52.11
Connecticut	50.00	50.00
Delaware	50.00	50.00
District of Columbia	50.00	50.00
Florida	50.00	54.70
Georgia	57.88	62.09
Guam	50.00	[1] 50.00
Hawaii	50.00	54.50
Idaho	65.00	73.32
Illinois	50.00	50.00
Indiana	59.73	63.76
Iowa	58.36	62.52
Kansas	51.19	56.07
Kentucky	65.00	72.95
Louisiana	65.00	73.12
Maine	61.34	65.20
Maryland	50.00	50.00
Massachusetts	50.00	50.00
Michigan	50.00	54.54
Minnesota	50.00	52.74
Mississippi	65.00	80.18
Missouri	54.65	59.18
Montana	65.00	71.35
Nebraska	56.80	61.12
Nevada	50.00	50.00
New Hampshire	50.00	50.00
New Jersey	50.00	50.00
New Mexico	65.00	72.25
New York	50.00	50.00
North Carolina	63.85	67.46
North Dakota	63.91	67.52
Northern Mariana Islands	50.00	50.00
Ohio	55.08	59.57
Oklahoma	64.76	68.29
Oregon	58.83	62.95
Pennsylvania	52.07	56.86
Puerto Rico	50.00	[1] 50.00
Rhode Island	50.17	55.15
South Carolina	65.00	73.07
South Dakota	65.00	70.90
Tennessee	65.00	69.64
Texas	56.92	61.23
Utah	65.00	74.70
Vermont	58.64	62.77
Virgin Islands	50.00	[1] 50.00
Virginia	50.00	50.00
Washington	50.00	53.88
West Virginia	65.00	76.61

FEDERAL PERCENTAGES AND FEDERAL MEDICAL ASSISTANCE PERCENTAGES, EFFECTIVE OCTOBER 1, 1989–SEPTEMBER 30, 1990 (FISCAL YEAR 1990)—Continued

State	Federal percentages	Federal medical assistance percentages
Wisconsin	54.76	59.28
Wyoming	62.17	65.95

[1] For purpose of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI and Part A of title IV will be 75 per centum.

[FR Doc. 88–24871 Filed 10–26–88; 8:45 am]
BILLING CODE 4150–04–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–060–09–4410–14]

Moab District Advisory Council; Meeting

AGENCY: Bureau of Land Management, Moab, Interior.

ACTION: Moab District Advisory Council meeting.

SUMMARY: The Moab District Advisory Council will meet Tuesday and Wednesday, November 29 and 30, 1988. The meeting will be held in the Tamarisk Inn in Green River, Utah, beginning at 10 a.m. on the 29th and adjourning at 3:00 p.m. on the 30th. The focus of the agenda will be the San Rafael Draft Resource Management Plan/Draft Environmental Impact Statement (DRMP/DEIS). Also, approval of previous meeting's minutes, selected program updates, new business, opportunity for public comment, finalization of resolutions, and adjournment.

All Advisory Council meeting are open to the public. Persons wishing to make a comment to the Council must notify the BLM by November 28. Depending on the number of people desiring to make a statement, a per-person time limit may be established. For further information, contact: Mary Plumb, Public Affairs Officer, P.O. Box 970, Moab, Utah 84532. Phone (801) 259–6111.

Gene Nodine,

District Manager.

[FR Doc. 88–24880 Filed 10–26–88; 8:45 am]
BILLING CODE 4310–DQ–M

[AZ–040–08–4410–02]

Safford District Advisory Council; Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given in accordance with Pub. L. 94–579 and 43 CFR Part 1780, that a meeting of the Safford District Advisory Council will be held.

DATE: Friday, November 18, 1988 at 10:00 a.m.

ADDRESS: Bureau of Land Management, Safford District Office, 425 E. 4th Street, Safford, AZ.

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following items; Overview of the San Simon Project; Wilderness release language and water rights; RMP update; Management update; and business from the floor.

The meeting is open to the public. Interested persons may make oral statements to the Council between 1:30 and 2:30 p.m. or may file written statements for the Council's consideration. Anyone wishing to make an oral statement must contact the Safford District Manager by November 17, 1988. Depending upon the number of people wishing to make oral statements, a per person time limit may be considered.

Summary minutes of the meeting will be maintained in the District Office and will be available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

FOR FURTHER INFORMATION: Gil Esquerdo, Public Affairs Specialist, Safford District Office, 425 E. 4th St., Safford, AZ 85546. Telephone (602)–4040.

Ray A. Brady,

District Manager.

Date: October 18, 1988.

[FR Doc. 88–24855 Filed 10–26–88; 8:45 am]
BILLING CODE 4310–32–M

[NM–030–4212–11; NM75602]

Realty Action; Chaparral, NM, Interior,

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The following described parcel of land has been examined and identified as suitable for lease/patent under section 212 of the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2759; 43 U.S.C. 869–4; 44 Stat. 741, as amended):

T. 26 S., R. 5 E.,
Sec. 14, S½SW¼SE¼SW¼, NMPM(1.25 acres).

The subject land will be offered to the Disabled American Veterans Chapter 25 of Chaparral, New Mexico for a meeting place and community activities center. This lease/patent is consistent with the Bureau of Land Management's planning system and County plans. The public interest will be served by offering this land under the Recreation and Public Purposes Act.

DATE: Comments must be submitted on or before December 12, 1988.

ADDRESS: Comments should be sent to Bureau of Land Management, Las Cruces District Office, 1800 Marquess, Las Cruces, New Mexico 88005.

FOR FURTHER INFORMATION CONTACT: Madeline Dzielak at the address above or at 505–525–8228, (FTS 571–8350).

SUPPLEMENTARY INFORMATION: Publication of this notice will segregate the public land from all appropriations under the public land laws, including the mining laws but not mineral leasing laws, This segregation will terminate upon the issuance of a lease/patent, 2 years from the date of publication of this notice in the **Federal Register** or upon publication of a notice of termination. Any adverse comments will be evaluated by the State Director who may vacate or modify this realty action and issue a fiscal determination. In the absence of any objections, this realty actions will become the final determination of the Department of the Interior.

Richard T. Watts,

Acting District Manager.

October 20, 1988.

[FR Doc. 88–24856 Filed 10–26–88; 8:45 am]
BILLING CODE 4310–FB–M

[CA–940–08–4520–12; Group 1012]

Plat of Survey; California

October 14, 1988.

1. This plat of the following described land will be officially filed in the California State Office, Sacramento, California immediately:

San Bernardino Meridian, Riverside County

T. 5S., R. 1 E.

2. This plat representing the dependent resurvey of a portion of the west boundary, and a portion of the subdivisional lines, and the survey of the subdivision of section 30, Township

5 South, Range 1 East, San Bernardino Meridian, California, under Group No. 1012 California, was accepted September 14, 1988.

3. This plat will immediately become the basic record of describing the land for all authorized purposes. This plat has been placed in the open files and is available to the public for information only.

4. This plat was executed to meet certain administrative needs of the Bureau of Land Management.

5. All inquires relating to this land should be sent to the California State Office, Bureau of Land Management, Federal Office Building, 2800 Cottage Way, Room E-2841, Sacramento, California 95825.

Bobbie J. Baldwin,

Acting Chief, Public Information Section.

[FR Doc. 88-24858 Filed 10-26-88; 8:45 am]

BILLING CODE 4310-40-M

[ID-942-09-4730-12]

Idaho; Filing of Plats of Survey

The plat of survey of the following described land, was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 10:00 a.m., October 19, 1988.

The plat representing the dependent resurvey of portion of the 1971 restored original meander lines for the left bank of the Snake River and the survey of irregular lots 18, 19, and 20 in Section 22 T. 5 N., R. 38 E., Boise Meridian, Idaho, Group No. 697 was accepted October 7, 1988.

This survey was executed to meet certain administrative needs by this Bureau.

All inquiries about this land should be sent to the Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

Gerald W. Hochstrasser,

Acting Chief, Cadastral Surveyor for Idaho.

October 19, 1988.

[FR Doc. 88-24881 Filed 10-26-88; 8:45 am]

BILLING CODE 4310-GG-M

[CA-940-09-4214-10; CACA 17620]

Proposed Withdrawal and Opportunity for Public Meeting; California

October 19, 1988.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management proposes to withdraw 662.50 acres of public land in San Bernardino County, to protect and preserve the Calico Early Man Site. This notice closes the land for up to 2 years from surface entry and mining. The land will remain open to mineral leasing.

DATE: Comments and requests for a public meeting must be received by January 25, 1988.

ADDRESS: Comments and meeting requests should be sent to the California State Director, BLM, 2800 Cottage Way, Sacramento, California 95825.

FOR FURTHER INFORMATION CONTACT: Viola Andrade, BLM California State Office, (916) 978-4815.

SUPPLEMENTARY INFORMATION: On August 24, 1988, a petition was approved allowing the Bureau of Land Management to file an application to withdraw the following described public land from settlement, sale, location, or entry under the general land laws, including the mining laws, subject to valid existing rights:

San Bernardino Meridian

T. 10 N., R. 2 E.,
- Sec. 15, S½S½SW¼NW¼, S½SW¼SE¼NW¼, W½NE¼SW¼, W½SW¼, and W½SE¼SW¼;
- Sec. 22, SW¼NE¼NE¼NE¼, W½NE¼NE¼, SE¼NE¼NE¼, W½NE¼, SE¼NE¼, NW¼, and N½S½;
- Sec. 23, SW¼SW¼NW¼, NW¼, W½SW¼NW¼, SW¼SE¼SW¼NW¼, W½NW¼SW¼, and W½E½NW¼SW¼.

The area described contains approximately 662.50 acres in San Bernardino County.

The purpose of the proposed withdrawal is to protect the archaeological, historical, geological, and recreational integrity of the Calico Early Man Site.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the undersigned officer within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR Part 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the land will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary uses which may be permitted during this segregative period are licenses, permits, cooperative agreements, or discretionary land-use authorizations of a temporary nature.

Nancy J. Alex,

Chief, Lands Section, Branch of Adjudication and Records.

[FR Doc. 88-24857 Filed 10-26-88; 8:45 am]

BILLING CODE 4310-40-M

[WY-930-09-4214-10; WYW 112132]

Proposed Withdrawal and Opportunity for Public Meeting; Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Department of Energy has filed an application to withdraw 80 acres of public mineral estate approximately 40 miles northwest of Douglas, Wyoming. The application proposes withdrawing the Federal mineral estate while purchasing the private surface, in order to stabilize, in place, an uranium mill tailings area, known as the Spook Site. This notice will temporarily segregate the land for up to two (2) years from location and entry under the United States mining laws. The lands will remain open to mineral leasing with the concurrence of the Department of Energy, the Nuclear Regulatory Commission, and the Bureau of Land Management. During this period, the Department of Energy will prepare the necessary National Environmental Policy Act compliance documentation and justification for Secretarial consideration of the withdrawal application. The withdrawal is requested for a period of five (5) years pending permanent Congressional action.

DATE: Comments and requests for a public meeting should be received on or before January 25, 1988.

ADDRESS: Comments and meeting requests should be sent to the Wyoming State Director, BLM, 2515 Warren Avenue, P.O. Box 1828, Cheyenne, Wyoming 82003.

FOR FURTHER INFORMATION CONTACT: Tamara Gertsch, BLM Wyoming State Office, 307-772-2072.

SUPPLEMENTARY INFORMATION: On October 5, 1988, the U.S. Department of Energy filed an application to withdraw the following described public mineral estate for their exclusive use for construction of a proposed disposal site for residual radioactive wastes pursuant to the Uranium Mill Tailings Radiation Control Act of 1978; 92 Stat. 3021, 42 U.S.C. 7901 *et seq.*

Sixth Principal Meridian

T. 38 N., R. 73 W.,
Sec. 28, SE¼NE¼,NE¼SE¼.

The area described contains 80 acres in Convers County.

Effective on the date of publication, these lands are segregated from location and entry under the United States mining laws. The lands remain open to mineral leasing subject to concurrence by the Department of Energy, the Nuclear Regulatory Commission, and the Department of the Interior.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the undersigned officer within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR Part 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the lands will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary uses which will be permitted during this segregative period are only those specific uses authorized by the Department of Energy, the Nuclear Regulatory Commission, and the Department of the Interior. Additionally, existing oil and gas leases WYW 76347, and WYW 39968, will continue to be authorized.

The temporary segregation of the lands in connection with the withdrawal application shall not affect the administrative jurisdiction over the lands, and the segregation shall not have the effect of authorizing any use of the lands by the Department of Energy.

Hillary A. Oden,

State Director.

Date: October 21, 1988.

[FR Doc. 88-24816 Filed 10-26-88; 8:45 am]

BILLING CODE 4310-22-M

Bureau of Mines

Advisory Committee on Mining and Mineral Resources Research; Meeting

The Advisory Committee on Mining and Mineral Resources Research will meet from 8:00 a.m. to 5:00 p.m. (or completion of business) on Thursday, November 17, 1988, in the Secretary's Conference Room (Room 5160), U.S. Department of the Interior, 18th and C Streets, NW., Washington, DC 20240.

The proposed agenda is:

1. Welcome by the Assistant Secretary—Water and Science and by the Directors of the Bureau of Mines and the Geological Survey.

2. Approval of the minutes of the meeting of September 30, 1987.

3. Approval of the 1988 grant awards program.

4. Review of 1988 legislation affecting the Mineral Institutes program:

Public Law 100-483
Appropriations for the Mineral Institutes
Appropriations for related purposes.

5. Status of proposed regulations: Discussion and approval of criteria to be used in the evaluation of allotment grants.

6. Review and recommendations concerning the continuation or revision of current generic mineral technology center configuration.

7. Discussion of and approval of the annual update to the National Plan for Research in Mining and Mineral Resources.

8. New business.

This meeting is open to the public. Approximately 30 visitors can be accommodated on a first-come, first-served basis. Written statements concerning the subjects are welcome.

In order to be admitted to the building, visitors who expect to attend should inform Dr. Ronald A. Munson, Chief, Office of Mineral Institutes, Bureau of Mines, Mail Stop 1020, 2401 E Street, NW., Washington, DC 20241, phone (202) 634-1328, no later than noon, Wednesday, November 16.

Dated: October 24, 1988

T. S. Ary,

Director.

[FR Doc. 88-24794 Filed 10-26-88; 8:45 am]

BILLING CODE 4310-53-M

Bureau of Reclamation

Investigation and Potential Construction of Cogeneration-Desalination Plants in the Colorado River Basin

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of investigation and potential construction of cogeneration-desalination plants in the Colorado River Basin.

SUMMARY: The Bureau of Reclamation, Upper Colorado Region, intends to enter into a cooperative agreement with Sunlaw Energy Corporation for the preparation of feasibility and National Environmental Policy Act (NEPA) documents for investigation and potential construction of cogeneration-desalination plants in the Colorado River Basin. Response to this notice will be used to determine if a comparable source more advantageous to the government is available. If no affirmative responses are received within the specified time, a cooperative agreement will be awarded to Sunlaw Energy Corporation.

DATES: Written responses addressing the specified selection criteria in order to determine capability to meet the requirements must be received by the Upper Colorado Regional Office of the Bureau of Reclamation within 30 calendar days after publication of this notice.

ADDRESS: Point of contact is Bureau of Reclamation, 125 South State Street, PO Box 11568, Salt Lake City, UT, 84147.

FOR FURTHER INFORMATION CONTACT: Dave Trueman, (801) 524-6292 or Rebecca Parton (801) 524-3594.

SUPPLEMENTARY INFORMATION: Study and construction of salinity control units in the Colorado Rivern Basin are authorized under Public Laws 92-500, 93-320, 96-375, and 98-569. These authorities extend to cooperative developments with private industry interested in sharing the cost of investigation and developments which include salinity control as a project co-purpose.

The feasibility and NEPA study costs are expected to be between $1 million and $1.5 million per site and will be cost shared between the Bureau of Reclamation and the project proponent.

Selection criteria included the least cost per ton of salt removed, the highest cost share for cogeneration plants, lowest capital investment by the Federal government, most effective disposal of salt by-product, public support, environmental soundness, and best use of fresh water by-product.

A new project is more likely to receive favorable Congressional authorization and funding where the salinity control costs are less than $70 per ton of salt removed and disposed of. Projects will probably not be favorably considered, at this time, which are above $100 per ton of salt removed and disposesd of.

J. Austin Burke,

Acting Deputy Commissioner of Reclamation.

Date: October 17, 1988.

[FR Doc. 88-24860 Filed 10-26-88; 8:45 am]

BILLING CODE 4310-09-M

Minerals Management Service

Environmental Documents Prepared for Proposed Oil and Gas Operations on the Alaska Outer Continental Shelf

AGENCY: Minerals Management Service (MMS), U.S. Department of the Interior.

ACTION: Notice of the Availability of Environmental Documents Prepared for Outer Continental Shelf (OCS) Minerals Exploration Proposals on the Alaska OCS.

SUMMARY: The MMS, in accordance with Federal regulations (40 CFR 1501.4 and 1506.6) that implement the National Environmental Policy Act (NEPA), announces the availability of NEPA-related Environmental Assessments (EA's) and Findings of No Significant Impact (FONSI's) prepared by the MMS for oil and gas exploration activities proposed on the Alaska OCS. This listing includes all proposals for which FONSI's were prepared by the Alaska OCS in the 3-month period preceding this Notice.

Proposal

Amoco, as operator for itself; Shell Western Exploration and Production Inc.; and Union Oil of California propose to drill up to 14 wells from 12 leases acquired from Lease Sale 97 of March 1988. The leases are located in the eastern Alaskan Beaufort Sea, approximately 30 miles northeast of Arey Island in about 170 feet of water. Amoco has named the prospect "Galahad." The most likely location for the first well is Lease OCS-Y 1092. The wells will be drilled during the "open-water" season from the CANMAR Explorer II or the Beaudril Kulluk beginning as early as 1988.

Location

Lease	Blocks(s)
OCS-Y 1085	NR 6-4 366
1086	367
1087	368
1091	411
1092	412
1093	413
1094	414
1097	456
1098	457
1099	458
1100	501
1101	502

Environmental Assessment

EA No. AK 88-03.

FONSI Date

September 30, 1988.

FOR FURTHER INFORMATION CONTACT: Persons interested in reviewing environmental documents for the proposals listed above or obtaining information about EA's and FONSI's prepared for activities on the Alaska OCS are encouraged to contact the MMS office in the Alaska OCS Region.

The FONSI and associated EA are available for public inspection between the hours of 7:45 a.m. and 4:30 p.m., Monday through Friday at: Minerals Management Service, Alaska OCS Region, Library, 949 East 36th Avenue, Room 502, Anchorage, Alaska 99508-4302, phone: (907) 261-4435.

SUPPLEMENTARY INFORMATION: The MMS prepares EA's and FONSI's for proposals which relate to exploration for oil and gas resources on the Alaska OCS. The EA's examine the potential environmental effects of activities described in the proposals and present MMS conclusions regarding the significance of those effects. The EA is used as a basis for determining whether or not approval of the proposals constitutes major Federal actions that significantly affect the quality of the human environment in the sense of NEPA 102(2)(C). A FONSI is prepared in those instances where MMS finds that approval will not result in significant effects on the quality of the human environment. The FONSI briefly presents the basis for that finding and includes a summary or copy of the EA.

The Notice constitutes the public Notice of Availability of environmental documents required under the NEPA regulations.

Date: October 14, 1988.

Alan D. Powers,

Regional Director, Alaska OCS Region.

[FR Doc. 88-24859 Filed 10-26-88; 8:45 am]

BILLING CODE 4310-MR-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332-263]

Competitive Conditions in the U.S. and World Markets for Fresh Cut Roses

AGENCY: U.S. International Trade Commission.

ACTION: Correction of filing dates.

SUMMARY: Requests to appear at the public hearing and prehearing briefs (original and 14 copies) should be filed with the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436 not later than January 4, 1989. Post-hearing briefs are required by February 1, 1989.

Notice of the investigation will be published in the **Federal Register** of October 26, 1988.

By order of the Commission.

Kenneth R. Mason,

Secretary.

Issued: October 24, 1988.

[FR Doc. 88-24890 Filed 10-26-88; 8:45 am]

BILLING CODE 7020-02-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31329]

Tennessee Southern Railroad Co., Inc.; Purchase and Lease; CSX Transportation, Inc.; Decision

AGENCY: Interstate Commerce Commission.

ACTION: Notice of decision accepting application for consideration.

SUMMARY: The Commission is accepting for consideration the application, filed September 23, and supplemented September 30, 1988, by the Tennessee Southern Railroad Company, Inc., to acquire, by purchase and lease, 117.86 miles of rail line of CSX Transportation, Inc., between Florence, AL, and Columbia, TN; between Columbia and Pulaski, TN; and between Columbia and Godwin, TN. Pursuant to 49 CFR Part 1180, the Commission finds this to be a minor transaction.

DATES: Written comments must be filed with the Interstate Commerce Commission no later than November 25, 1988. Written comments from the Secretary of Transportation and Attorney General of the United States must be filed by December 12, 1988. Applicants' reply is due by December 30, 1988.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 275-7245. (TDD for hearing impaired: (202) 275-1721).

ADDRESSES: An original and 10 copies of

all documents must be sent to: Office of the Secretary, Case Control Branch, Attn: Finance Docket No., 31329, Interstate Commerce Commission, Washington, DC 20423.

In addition, one copy of all documents in this proceeding must be sent to each of applicants' representatives:

Charles M. Rosenberger, CSX Transportation, Inc., 500 Water Street, Jacksonville, FL 32202

R. Lawrence McCaffrey, Jr., Counsel for Tennessee Southern Railroad Company, Inc., Suite 800, 1350 New York Avenue, NW., Washington, DC 20005-4797.

SUPPLEMENTARY INFORMATION: By application filed September 23, and supplemented September 30, 1988, Tennessee Southern Railroad Company, Inc., (TSRC) and CSX Transportation, Inc., (CSX), collectively referred to as applicants, seek Commission approval under 49 U.S.C. 11343, *et seq.*, for TSRC to acquire, by purhcase and lease, 117.86 miles of CSX lines in Tennessee and Alabama. TSRC will purchase CSX's lines between Natco, TN, (milepost 229.50) and Columbia, TN, (milepost 233.40) and between Columbia (milepost 233.00) and Nucarbon, TN, (milepost 272.70), a total of 43.60 miles, for $1.2 million. Also, TSRC will lease for a 10-year period CSX's lines between Nucarbon (milepost 272.70) and Florence, AL, (milepost 312.26); between Columbia (milepost 233.40) and Pulaski, TN, (milepost 265.80); and between Natco (milepost 229.50) and Godwin, TN, (milepost 227.20), a total of 74.26 miles, for an annual rental of $65,000. Applicants contend that this is a minor transaction under 49 CFR 1180.2(c), and they submitted an application in accordance with the railroad consolidation procedures at 49 CFR Part 1180 for minor transactions. The parties intend to consummate the transaction as soon as possible after final Commission approval.

TSRC is a Class III railroad. It operates 1.4 miles of line in Florence and is controlled by G. Richard Abernathy, an individual. It commenced operations on July 11, 1988. CSX is a Class I railroad and a unit of CSX Corporation.

Applicants state that the acquisition by TSRC will result in the preservation and improvement of rail service to the approximately 25 shippers on these lines. Whereas CSX intended to reduce its 5-day per week service to 3 days weekly, TSRC intends to provide service 5 or 6 days per week. TSRC will not eliminate any facilities on the line. As a short line operator, it states that it will offer a more responsive service to the shippers. By integrating its present operations with the new operation, TSRC states that it will be able to spread out its current administrative, insurance, and operating costs. It anticipates that it will be an efficient, low-cost carrier and that, in the long term, shippers will be able to share in its cost savings. CSX has been unable to service fully the needs of its shippers on this short-haul line, and many of them have converted to motor carriage. By implementing local marketing and providing low cost, efficient service, TSRC hopes to regain many of CSX's former shippers.

Noting that TSRC presently does not serve any of the shippers on the lines, applicants contend that the transaction will not create a monopoly or reduce rail competition. TSRC's service will merely be substituted for that of CSX. Moreover, operation of the lines by TSRC is alleged to enhance intermodal competition by offering improved rail service to shippers, and in particular those shippers that previously converted to motor carriage.

The Railway Labor Executives' Association and the United Transportation Union request the imposition of labor protective conditions. Applicants state that the proposed transaction between Godwin and Florence will result in the elimination of 12 CSX employee positions. TSRC has agreed to hire three current and former CSX employees when it commences operations. It also will create seven new positions and give affected CSX employees preferential hiring rights. Applicants do not specifically indicate the extent to which both the acquisition and lease transactions together, as well as the extent which each of the transactions separately, will affect employees. Although applicants state that they assume that all affected employees will be afforded the protection pursuant to the conditions set forth in *New York Dock Railway—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979); those conditions would only be applicable to employees affected by the acquisition. We have determined that the appropriate labor protective conditions in lease transactions are those contained in *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980) (*Mendocino*). Accordingly, the *Mendocino* conditions would likely be imposed for the benefit of employees affected only by the lease.

Under the consolidation regulations, we must determine initially whether a proposed transaction is major, significant, minor, or exempt. The proposed transaction involves a Class I and a Class III railroad. It has no regional or national significance and will neither result in a major market extension nor reduce the present level of competition. Accordingly, we find the proposal a minor transaction under 49 CFR 1180.2(c). Because the application complies with the applicable regulations governing minor transactions, we are accepting it for consideration.

The application and exhibits are available for inspection in the Public Docket Room at the Offices of the Interstate Commerce Commission in Washington, DC. In addition, they may be obtained upon request from applicants' representatives named above.

Any interested persons, including government entities, may participate in this proceeding by submitting written comments. Comments must be filed no later than November 25, 1988. The Secretary of Transportation and Attorney General of the United States must file their comments no later than December 12, 1988. An original and 10 copies must be filed with the Secretary, Interstate Commerce Commission, Washington, DC 20423.

Written comments must be served concurrently by first-class mail on the United States Secretary of Transportation, the Attorney General of the United States, and the applicants' representatives. Written comments must also be served on all parties of record within 10 days of service of the service list by the Commission. We plan to issue the service list by December 12, 1988. Any person who files timely written comments shall be considered a party of record if the person's comments so request. In this event, no petition for leave to intervene need be filed. Consistent with 49 CFR 1180.4(d)(1)(iii), written comments must contain:

(A) The docket number and title of the proceeding;

(B) The name, address, and telephone number of the commenting party and its representative upon whom service shall be made;

(C) The commenting party's position, *i.e.*, whether it supports or opposes the proposed transaction;

(D) A statement of whether the commenting party intends to participate formally in the proceeding or merely comment upon the proposal;

(E) If desired, a request for an oral hearing with reasons supporting this request; the request must indicate the disputed material facts that can only be resolved at a hearing; and

(F) A list of all information sought to be discovered from applicant carriers.

Because we have determined that the proposal in this proceeding constitutes a minor transaction, no responsive

applications will be permitted. The time limits for processing a minor transaction are set forth at 49 U.S.C. 11345(d).

Discovery may begin immediately. We admonish the parties to resolve all discovery matters amicably.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered: 1. This proposal is found to be a minor transaction under 49 CFR 1180.2(c).

2. The application in Finance Docket No. 31329 is accepted for consideration.

3. The parties shall comply with all provisions as stated above.

4. This decision is effective on the date of service.

Decided: October 20, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips.

Noreta R. McGee,

Secretary.

[FR Doc. 88-24848 Filed 10-26-88; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree; Continental Chemiste Corp. et al.

In accordance with the Policy of the Department of Justice, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Continental Chemiste Corporation and Kenneth Kass,* Civil Action No. 87-C-10214, was lodged with the United States District Court for the Northern District of Illinois on September 21, 1988. The action was filed pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. 136 *et seq.*, against Continental Chemiste Corporation ("Chemiste") and Kenneth Kass. Chemiste is an Illinois corporation conducting business in Chicago and Defendant Kass was the president of the corporation. The Complaint alleged that Defendants violated FIFRA by distributing and selling pesticides that were not registered under FIFRA, by distributing and selling misbranded pesticides, by refusing to allow the EPA to inspect Chemiste's records and premises under FIFRA and by violating the cancellation of the registration of the pesticides produced by Defendants. The Complaint sought an injunction against further violations of section 12 of FIFRA and an order directing Defendants to comply with the provisions of an EPA notice concerning the cancellation of the registrations of Defendants pesticides.

The Consent Decree enjoins the Defendants from further violations of section 12 of FIFRA and requires compliance with the provisions of an EPA notice concerning the cancellation of the registrations of Defendants' pesticides. Defendant Chemiste is required to notify retailers who received shipments of the cancelled pesticides that the sale of "Moth-Cloud" (EPA Reg. No. 495-8-Cancelled) and "Smo-Cloud" (EPA Reg. No. 495-6-Cancelled) is prohibited. Defendant must accept all returned stocks of these lindane-based pesticides from retailers and dispose of the pesticides in accordance with the Resource Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.*, reformulate the pesticides into a registered product or export the pesticides.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, Washington, DC 20530. All comments should refer to *United States* v. *Continental Chemiste Corporation and Kenneth Kass,* DOJ Reference No. 1-742.

The proposed Consent Decree may be examined at the office of the United States Attorney, 219 South Dearborn Street, Room 1500 S, Chicago, Illinois, 60604, and at the office of Regional Counsel, Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604. Copies of the proposed Consent Decree may be examined at the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Room 1515, Ninth Street and Pennsylvania Avenue NW., Washington, DC 20530. A copy of the proposed Consent Decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. A request for a copy of the proposed Consent Decree with exhibits should be accompanied by a check in the amount of $1.60 (ten cents per page copying costs) payable to the "United States Treasurer."

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88-24852 Filed 10-26-88; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

Pursuant to the National Cooperative Research Act of 1984; The Importance of Lubricating Oil in Diesel Particulate Emissions, Southwest Research Institute

Notice is hereby given that, on October 3, 1988, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), Southwest Research Institute ("SwRI") filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing the addition of a party to its group research project regarding "The Importance of Lubricating Oil in Diesel Particulate Emissions." The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the SwRI advised that Pennzoil Products Company (effective August 10, 1988) has become a party to the group research project.

No other changes have been made in either the membership or planned activity of the group research project.

On August 21, 1987, SwRI filed its original notification pursuant to section 6(a) of the Act. The Department of Justice (the "Department") published a notice in the **Federal Register** pursuant to section 6(b) of the Act on September 18, 1987, 52 FR 35335. On December 22, 1987, SwRI filed an additional written notification. The Department published a notice in the **Federal Register** in response to the additional notification on January 19, 1988 (53 FR 1418). On May 27, 1988, SwRI filed an additional written notification. The Department published a notice in the **Federal Register** in response to the additional notification on June 23, 1988 (53 FR 23704) and on August 16, 1988, SwRI filed an additional written notification. The Department published a notice in the **Federal Register** in response to the additional notification on September 15, 1988 (53 FR 35936).

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 88-24853 Filed 10-26-88 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Office of the Secretary

Commission on Workforce Quality and Labor Market Efficiency; Meeting

The Commission on Workforce Quality and Labor Market Efficiency was established under the provisions of the Federal Advisory Committee Act to increase the excellence of the American workforce.

A public meeting of the Commission on Workforce Quality and Labor Market Effficiency will be held on December 6, 1988, commencing at 1:00 p.m., in room S–2508 of the Department of Labor, 200 Constitution Avenue NW., Washington, DC.

The purposes of the meeting are to:

1. Approve the interim report of the Commission.

2. Review the research agenda of the Commission's staff.

3. Be given briefings by experts in the fields of: education, economics, and compensation and benefts packages.

For additional information, contact: Laurie J. Bassi, Deputy Director, Commission on Workforce Quality and Labor Market Efficiency, U.S. Department of Labor, 200 Constitution Avenue NW., Room C–2313, Washington, DC 20210, telephone (202) 523–6836.

Individuals or organizations wishing to submit written statements pertaining to the research agenda of the Commission on Workforce Quality and Labor Market Efficiency should send 40 copies to the address given above. Papers will be accepted and included in the record of the meeting if received on or before December 1, 1988.

On January 5, 1989 and thereafter, official records of the meeting will be available for public inspection at: Department of Labor, 200 Constitution Avenue, Room C–2313, Washington, DC.

Signed at Washington, DC, this 21st day of October 1988.

Ann McLaughlin,

Secretary of Labor.

[FR Doc. 88–24847 Filed 10–26–88 8:45 am]

BILLING CODE 4516–23–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 December 12, 1988. Once the appraisal of the records is complete, 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. Defense Nuclear Agency (N1–374–88–6). Records relating to the exposure of individuals to radioactive materials. Long-term retention is proposed (75 years).

2. Department of the Navy, Chief of Naval Operations, Naval Data Automation Command (N1–NU–86–5). A comprehensive schedule relating to planning, design, construction, acquisition, development, maintenance, administration, and disposition of structures and facilities ashore, including fleet facilities. Schedule provides for permanent retention of records relating to overall policies, procedures and significant actions.

3. Department of Agriculture, Forest Service (N1–95–17). General correspondence files maintained in the offices of energy coordinators throughout the agency.

4. Department of Commerce, International Trade Administration (N1–151–88–7). Routine administrative records of the Office of the Director, Office of International Trade Promotion, 1956–61.

5. Department of Commerce, International Trade Administration (N1–151–88–12). Product background files for Commercial News USA.

6. Department of Commerce, Bureau of Economic Analysis, Business Outlook Division (N1–375–88–4). Working papers for the Inventory and Sales Anticipation Survey, 1957–71.

7. Department of Education, Office of International Education (N1–12–88–5). Reading file of Oliver J. Caldwell, 1952–63.

8. Department of Health and Human Service, Public Health Service (N1–90–88–4). Routine financial files and license control cards of the United States Cadet Nurse Corps, 1941–49.

9. Department of Labor, Bureau of Labor Statistics, Office of Wages and

Industrial Relations (N1–257–88–4). Information copies of union wage agreements for selected occupations and strike index cards.

Dated: October 24, 1988.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 88–24883 Filed 10–26–88; 8:45 am]

BILLING CODE 7515–01–M

Advisory Committee on Presidential Libraries; Meeting

Notice is hereby given that the Committee on Presidential Libraries will meet on Thursday, November 17, 1988, from 1:30 p.m. to 3:30 p.m., in Room 105 of the National Archives Building, 7th and Pennsylvania Avenue, NW., Washington, DC.

This will be the first meeting of the committee. The agenda for the meeting will be to discuss the organizational structure and functions of the committee.

The meeting will be open to the public. For futher information, call John Fawcett on 202–523–3212.

Dated: October 21, 1988.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 88–24882 Filed 10–26–88; 8:45 am]

BILLING CODE 7515–01–M

NATIONAL SCIENCE FOUNDATION

Advisory Committee for International Programs; Meeting

In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, the National Science Foundation announces the following meeting:

Name: Advisory Committee for International Programs.

Date: November 21, 1988, 8:30 a.m. to 5:00 p.m., November 22, 1988, 8:30 a.m. to 5:00 p.m.

Place: National Science Foundation, 1800 G Street, NW., Room 1143, Washington, DC 20550.

Type of Meeting: Open.

Contact Person: Dr. John Boright, Director, Division of International Programs, National Science Foundation, Washington, DC 20550, Telephone (202) 357–9552.

Summary of Minutes: May be obtained from Contact Person.

Purpose of Meeting: To provide advice, recommendations, and oversight related to support for international cooperation in science and engineering.

Tentative Agenda:

November 21

- Status report on international programs of NSF.
- Status of current international initiatives.
- Briefing on International Information and Analysis Section activities.
- Briefing on major international negotiations.
- Briefing on Pacific Rim Initiatives.

November 22

- Discussion of science and engineering initiatives with Pacific Rim countries.

October 24, 1988.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 88–24793 Filed 10–26–88; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–344]

Portland General Electric Co., The City of Eugene, Oregon and Pacific Power and Light Co., Trojan Nuclear Plant; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–1 issued to Portland General Electric Company, *et al.*, (the licensee), for operation of Trojan Nuclear Plant, located in Columbia County, Oregon.

Environmental Assessment

Identification of Proposed Action

The proposed amendment is a request to revise the Trojan Technical Specifications (TS) to delete the U–235 enrichment limit on fuel assemblies, and to authorize the storage of new fuel assemblies with enrichment of up to 4.5 weight percent (w/o) U–235 in the new fuel storage racks.

The proposed action is in accordance with the licensee's application for amendment dated March 1, 1988, as supplemented August 5, 1988.

The Need for the Proposed Action

The proposed amendment is required to permit the receipt, storage and use of fuel assemblies with an enrichment of U–235 up to 4.5 w/o, which is higher than the 3.5 w/o currently allowed by the Trojan Technical Specifications.

Environmental Impacts of the Proposed Action

The safety considerations associated with reactor operation with fuel enriched to 4.5 w/o U–235 have been evaluated by the NRC staff. The staff has concluded that such changes would not adversely affect plant safety.

The use of fuel with increased enrichment would not significantly increase the environmental impacts associated with operation of the facility and such impacts would be within those evaluated in the Final Environmental Statement related to operation of Trojan. The proposed action would not involve a significant change in the probability or consequences of any accident previously evaluated, nor does it involve a new or different kind of accident. Consequently, any radiological releases resulting from an accident would be significantly greater than previously determined. The proposed amendment does not otherwise affect routine radiological plant effluents. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed amendment. The Commission also concludes that the proposed action will not result in a significant increase in individual or cumulative occupational radiation exposure.

With regard to nonradiological impacts, the proposed amendment does not affect nonradiological plant effluents and has no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed amendment.

The environmental impacts of transportation resulting from the use of higher enrichment fuel and extended irradiation are discussed in the staff assessment entitled "NRC Assessment of the Environmental Effects of Transportation Resulting from Extended Fuel Enrichment and Irradiation," which was published in the Federal Register on August 11, 1988 (53 FR 30355) in connection with the Shearon Harris Nuclear Power Plant, Unit 1, Environmental Assessment and Finding of No Significant Impact. As indicated therein, the environmental cost contribution of transportation of the increases in the fuel enrichment up to 5% and irradiation limits up to 60 GWD/MT are either unchanged or may, in fact, be reduced from those summarized in

Table S–4, as set forth in 10 CFR 51.52cc). These findings are applicable to this amendment for the Trojan Nuclear Plant.

The Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the **Federal Register** on May 18, 1988 (53 FR 17807). No request for hearing or petition for leave to intervene was filed following this notice.

Alternatives to the Proposed Action

Because the Commission has concluded that there are no significant environmental impacts associated with the proposed action, there is no need to examine alternatives to the proposed action.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in connection with the Final Environmental Statement related to operation of Trojan Nuclear Power Plant, dated August 1973.

Agencies and Persons Consulted

The NRC staff has reviewed the licensee's request that supports the proposed amendment. The NRC staff 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 amendment.

Based upon the foregoing environmental assessment, the Commission concludes the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the application for amendment dated March 1, 1988, as supplemented August 5, 1988, which is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, and at the Portland State University Library, 731 SW., Harrison Street, Portland, Oregon 97207.

Dated at Rockville, Maryland, this 6th day of October 1988.

For the Nuclear Regulatory Commission.

George W. Knighton,

Director, Project Directorate V, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 88–24821 Filed 10–26–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–395]

South Carolina Electric & Gas Co. and South Carolina Public Service Authority, Virgil C. Summer Nuclear Station; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–12 to the South Carolina Electric & Gas Company and South Carolina Public Service Authority (the licensee) for the Virgil C. Summer Nuclear Station, Unit No. 1, located in Fairfield County, South Carolina.

Environmental Assessment

Identification of Proposed Action

The proposed amendment would revise the provisions in the Technical Specifications (TS) relating to fuel enrichment.

The proposed action is in accordance with the licensee's applications dated March 8, 1988; May 20, 1988; and June 20, 1988, which were supplemented with submittals filed July 8, 1988; August 31, 1988; September 16, 1988; September 30, 1988; and October 11, 1988.

The Need for the Proposed Action

The proposed changes are needed so that the licensee can (1) continue use of higher enrichment fuel and (2) maintain the flexibility to extend the fuel irradiation and to operate for longer fuel cycles.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed revisions to the Technical Specifications. The proposed revisions would permit use of fuel enriched with Uranium 235 in excess of 4 weight percent and up to 4.25 weight percent and the licensee would expect the fuel to be irradiated to levels above 33 gigawatt days per metric ton (GWD/MT), but not to exceed 60 GWD/MT. The safety considerations associated with reactor operation with higher enrichment and extended irradiation have been evaluated by the NRC staff. The staff has concluded that such changes would not adversely affect plant safety. The proposed changes have no effect on the probability of any accident. The increased burnup may slightly change the mix of fission products that might be released in the event of a serious accident but such small changes would not significantly affect the consequences of serious accidents. No changes are being made in the types or amounts of any radiological effluents that may be released offsite. There is no significant increase in the allowable individual or cumulative occupational radiation exposure.

With regard to potential nonradiological impacts of reactor operation with higher enrichment and extended irradiation, the proposed changes to the TS involve systems located within the restricted area, as defined in 10 CFR Part 20. They do not affect nonradiological plant effluents and have no other environmental impact.

The environmental impacts of transporation resulting from the use of higher enrichment fuel and extended irradiation are discussed in the NRC staff's assessment entitled, "NRC Assessment of the Environmental Effects of Transportation Resulting from Extended Fuel Enrichment and Irradiation," dated July 7, 1988. This assessment was published in the August 11, 1988 **Federal Register** (53 FR 30355) as part of the Carolina Power & Light Co., et al., Shearon Harris Nuclear Power Plant, Unit 1, Environmental Impact Assessment and Finding of No Significant Impact for the utilization of higher enriched fuel and extended fuel irradiation and is hereby referenced for this Environmental Assessment and Finding of No Significant Impact. As indicated therein, the environmental cost contributions of the proposed increase in the fuel enrichment and irradiation limits are either unchanged or may in fact be reduced from those summarized in Table S–4, as set forth in 10 CFR 51.52(c). Therefore, the Commission concludes that there are no significant radiological or nonradiological environmental impacts associated with the proposed amendment.

Alternative to the Proposed Action

Since the Commission concluded that there are no significant environmental effects that would result from the proposed action, any alternatives would have equal or greater environmental impacts.

The principal alternative would be to deny the requested amendment. This would not reduce environmental impacts of plant operation and would result in reduced operational flexibility.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the "Final Environmental Statement related to the operation of the Virgil C. Summer Nuclear Station, Unit No. 1," dated May 1981.

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 license amendment.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the application for amendment and various revisions and supplemental information submitted dated March 8, 1988; May 20, 1988; June 20, 1988; July 8, 1988; August 31, 1988; September 16, 1988; September 30, 1988; and October 11, 1988, which are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC 20555 and at the Fairfield County Library, Garden and Washington Street, Winnsboro, South Carolina 29180.

Dated at Rockville, Maryland, this 24th day of October 1988.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Director, Project Directorate II–I, Division of Reactor Projects I/II.

[FR Doc. 88–24949 Filed 10–26–88; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards, Subcommittee on Advanced Boiling Water Reactors; Meeting

The ACRS Subcommittee on Advanced Boiling Water Reactors will hold a meeting on November 15–16, 1988, Room P–114, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, November 15, 1988–8:30 a.m. until the conclusion of business.

Wednesday, November 16, 1988–8:30 a.m. until the conclusion of business.

The Subcommittee will continue its FDA review of this standard plant. Detailed ACRS questions will be covered on review module 1. An overview of the second review module is planned.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, its consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Herman Alderman (telephone 301/492–7750) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Date: October 19, 1988.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 88–24790 Filed 10–26–88; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards; Procedures for Meetings

Background

Procedures to be followed with respect to meetings conducted pursuant to the Federal Advisory Committee Act by the Nuclear Regulatory Commission's Advisory Committee on Reactor Safeguards, which were published October 2, 1987 (52 FR 37033), are renewed by this notice. These procedures are set forth in order that they may be referenced in future individual meeting notices.

The Advisory Committee on Reactor Safeguards (ACRS) is an independent group established by Congress to review and report on each application for a construction permit and on each application for an operating license for a nuclear power reactor facility and on certain other nuclear safety matters. The Committee's reports become a part of the public record. Although ACRS meetings are ordinarily open to the public and provide for oral or written statements from members of the public to be considered as a part of the Committee's information gathering procedure, they are not adjudicatory hearings such as are conducted by the Nuclear Regulatory Commission's Atomic Safety and Licensing Board as part of the Commission's licensing process. ACRS reviews do not normally encompass matters pertaining to environmental impacts other than those pertaining to radiological safety. ACRS full meetings are conducted in accordance with the Federal Advisory Committee Act.

General Rules Regarding ACRS Meetings

An agenda is published in the **Federal Register** for each full Committee meeting and for each Subcommittee meeting which is partially or fully open to public attendance. Practical considerations may dictate some alterations in the agenda. The Chairman of the Committee or Subcommittee which is meeting is empowered to conduct the meeting in a manner that, in his judgment, will facilitate the orderly conduct of business, including provisions to carry over an incomplete session from one day to the next.

With respect to public participation in ACRS meetings, the following requirements shall apply:

(a) Persons wishing to submit written statements regarding the agenda items may do so by providing a readily reproducible copy at the beginning of the meeting. When meetings are held at locations other than Washington, DC, reproduction facilities are usually not available. Accordingly, 15 additional copies should be provided for use at such meetings. Comments should be limited to safety-related areas within the Committee's purview.

Persons desiring to mail written comments may do so by sending a readily reproducible copy addressed to the Designated Federal Official specified in the **Federal Register** notice for the individual meeting in care of the ACRS, NRC, Washington, DC 20555. Comments postmarked no later than one calendar week prior to a meeting will normally be received in time for reproduction, distribution, and consideration at the meeting.

(b) Persons desiring to make an oral statement at the meeting should make a request to do so prior to the beginning of the meeting, identifying the topics and desired presentation time so that

appropriate arrangements can be made. The Committee will receive oral statements on topics relevant to its purview at an appropriate time chosen by the Chairman.

(c) Further information regarding topics to be discussed, whether a meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call, on the working day prior to the meeting, to the Office of the Executive Director of the Committee (telephone: 301/492–4516 ATTN: the Designated Federal Official specified in the **Federal Register** Notice for the meeting) between 7:30 a.m. and 4:15 p.m., Washington, DC time.

(d) Questions may be asked only by ACRS Members, Consultants, and Staff.

(e) The use of still, motion picture, and television cameras, the physical installation and presence of which will not interfere with the conduct of the meeting, will be permitted both before and after the meeting and during any recess. The use of such equipment will be allowed while the meeting is in session at the discretion of the Chairman to degree that is not disruptive to the meeting. When use of such equipment is permitted, appropriate measures will be taken to protect proprietary or privileged information which may be in documents, folders, etc., being used during the meeting. Recordings will be permitted only during those sessions of the meeting when a transcript is being kept.

(f) A copy of the transcript of the open portions of the meeting where factual information is presented will be available at the NRC Public Document Room, 2120 L Street NW., Washington, DC 20555, for inspection within one week following the meeting. A copy of the minutes of the meeting will be available at the same location on or before three months following the meeting. Copies may be obtained upon payment of appropriate charges

Special Provisions When Proprietary Sessions Are To Be Held

If it is necessary to hold closed sessions for the purpose of discussing matters involving proprietary information, persons with agreements permitting access to such information may attend those portions of ACRS meetings where this material is being discussed upon confirmation that such agreements re effective and relate to the material being discussed.

The Executive Director of the ACRS should be informed of such an agreement at least three working days prior to the meeting so that it can be confirmed and a determination made regarding the applicability of the agreement to the material that will be discussed during the meeting. The minimum information provided should include information regarding the date of the agreement, the scope of material included in the agreement, the project or projects involved, and the names and titles of the persons signing the agreement. Additional information may be requested to identify the specific agreement involved. A copy of the executed agreement should be provided to the Designated Federal Official prior to the beginning of the meeting.

Date: October 24, 1988.

Andrew L. Bates,

Acting Advisory Committee Management Officer.

[FR Doc. 88–24825 Filed 10–26–88; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards, Subcommittee on Auxiliary and Secondary Systems; Meeting

The ACRS Subcommittee on Auxiliary and Secondary Systems will hold a meeting on November 22, 1988, Room P–114, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting will be as follows:

Tuesday, November 22, 1988–10:45 a.m. until 4:00 p.m.

The Subcommittee will review the adequacy of the proposed staff's plans to implement the recommendations resulting from the Fire Risk Scoping Study.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS Staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, its consultants, and other interested persons regarding this reviw.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS Staff member, Mr. Sam Duraiswamy (telephone 301/492–9522) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Dated: October 19, 1988.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 88–24827 Filed 10–26–88; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards, Subcommittee on Reliability Assurance; Meeting

The ACRS Subcommittee on Reliability Assurance will hold a meeting on November 2, 1988, Room P–114, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting will be as follows:

Tuesday, November 22, 1988—8:00 a.m. Until 10:30 a.m.

The Subcommittee will continue its discussion of the Equipment Qualification-Risk Scoping Study with special emphasis on the peer-review comments.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, its consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Sam Duraiswamy (telephone 301/492-9522) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Date: October 19, 1988.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 88-24828 Filed 10-26-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-456, License No. NPF-72, EA 88-91]

Commonwealth Edison, Braidwood Station, Unit 1; Order Imposing Civil Monetary Penalty

I

Commonwealth Edison Company (licensee) is the holder of Operating License No. NPF-72 issued by the Nuclear Regulatory Commission (NRC/Commission) on July 2, 1987. The license authorizes the licensee to operate the Braidwood Station, Unit 1, in accordance with the conditions specified therein.

II

An inspection of the licensee's activities was conducted during the period March 1-17, 1988. The results of this inspection indicated 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 May 6, 1988. The Notice stated the nature of the violations, the provisions of the NRC's requirements that the licensee had violated, and the amount of the civil penalty proposed for the violations.

The licensee responded to the Notice of Violation and Proposed Imposition of Civil Penalty by letter dated June 20, 1988. In its response, the licensee denies Violations B, C.1, and part of C.2 and admits Violation A. In addition, the licensee takes issue with the proposed imposition of a Severity Level III violation and the civil penalty.

After reviewing the licensee's response, the NRC staff concludes that with regard to Violation B the licensee was correct in arguing that the violation was incorrect as stated in that testing performed on March 4 and 11, 1987 could not have detected a problem in a design change that was not fully implemented until a few weeks after the testing. In a letter dated September 7, 1988 the NRC staff informed the licensee of that conclusion and provided the licensee with a modification of Violation B which properly identified the time period of testing which, by the licensee's admission, was inadequate to identify the heater interlock logic switch deficiency. The licensee responded to the September 7, 1988 letter in a letter dated October 6, 1988. In that response the licensee did not take exception to the modified violation but rather provided additional information relative to system operability.

III

After consideration of the licensee's responses and the statements of fact, explanation, and argument for mitigation contained herein, the Deputy Executive Director for Regional Operations has determined, as set forth in the Appendix to this Order, that Violations A and C occurred as stated, that Violation B as amended in the NRC staff's letter of September 7, 1988 occurred as stated, that the violations are properly categorized at Severity Level III, and that the penalty proposed for the violations designated in the Notice of Violation and Proposed Imposition of Civil Penalty should be imposed.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, It Is Hereby ordered that:

The licensee pay a civil penalty in the amount of Fifty Thousand Dollars ($50,000) 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 of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555.

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 of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555, with a copy to the Regional Administrator, Region III, 799 Roosevelt Road, Glen Ellyn, Illinois 60137, and a copy to the NRC Resident Inspector, Braidwood Station.

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 at 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 issue to be considered at such hearing shall be:

(a) Whether the licensee was in violation of the Commission's requirements as set forth in the Notice of Violation and Proposed Imposition of Civil Penalty as amended referenced in Section II above, and

(b) Whether, on the basis of such violations, this Order should be sustained.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 19th day of October 1988.

James M. Taylor,

Deputy Executive Director for Regional Operations.

Appendix

On May 6, 1988, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for voilations identified during an NRC inspection. Commonwealth Edison Company (CECO) responded to the Notice on June 20, 1988. In its initial response, the licensee admits that Violation A occurred as stated, but denies that Violations B, C.1, and part of C.2 occurred as stated in the Notice. In addition, the licensee takes issue with the proposed imposition of the Severity Level III violation and the civil penalty. The NRC staff's evaluation and conclusions regarding the licensee's arguments follows.

Restatement of Violation B

B. 10 CFR Part 50, Appendix B, Criterion XI, "Test Control," requires in

part that a test program be established to demonstrate that systems and components will perform satisfactorily in service.

Commonwealth Edison Company Quality Procedure No. 11–2, "Development, Performance, Documentation, and Evaluation of Preoperational and Start-Up Tests," in part implements 10 CFR Part 50, Appendix B, Criterion XI. Section 3.2 of Quality Procedure No. 11–2 defines preoperational tests as tests to demonstrate the satisfactory mechanical and electrical operation of the systems involved including interlocks between systems.

Contrary to the above, the licensee's test program did not demonstrate that the Control Room Ventilation System would perform satisfactorily in that preoperational testing of the Control Room Ventilation Systems which was performed on March 4 and 11, 1987 on trains B and A respectively did not identify that heater interlock logic switches were wired incorrectly, that specified switch setpoints had not been adjusted, and that the Control Room Ventilation Systems were inoperable.

Summary of Licensee's Response to Violation B

The licensee denies the violation because the design error could not have been detected by initial preoperatioal testing of the Control Room Ventilation Systems (CRVS) performed on March 4 and 11, 1987. The design change was not completed until May 21, 1987. However, the licensee admits that testing requried subsequent to the installation of the design change was incorrectly selected. It also points out that the Notice transmittal letter characterized the CRVS as a degraded system rather than an inoperable system as stated in Violation B.

NRC Evaluation of Licensee's Response

The NRC staff agrees that the design change occurred after the initial preoperational testing of the CRVS on March 4 and 11, 1987, and, therefore, the initial preoperational tests could not have detected the design error. However, the licensee admits that testing required subsequent to the installation of the design change was incorrectly selected. This testing is considered part of the requried preoperational testing program and should have been adequate to identify the design error before the CRVS were declared operable at the time of initial criticality for Unit 1 on May 29, 1987; however, the design error was not identified by the licensee until November 6, 1987, during a review of CRVS startup test results. The NRC staff agrees with the licensee's statement that, for consistency, the Notice transmittal letter characterization of the CRVS as a degraded system rather than an inoperable system is also appropriate for Violation B. In consideration of these comments, Violation B was amended in a September 7, 1988 letter to the licensee to read as follows:

B. 10 CFR Part 50, Appendix B, Criterion XI, "Test Control," requires in part, that a test program be established to demonstrate that systems and components will perform satisfactorily in service.

Commonwealth Edison Company Quality Procedure No. 11–2, "Development, Performance, Documentation, and Evaluation of Preoperational and Start-up Tests," in part implements 10 CFR part 50, Appendix B, Criterion XI. Section 3.2 of Quality Procedure No. 11–2 defines preoperational tests as tests to demonstrate the satisfactory mechanical and electrical operation of the systems involved including interlocks between systems.

Contrary to the above, the licensee's test program did not demosntrate that the Control Room Ventilation Systems (CRVS) would perform satisfactorily in that CRVS preoperational testing, which was completed before the CRVS were declared operable at the time of Unit 1 initial criticality on May 29, 1987, did not identify that heater interlock logic switches were wired incorrectly, that specified switch setpoints had not been adjusted, and that the CRVS were in a degraded condition.

The violation, as modified, focuses on the licensee's failure to adequately implement the CRVS preoperational test program, including tests required following system design changes but before the systems were declared operational, rather than the inability of the initial preoperational tests to identify the design error. The licensee responsed to the September 7, 1988 letter. However, that response dated October 6, 1988 only provided further information relative to system operability and did not take exception to the modified violation. Therefore, the NRC staff has concluded that the violation, as rewritten for clarification, occurred.

Restatement of Violation C.1

C. 10 CFR Part 50, Appendix B, Criterion V, "Instructions, Procedures, and Drawings," requires that activities affecting quality be prescribed by documented instructions, procedures, or drawings and be accomplished in accordance with these instructions, procedures, or drawings.

Contrary to the above, as of November 6, 1987, it was identified that activities affecting quality had not been accomplished in accordance with prescribed instructions or drawings, in that:

1. The Architect Engineer did not perform the interdisciplinary review of ECN 34446, to verify or check the adequacy of the design information, as required by procedures.

Summary of Licensee's Response to Violation C.1

The licensee denies the violation and contends that it is a restatement of Violation A.

NRC Evaluation of Licensee's Response

The NRC staff maintains that Violations C.1 and A are different. Violation A states that the licensee did not meet the requirements of 10 CFR Part 50, Appendix B, Criterion III because measures for coordination among design organizations were inadequate in that the measures failed to ensure that ECN No. 34272 was correctly incorporated into ECN No. 34446. The root cause of Violation A was ambiguous nomenclature used in the logic diagrams of ECN No. 34272. Violation C.1 states that the licensee did not meet the requirements of 10 CFR Part 50, Appendix B, Criterion V in that activities affecting quality had not been accomplished in accordance with prescribed procedural instructions. Specifically, the architect engineer did not follow the procedural requirement to perform the interdisciplinary review of ECN No. 34446 to verify or check the adequacy of the design information. The root cause of Violation C.1 was an individual's error which resulted in a procedural instruction being improperly implemented. Sargent & Lundy General Quality Assurance Procedure No. GQ–3.13, "Engineering Change Notices," states that the preparer shall forward the ECN for internal interfacing comments and if no interfacing comments are required, the ECN shall be forwarded directly to the reviewer. By incorrectly concluding that no internal interfacing comments were necessary, the preparer precluded the interdisciplinary review of ECN No. 34446 that could have caught the error that was made. This violation occurred independently of and in addition to Violation A.

Restatement of Violation C.2

C. 10 CFR Part 50, Appendix B, Criterion V, "Instructions, Procedures

and Drawings," requires that activities affecting quality be prescribed by documented instructions, procedures, or drawings and be accomplished in accordance with these instructions, procedures, or drawings.

Contrary to the above, as of November 6, 1987, it was identified that activities affecting quality had not been accomplished in accordance with prescribed instructions or drawings, in that:

2. The heater interlock logic switches for the Control Room Ventilation Systems had not been modified in accordance with the instructions or drawings of ECN No. 34272 which was issued December 16, 1986 or in accordance with the differential pressure switch setpoint specifications for Switches OPDS–VC059 (Sheet No. PS631) and OPDS–VC060 (Sheet No. PS633) which were promulgated on February 9, 1987.

Summary of Licensee's Response to Violation C.2

The licensee denies the first part of the violation because it contends that the heater interlock logic switches for the Control Room Ventilation Systems (CRVS) had been modified in accordance with the instructions and drawings of ECN No. 34272 on May 20 and 21, 1987. The licensee admits that the differential pressure switch setpoints specifications had not been implemented in a timely fashion, per the Station Review Program, because of a work backlog.

NRC Evaluation of Licensee's Response

The NRC staff maintains its position that the CRVS had not been modified in accordance with the instructions or drawings of ECN No. 34272. The modifications which occurred in May 1987 were in accordance with ECN No. 34446, not ECN No. 34272. The instructions and drawings of ECN No. 34272 correctly specified the modifications to the CRVS heater interlock logic switches. Due, in part, to the licensee's failure to follow design control procedures, ECN No. 34272 specifications were incorrectly incorporated into ECN No. 34446.

Summary of Lincensee's Arguments Regarding Severity Level

The licensee acknowledges that there were specific deficiencies which required corrective action, but believes that no programmatic defects exist warranting the imposition of a Severity Level III violation and civil penalty. The licensee presents the following arguments to support this assertion:

1. The failure to coordinate mechanical and electrical design requirements was an isolated occurrence resulting from one individual's misinterpretation of nomenclature.

2. A 100% review of safety-related differential pressure switch applications at the four Byron and Braidwood units revealed no similar discrepancies, thus demonstrating that adequate measures were established to control design interfaces.

3. The failure to conduct a proper test of the change in heater design resulted from an individual (rather than general) failure to judge accurately the complexity of the change.

4. A review of 2,176 preoperational testing "deficiencies," resulting from changes in design after completion of preoperational testing but before the systems were released to plant operations showed that the proper tests had been conducted in all but five cases (only three in addition to CRVS tests for which licensee was cited). The licensee asserts this demonstrates that the test control program was, in general, fundamentally sound and properly implemented.

5. A review of violations identified during the last SALP period indicated that those items should not be considered symptomatic of the items presented in the Notice.

NRC Evaluation of Licensee's Response

The NRC staff maintains that the violations should be categorized collectively as a Severity Level III problem in accordance with 10 CFR Part 2, Supplement I.C.2, in that the violations resulted in systems (CRVS) designed to prevent or mitigate a serious safety event not being able to perform their intended function under certain conditions. In Attachment C to its June 20, 1988 response, the licensee responds to NRC concerns regarding its safety significance assessments. The licensee provides additional information in its October 6, 1988 letter. The licensee concludes that while thyroid dose in an accident could be increased due to the degraded CRVS, that dose would remain below the design criterion of 10 CFR Part 50, Appendix A, GDC–19 (23.7 rem versus 30 rem). The NRC staff review of the licensee's submittals indicates that although some of the NRC concerns have been resolved, the licensee assessment remains speculative, especially the filter efficiency assumption for 100% relative humidity conditions. Moreover, although the staff and the licensee disagree on some assessment assumptions, there is agreement that the Control Room Ventilation Systems were in a degraded condition and the accident thyroid dose would be increased due to the degraded conditions. NRC's concerns are based not only on the degraded systems but also, and more importantly, on the underlying design control and testing problems which permitted a safety system to be operated for several months in a modified condition without appropriate verification to assure it met design requirements. Although the design and test control problems appear to be primarily due to personnel errors, the failure to reset the heater interlock switch setpoints was due to a programmatic backlog problem which caused significant delays in making setpoint adjustments. The series of problems represented by the violations exacerbated the initial design error by delaying its discovery. As a result of this delay, the Control Room Ventilation Systems (CRVS) were degraded from May 29, 1987 until November 21, 1987.

The NRC staff has reviewed the specific arguments made by the licensee and concludes that an argument may be made that no programmatic deficiencies existed. However, the fact remains that in this case a series of errors resulted in a safety related system being in a degraded mode and, as such, the violations most appropriately fit example C.2 of Supplement I of 10 CFR Part 2, Appendix C.

Summary of Request for Mitigation of Civil Penalty

The licensee contends that an adequate basis exists for mitigation of the proposed Civil Penalty. In support of this position, it presents the following arguments which address the five civil penalty adjustment factors contained in Section V(B) of 10 CFR 2, Appendix C:

1. Prompt Identification and Reporting

Summary of Licensee's Argument. Under the circumstances, the length of time to discover the design error was not unreasonably long and, as such, should not be the basis to discount the licensee's prompt reporting.

NRC Evaluation. Under the NRC Enforcement Policy, the reasonableness of the length of time to discovery depends on the opportunities for discovery and ease of discovery. In this case, from the time ECN No. 34446 was prepared on December 16, 1986 until the design error was discovered, during a review of CRVS startup test results on November 6, 1987, the licensee missed numerous discovery opportunities, including: (1) Interfacing comment reviews of ECN No. 34446, if the ECN preparer had properly followed the

procedure; (2) the required review of the ECN by the reviewer and the approver; (3) the testing of the heater switch design change in May 1987, if the correct test type had been chosen; (4) switch setpoint verifications, if the setpoint had been adjusted as required before the CRVS were declared operable on May 29, 1987; (5) various CRVS surveillance and startup tests between May 29 and November 6, 1987, if the setpoints had been adjusted as required; and (6) the CRVS startup test on October 2, 1987, if startup test personnel had been fully cognizant of the system operability implications of the zero heater current measurements. It is the NRC staff's position that it is reasonable to have expected the licensee to have discovered the design error earlier and, therefore, mitigation of the proposed civil penalty for prompt identification and reporting of the event is not warranted.

2. Corrective Action to Prevent Recurrence

Summary of Licensee's Arguments. The licensee contends that prompt and comprehensive corrective actions have been taken.

NRC Evaluation. Although the design changes were quickly corrected after the errors were identified, it was 15 days before the heater interlock switch setpoints were corrected. Furthermore, although the licensee conducted a review to verify no other safety-related errors were associated with design changes which occurred after completion of system preoperational testing but before the systems were released to the Operations Department, the review was conducted after concerns were raised by the NRC during the enforcement conference. It is the NRC staff's position that the licensee's corrective actions were not sufficiently prompt to warrant mitigation of the proposed civil penalty for corrective action to prevent recurrence.

3. Past Performance

Summary of Licensee's Agruments. The licensee believes that this incident is distinct from other issues addressed in the last Braidwood SALP. The licensee maintains that, although prior violations have occurred in the Braidwood Startup Test Program, and that this program is significant to the safe operation of Braidwood Station, the remedial review done of the results of the program, as they relate to detection of design errors, has identified no prior occurrence for which prior corrective action was either inadequate or ineffective.

NRC Evaluation. The NRC maintains that the design control problems are indicative of the previous performance problems identified during the SALP 7 assessment period. The SALP 7 Inspection Report (No. 50–456/88001(DRP); No. 50–457/88001(DRP)) findings are symptomatic of the items presented in the Notice in that they are indicative of a need to reduce personnel errors by increasing personnel alertness and sensitivity to plant conditions and requirements and to improve design control, test control, and adherence to procedures.

4. Prior Notice of Similar Events

Summary of Licensee's Arguments. The licensee contends that there was no prior notice of similar events.

NRC Evaluation. The NRC staff agrees that the licensee had no prior notice. However, because a lack of prior notice does not serve as a basis for mitigation under the Enforcement Policy, the base civil penalty is unaffected by this factor.

5. *Multiple Occurrences*

Summary of Licensee's Arguments. The licensee contends that comprehensive reviews of design changes did not identify multiple occurrences of the problems identified in the Notice.

NRC Evaluation. The NRC staff agrees that there were no multiple occurrences. However, because a lack of multiple occurrences does not serve as a basis for mitigation under the Enforcement Policy, the base civil penalty is unaffected by this factor.

NRC Conclusion. The NRC staff concludes that the violations, as amended with respect to Violation B, occurred as stated in the Notice of Violation and Proposed Imposition of Civil Penalty. Moreover, the NRC concludes that the violations are appropriately classified as a Severity Level III problem. Further, the NRC staff has also concluded that a sufficient basis has not been provided by the licensee for the reduction of the Severity Level, or remission, or mitigation of the proposed civil penalty. Accordingly, the civil penalty in the amount of Fifty Thousand Dollars ($50,000) should be imposed.

[FR Doc. 88–24823 Filed 10–26–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–461, License No. NPF–62, EA 88–90]

Illinois Power Company (Clinton Nuclear Station); Order Imposing Civil Monetary Penalty

I

Illinois Power Company (licensee) is the holder of Operating License No. NPF–62 issued by the Nuclear Regulatory Commission (NRC or Commission) on April 17, 1987. The license authorizes the licensee to operate the Clinton Nuclear Station in accordance with the conditions specified therein.

II

Special safety inspections of the licensee's activities were conducted during the periods April 17 through October 13, 1987 and February 25 through March 31, 1988. (NRC Inspection Reports No. 50–461/87026 (DRS) and No. 50–461/88010 (DRS)). The results of the inspections indicated 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 (Notice) was served upon the licensee by letter dated June 1, 1988. The Notice stated the nature of the violations, the provisions of the NRC's requirements that the licensee had violated, and the amount of the civil penalty proposed for the violations. The licensee responded to the Notice of Violation and Proposed Imposition of Civil Penalty by letter dated June 29, 1988. In its response, the licensee denied Violations A and C and admitted Violation B. In addition, the licensee requested remission of the civil penalty.

III

After consideration of the licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the Deputy Executive Director for Regional Operations has determined, as set forth in the Appendix to this Order, that Violation A occurred as stated and that the penalty proposed for the violation designated in the Notice of Violation and Proposed Imposition of Civil Penalty should be imposed. With respect to Violation C it was determined that although the licensee failed to meet the EQ requirements of 10 CFR 50.49 the violation is most appropriately classified at Severity Level IV and should be removed as a violation supporting the proposed civil penalty.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, it is Hereby Ordered That:

The licensee pay a civil monetary penalty in the amount of Seventy-Five Thousand Dollars ($75,000) 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.

The licensee may request a hearing within 30 days of the date of this Order. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and should 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 III, 799 Roosevelt Road, Glen Ellyn, Illinois, 60137, and a copy to the NRC Resident Inspector, Clinton Nuclear Station.

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 at 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 issue to be considered at such hearing shall be:

(a) Whether the licensee was in violation of NRC requirements as described in Violation A set forth in the Notice of Violation and Proposed Imposition of Civil Penalty referenced in Section II above, and

(b) Whether, on the basis of that violation and Violation B set forth in the Notice and admitted by the licensee, this Order should be sustained.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 20th day of October 1988.

James M. Taylor,

Deputy Executive Director for Regional Operations.

Appendix—Evaluation and Conclusion

On June 1, 1988, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for violations identified during an NRC inspection. Illinois Power Company responded to the Notice on June 29, 1988. In its response, the licensee admitted that Violation B occurred, but denied that Violations A and C occurred as stated in the Notice. The licensee argues that the NRC's actions in proposing a civil penalty for Violations A and C is not consistent with sound regulatory practices and that remission of the penalty is warranted. The contested violations are restated below, followed by a summary of the licensee's response, the NRC evaluation, and the NRC conclusion.

I. Restatement of Violation A

10 CFR 50.49(f) requires, in part, that each item of electric equipment important to safety be qualified by testing and/or analysis under postulated environmental conditions.

Contrary to the above, as of August 19, 1987, the following equipment important to safety was not qualified by appropriate testing and/or analysis which reflected the installed configuration:

One hundred and ninety-six AMP KYNAR electrical butt splices installed in valve actuators, solenoid valves and electrical junction boxes affecting multiple safety systems.

Summary of Licensee's Response

The licensee denies that Violation A occurred as stated, in that it had a qualification test report for the most severe environmental condition anticipated in a design basis accident (DBA). The licensee stated that the samples were tested in a configuration similar to their installation in the plant. The licensee noted that in the cover letter accompanying the Notice of Violation, the NRC stated that the butt splices and the wire nuts should have been tested in contact with a ground "since that is a possible configuration and failure mode." When a walkdown of butt splices was performed, none were found in contact with a metal ground. The licensee believes that the NRC's view of the environmental qualification testing required for these items is a result of a new interpretation by the NRC of the applicable regulations and of industry standards.

NRC Evaluation of Licensee's Response

Although the licensee had a qualification test report on AMP KYNAR butt splices for severe environmental parameters anticipated during a DBA at Clinton, the tested configuration of the AMP KYNAR butt splices did not simulate an installation in which the splices were touching each other or the metal enclosures. Since Clinton installation and maintenance procedures provide no restrictions for ensuring that splices do not touch each other or the metal housing, severe failures in these configurations were postulated by the NRC during the inspection and were confirmed during testing of the splices.

The licensee in its response stated that during a walkdown subsequent to the NRC finding, none of the splices were found to be in contact with a metal ground. However, it is not clear to the NRC how the licensee could assume that several splices installed in a congested metal junction box or equipment housing would not touch the metal enclosure and thereby have the potential of being grounded. In addition, prior to the NRC finding, the licensee had no evidence to support a conclusion that the splices were not touching the enclosure since such a configuration was allowed by installation design or could result due to maintenance activities. In short, a butt splice in contact with ground is an expected configuration. It was also noted that the licensee's response did not address postulated failures due to splices touching each other and there was no record in the licensee's EQ documentation to show that any evaluations or tests of such a configuration had been performed.

The NRC's view of this violation does not reflect a new interpretation of the EQ regulations and standards. 10 CFR 50.49(k) establishes NUREG–0588, Category I, requirements as being acceptable for qualification of original equipment. NUREG–0588, Category I, section 2.2(3) refers to IEEE 323–1974, section 6.3.1.2 which states, in part, that equipment during a type test shall be maintained in a manner and a position that simulates its expected installation when in actual use. The NRC has proposed a number of other environmental qualification enforcement actions for cases in which installed equipment was not maintained in the condition or position of the tested equipment. The NRC recognizes that there is no specific requirement to consider splice-to-splice and splice-to-metal housing configurations. However, given the rather unique application of the AMP KYNAR butt splices, inside containment at Clinton, the NRC concludes that considering such configurations is necessary and not unreasonable. Based on the above considerations, the licensee had not conducted a test to demonstrate qualification of the butt splices in the expected mounting configuration in which splices touch each other or the metal enclosure nor was it demonstrated that such configuration should not be considered.

Restatement of Violation C

10 CFR 50.49(f) requires, in part, that each item of electric equipment important to safety be qualified by testing and/or analysis under postulated environmental conditions.

Contrary to the above, as of August 19, 1987, the following equipment important to safety was not qualified by appropriate testing and/or analysis which reflected the installed configuration:

Two hundred and seventy Thomas and Betts nylon wire caps installed in ninety dual voltage Limitorque actuators affecting multiple pieces of equipment important to safety.

Summary of Licensee's Response

The licensee denies that Violation C occurred as stated, in that these caps were tested by Limitorque for anticipated environmental conditions during a DBA at the Clinton Station. The licensee states that the caps were tested in the configuration installed in the plant. The licensee believes that the NRC's view that environmental qualification testing of these items was not adequate is the result of a new interpretation by the NRC of industry standards.

NRC Evaluation of Licensee's Response

The licensee's EQ documentation did not address the testing of any kind of nylon wire caps. Subsequent to the finding, the licensee contended that a letter from the vendor (Limitorque) confirmed that Thomas and Betts wire caps were used; however, a letter from a vendor, in lieu of test data, is not considered an adequate basis for the environmental qualification of the component. Since there was no evidence in the EQ files that the wire caps had been tested, and NRC was unable to determine if the installed configuration was adequate.

NRC's view of this violation does not represent a new interpretation of the EQ regulations and standards. NUREG 0588, Category I, Section 5(2) states that a certificate of conformance by itself is not acceptable unless it is accompanied by test data and information on the qualification program. Examining the applicable industry standard, it is found that IEEE 323–1974, Section 6.2(5), states that qualification of Class 1E equipment shall include identification of the design life of any components which may have a life shorter than that of the complete equipment. Since the test report does not state that Thomas and Betts wire caps were used in the tested actuators, the vendor correspondence does not state that the wire caps were used in the tested actuators (and were unprotected), and since no data was provided which supports the vendor's assertions, insufficient evidence exists to support qualification. Furthermore, because the suspect caps were made of nylon, a material susceptible to radiation and thermal aging, the licensee should have addressed the mounting configuration and the condition of the caps during and after LOCA testing.

In conclusion, the NRC staff maintains that Violation C represents a violation of EQ requirements. However, after reconsidering the significance of the violation of NRC staff recommends that it be classified at Severity Level IV. Further, because this violation has been the subject of extensive discussion and corrective actions have been taken, it is recommended that a revised Notice not be issued.

II. Summary of Licensee's Request for Remission

The licensee believes that Violations A and C as stated in the Notice of Violation and Proposed Imposition of Civil Penalty did not occur and that other extenuating circumstances exist which make escalation of the civil penalty unwarranted and render remission of the penalty appropriate.

Past Performance

The licensee states that Illinois Power Company's performance in the area of environmental qualification of equipment at Clinton Power Station has been generally good. Similarly, during August through October of 1987, the NRC conducted an in-depth evaluation of the EQ program and found that it complies with NRC EQ requirements and, with limited specific exceptions, was properly implemented.

Prompt and Effective Corrective Action

For two of the examples cited in the alleged violation (AMP KYNAR butt splices and the nylon wire caps), corrective action was prompt and effective, resulting in completion of corrective action with no impact on plant operation. The NRC recognized in the cover letter accompanying the Notice of Violation that the corrective action in response to this item was "prompt and effective.

Other Extenuating Circumstances

The licensee states that the Notice of Violation that was issued by NRC Region III has concluded that the tests reviewed and accepted by Illinois Power Company were not adequate because the butt splices and wire caps were not tested while restrained to a grounded metal surface. Furthermore, when testing the nylon wire caps in the fashion required by the NRC, the only way that the wire caps coud be held in contact with metal was to physically restrain them to the actuator casing; otherwise contract could not be maintained. Thus, contact of these items with metal is only a speculative possibility that is unsupported by the design requirments or by the installations actually observed in the plant.

NRC Evaluation of Licensee's Request for Mitigation or Remission

The NRC staff has concluded that the removal of Violation C does not affect the civil penalty proposed. Violation A and B alone are sufficient for a Severity Level III violation and therefore the civil penalty is proposed based only on those two violations.

NRC reviews each proposed civil penalty on its own merits and adjusts the base civil penalty values upward or downward appropriately. The criteria for these adjustments are set forth in 10 CFR Part 2, Appendix C.V.B. Adjustments to the base civil penalty may be made for the factors described below:

1. *Prompt Identification and Reporting*—Reduction of up to 50% of the base civil penalty may be given when a licensee identifies the violations and promptly reports the violation to the NRC. In this case, the violations were identified by the NRC. Therefore, no reduction was made.

2. *Corrective Action to Prevent Recurrence*—Unusually prompt and extensive corrective action may result in reducing the proposed civil penalty as much as 50% of the base value. On the other hand, the civil penalty may be increased as much as 50% of the base value if initiation of corrective action is not prompt or is only minimally acceptable. The licensee took prompt actions to develop Justifications for Continued Operation and to test the AMP KYNAR butt splices, however, the actions taken by the licensee were inadequate following the discovery by the NRC in August 1987 that a junction box did not have a weep hole (Violation B which was admitted by the licensee). The licensee considered it an isolated case, but later found 155 others. Although prompt and extensive corrective actions were not taken for all of the identified violations, the licensee did so for 1 of the 2 problems and therefore 25% mitigation is appropriate.

3. *Past Performance*—Reduction by as much as 100% of the base civil penalty may be given for good prior performance in the general area of concern. On the

other hand, the base civil penalty may be increased by as much as 100% for prior poor performance in the general area of concern. In this case, neither escalation or mitigation was deemed appropriate since the NRC has not conducted prior broad inspections in this area and therefore has an inadequate basis for judging past performance.

4. *Prior Notice* —The base civil penalty may be increased by as much as 50% for cases where the licensee had prior knowledge of a problem as a result of a licensee audit, or specific NRC or industry notification. In this case, the licensee has prior notice about the junction box problem in the form of IE information Notice 84–57, a previous NRC violation (50–461/87026–03(b)), and a licensee Nonconforming Material Report dated September 16, 1986. Therefore, because the licensee had prior notice on one of the violations 25% escalation is appropriate.

4. *Multiple Occurrences*—The base civil penalty may be increased as much as 50% where multiple examples of a particular violation were identified during the inspection period. Based on numerous examples (196 AMP KYNAR butt splices and 156 junction boxes) and the numerous systems involved, the base civil penalty was increased by 50 percent.

In its presentation of "other Extenuating Circumstances," the licensee maintains that splice-to-splice contact is not a realistic possibility. Despite the licensee's assertion, the NRC staff concludes that the existence of a splice-to-splice contact is a realistic possibility where a mass of wires and splices are confined to the volume of an actuator casing. Therefore, these devices should have been tested in the splice-to splice configuration, since this represents a possible failure mode. This matter was addressed previously in the Appendix as was the NRC staff's revised position relative to Violation C.

As a result of the above considerations, the NRC has determined that a civil penalty increased 50% above in the base civil penalty is appropriate.

III. NRC Conclusions

The NRC staff has concluded that Violation A did occur as stated in the Notice of Violation and no basis has been provided for remission or mitigation of the civil penalty. Accordingly, the proposed civil penalty in the amount of $75,000 should be imposed.

[FR Doc. 88–24824 Filed 10–26–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–259, 50–260, and 50–296]

Tennessee Valley Authority; Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. DPR–33, DPR–52 and DPR–68 issued to Tennessee Valley Authority (TVA or the licensee), for the operation of the Browns Ferry Nuclear Plant (BFN), Units 1, 2 and 3, located in Limestone County, Alabama.

The proposed amendment would change the Browns Ferry (BFN) Technical Specification (TS) for Units 1, 2 and 3 to allow the Core Spray System (CSS) (Section 3.5.A.5) to be inoperable provided specific Limiting Conditions for Operation (LCO) are met. In addition, Unit 2 TS Tables 3.2.A and 3.2.B would be temporarily changed to note that Reactor Low Water Level Instruments LIS–3–203 A–D and LIS–3–58 A–D will be out-of-service during the time that the reactor vessel level monitoring upgrade system (RVLMS) is being performed. These changes are TS 260 and 261–T, respectively, in the licensee's application dated October 14, 1988.

Using the General Electric (GE) Standard Technical Specifications, the licensee's proposed amendment would state that the Core Spray is not required to be operable during refueling provided that the following steps are executed (1) reactor head is removed, (2) cavity is flooded, (3) spent fuel gates are removed, and (4) water level is maintained within specific limits. Changing the BFN TS as proposed, will allow various work (e.g., the reactor level monitoring modification) be performed in a safe and more efficient manner.

In addition, an asterisk (*) notation for TS 3.5.A.5 would require that there would be manual initiation capability to start either 1 loop of CSS or 1 Residual Heat Removal (RHR) pump, and its associated diesel generator. This requirement would ensure that there is additional water makeup capability and emergency power source available when there is work in progress that has the potential to drain the vessel. The spent fuel pool has a low level indication which alarms in the control room. By maintaining the requirement of TS 3.5.A.5 of having one Residual Heat Removal Service Water (RHRSW) pump operable, an additional source of water supply to the spent fuel pool is assured.

In performing the reactor vessel water level monitoring system upgrade modification, two specific water level monitoring instruments will be out-of-service. These instruments either automatically initiate the actuation of the diesel generator(s) on a reactor low water level signal or the Standby Gas Treatment System and the Reactor Building Isolation upon receipt of a reactor low level signal. Since the subject modifications render the automatic function of these instruments to be out-of-service, the licensee cannot meet the current TS. The proposed amendment request would grant temporary relief to permit fuel to be moved from the spent fuel pool to the reactor without the automatic initiation functions of these two instruments. During the time the automatic initiation logic is out-of-service, manual initiation of these systems would be available.

Before issuance of the proposed amendment, the Commission will have made findings required by the Atomic Energy Act of 1954 (the Act), as amended, 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; (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 by the licensee in its submittal and is given below.

NRC has provided standards for determining whether a significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license involves no significant hazards considerations if 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 an accident previously evaluated, or (3) involve a significant reduction in a margin of safety.

1. The proposed change does not involve a significant increase in the probability or consequences of any accident previously evaluated.

a. Changing TS LCO 3.5.A.5 does not change any of the design criteria or bases for

which BFN was licensed. The BFN Final Safety Analysis Report (FSAR) and the assumptions made in the accident analysis are not invalidated as a result of this change. The proposed change requires specific conditions to be met when the CSS is not needed to be operable. In addition to those conditions identified in the GE Standard TS, we are adding the requirements to have manual initiation capability available for either 1 CSS loop or 1 RHR pump, and their associated diesel generator(s), when work is being performed with the capability of draining the reactor vessel. This along with the requirement of having 1 RHRSW pump operable ensures that adequate water is available for makeup to the reactor vessel. The proposed change is still bounded by the FSAR analysis since the change only applies to operability requirements in the cold shutdown or refuel conditions.

b. This temporary change would allow the Reactor Low Water Level Instrument (LIS–3–203 A–D) to be out-of-service during that time in which the reactor vessel level monitoring system modificaton is being installed. When the reactor water level falls below the low level setpoint, this instrument automatically initiates the Standby Gas Treatment System and Reactor Building Isolation. The intended safety function of these systems is still maintained through the manual initiation capability. In addition to having manual initiation capability available, these systems would still automatically initiate upon receipt of a high radition signal. Again, this temporary relaxation does not invalidate any safety-related function or analysis in which BFN was licensed.

c. This temporary change would allow the Reactor Water Level Instrument (LIS–3–58 A–D) to be out-of-service during that time in which the reactor vessel level monitoring system modification is being installed. One of the functions of this instrument is to automatically actuate the diesel generator(s) when the reactor water level falls below the low level setpoint. Maintaining the manual initiation capability of the diesel generator(s) ensures that emergency power is available to either the CSS or RHR system. This ensures that adequate makeup water is available to either the CSS or RHR system. This ensures that adequate makeup water is available to the reactor vessel. This proposed change does not invalidate the BFN FSAR and the design basis to which BFN was designed.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

a. The proposed changes, as stated above, are enveloped by the current BFN FSAR. Even though the automatic initiation logic for the CSS and RHR system will be out-of-service during the specific LCO conditions stated in LCO 3.5.A.5, the addition of the asterick notation (*) requiring that manual initiation capability for 1 CSS loop or 1 RHR pump ensures that adequate water supply is available to keep the reactor core covered.

(b) The temporary relaxation of allowing instrument LIS–3–203 A–D to be out-of-service, will not introduce a new accident. Again, there is manual capability available to initiate the Standby Gas Treatment System and Reactor Building Isolation in the event they are needed to perform their intended safety function. In addition, these systems will still have automatic initiation capability available if a high radiation signal were received. The high radiation monitor is located on the refueling floor.

c. The temporary relaxation of allowing instrument LIS–3–58 A–D to be out-of-service, will not introduce a new accident different than that previously evaluated. Requiring the manual actuation capability of the diesel generator(s) provides additional assurance that either the CSS or RHR system would be able to provide makeup water to the reactor vessel if needed. By providing this assurance, BFN would be in a condition bounded by the current FSAR.

3. The proposed changes does not involve a significant reduction in a margin of safety.

a. By identifying the specific LCO conditions when the CSS and RHR automatic initiation logic could be out-of-service, added assurance is provided that an adequate margin of safety is maintained. In additon to the subject conditions, the proposed TS requires that a RHRSW pump is operable and the capability of manual initiation of 1 CSS loop or 1 RHR pump and an associated diesel generator are available. This would ensure that adequate equipment is available to perform their intended safety function.

The bases section of the BFN TS (3.5) states that by requiring the spent fuel pool gates to be open with the vessel head removed, the combined water inventory in the fuel pool, the reactor cavity, and the separator/dryer, between the fuel pool low level alarm and the reactor vessel flange, is approximately 65,800 cubic feet (492,000 gallons). This will provide adequate low pressure coolling in lieu of CSS and RHR (LPCI and containment cooling mode) as required in TS 3.5.A.4 and 3.5.B.9. With the additional requirements placed on TS 3.5.A.5, of having manual operation capability of 1 loop of CSS, 1 RHR pump, and automatic operation of 1 RHRSW pump a redundant supply of water is provided.

The BFN FSAR LOCA analysis assumes a pipe break under operating conditions in which the reactor is pressurized. This would allow the reactor vessel to drain at a faster rate than if the head were removed. As discussed above, requiring the cavity to be flooded, the spent fuel pool gate be opened, and that at least one RHRSW pump be operable, when irradiated fuel is in the vessel, ensures that an adequate supply of water is available to maintain the reactor core covered. In addition, the spent fuel pool has a low level alarm that alarms in the control room. When this alarm is received, makeup water can be supplied either through the RHRSW pump and/or the available CSS loop or RHR pump. Ensuring that the associated diesel generator has manual initiation capability during this LCO provides added assurance that emergency power is available therefore, adequate makeup capability will be maintained. By ensuring these conditions are met, the margin of safety is not significantly reduced.

b. The temporary relaxation to allow instrument LIS–3–203 A–D to be out-of-service during that time in which the reactor vessel level monitoring system modification is being performed does not significantly reduce the margin of safety since the maunal initiation of the Standby Gas Treatment System and Reactor Building isolation would be avaialble.

Along with the manual initiation capability of these systems, their automatic initiation capability will still be available upon receipt of a high radiation signal. These systems will be able to perform their intended safety function.

c. The temporary relaxation to allow instrument LIS–3–58 A–D to be out-of-service during that time in which the RVLMS is being performed does not significantly reduce the margin of safety since the manual initiation of the diesel generator(s) would be available. Manual initiation would supply power to the CSS and RHR system if required to perform their intended safety function.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for amendments involves no significant hazards consideration.

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 request for a hearing.

Comments should be addressed to the Regulatory Publications Branch, Division of Freedom of Information and Publication Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publciation date and page number of this **Federal Register** notice.

By November 28, 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 the proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene must 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 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 must 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 proceedings; (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 the petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or 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, the 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 should 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 detemination will serve to decide when the hearing is held.

If the final determination is that the request for amendment 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 determinaton is that the request for amendment involves a significant hazards consideration, any hearing held would take place before the issuance of the 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 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, Gelman Building, 2120 L 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 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 Suzanne C. Black: 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 the General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

Nontimely filings of the petition for leave to intevene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board designated to rule on the petition and/or requests, that the request should be granted 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 which is available foı public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street, Washington, DC 20555, and at the Local Public Document Room located at the Athens Public Library, South Street, Athens, Alabama 35611.

Dated at Rockville, Maryland, this 20th day of October 1988.

For the Nuclear Regulatory Commission.

Suzanne c. Black,

Assistant Director for Projects, TVA Projects Division, Office of Special Projects.

[FR Doc. 88–24822 Filed 10–26–88; 8:45 am]

BILLING CODE 7590–01–M

PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION

Public Information Collection Requirements Submitted to OMB for Review

DATE: October 27, 1988.

PADC 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 (44 U.S.C. Ch. 35). Copies of the submission may be obtained by calling the PADC clearance officer listed. Send comments to the OMB reviewer listed and to the PADC clearance officer.

Pennsylvania Avenue Development Corporation

OMB Number: 3208.

Form Number: No form number available; information requested in the Request for Proposals for the completion of the Federal Triangle in Washington, DC.

Title: Development Prospectus (Request for Proposals).

Description: Under the authority of the Federal Triangle Development Act of 1987 (Pub. L. 100–113), PADC has prepared a Request for Proposals for the completion of the Federal Triangle in Washington, DC, which will require bidders to submit information concerning financial investment in the project, past and present relationships among all members of each bidder's team, and documentation verifying the bidder's ability to complete projects on time and within budget.

Respondents: Real Estate Developers; Construction firms; Architect firms; Financial firms.

Clearance Officer: Talbot J. Nicholas II, Attorney, (202) 724–9057, PADC, Suite

1220 North, 1331 Pennsylvania Avenue, NW., Washington, DC 20004.

OMB Reviewer: Pam Barr, (202) 395-7340, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., Washington, DC 20503.

Date: October 20, 1988.

M.J. Brodie,

Executive Director.

[FR Doc. 88-24851 Filed 10-26-88; 8:45 am]

BILLING CODE 7630-01-M

PHYSICIAN PAYMENT REVIEW COMMISSION

Commission Hearing and Meeting

AGENCY: Physician Payment Review Commission.

ACTION: Notice of public hearing and meeting.

SUMMARY: The Physician Payment Review Commission will hold a hearing on Wednesday, November 2, 1988, from 9:00 a.m. to 5:30 p.m. in which groups representing physicians and beneficiaries will provide suggestions for the Commission's evaluation of the resource based relative value study by William Hsiao and will comment on other fee schedule issues. The Commission will hold a meeting on the two days following the hearing: Thursday, November 3, 1988, from 9:00 a.m. to 4:00 p.m. and Friday, November 4, 1988 (public meeting times to be announced at Thursday's session). Both the hearing and the meeting will be held at the Washington Plaza Hotel on Thomas Circle at Massachusetts and Vermont Avenues, NW.

The morning session of the meeting on November 3 will be devoted to a discussion between Commissioners and Dr. William Hsiao about his resource based relative value study. Topics to be covered in the afternoon session include practice guidelines, alternative approaches to moderating expenditure growth, and organizational models for administering expenditure targets. The times and topics for the public portion of the meeting on November 4 will be announced at the previous day's meeting.

ADDRESS: The Commission office is located in Suite 510, 2120 L Street, NW., Washington, DC. The telephone number is 202/653-7220.

FOR FURTHER INFORMATION CONTACT: Lauren LeRoy, Deputy Director, 202/653-7220..

Paul B. Ginsburg,

Executive Director.

[FR Doc. 88-24835 Filed 10-26-88; 8:45 am]

BILLING CODE 6820-SE-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-26206; File No. SR-NYSE-88-31]

Self-Regulatory Organization; Proposed Rule Change by New York Stock Exchange, Inc. Relating to Mandatory Indications on Openings, and Reopenings When Rule 80B Is In Effect, and Trading Halts With Indications When Rule 80A Is In Effect

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on October 18, 1988, the New York Exchange ("NYSE") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

(a) The proposed rule change consists of guidelines for mandatory indications on openings, and reopenings when Exchange Rule 80B is in effect, and guidelines for mandatory trading halts with indications when Exchange Rule 80A is in effect.[1]

Current Exchange policy requires, and shall continue to require, dissemination of an indication upon any delayed opening or regulatory and nonregulatory trading halt, except for a trading halt put into effect pursuant to the "circuit breaker" provisions of Exchange Rule 80B.

In addition, dissemination of an indication shall be *mandatory* for an opening which will result in a price change constituting the lesser of 10% or three points from the prior NYSE close, or five points if the previous close is $100 or higher, unless the price change is less than one point. These guidelines shall be effective prior to any opening as well as for the reopening of trading following a trading halt instituted pursuant to the "circuit breaker" provisions of Exchange Rule 80B.

During the five-minute period that Rule 80A is in effect and systematized orders in the NYSE-listed component stocks of the S&P 500 Index relating to program trading (as defined in Rule 80A) are diverted to an undisclosed file ("sidecar"), market conditions may warrant a widening of normal quotation spreads in a particular stock.

Reasonable trade variations should nonetheless take place during that period depending on supply and demand, and ITS commitments to trade received during the five-minute sidecar period should receive an execution at the best available bid or offer, as appropriate, in the subject security when the commitment is received in accordance with reasonable trade-to-trade continuity.

During, and at the conclusion of the five-minute sidecar period, trading in any sidecar stock shall halt if there is not sufficient trading interest on the Exchange to allow for orderly executions in that stock. In any event, trading in such stock *shall* be halted, and a price indication disseminated, where the next sale would be:

- *More than one point* from a last sale *under $20,*
- *More than two points* from a last sale *between $20 and $99 7/8;* and
- *More than three points* from a last sale of *$100 or more.*

In any case where trading in any of the 50 highest capitalized NYSE listed stocks in the S&P 500 index is halted, and there is an imbalance in such stock of 50,000 shares or more, the size of the imbalance in such stock shall also be disseminated. A trading halt shall not be *required* on the basis of a 50,000 share imbalance alone.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below and is set forth in sections (A), (B), and (C) below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of the mandatory indications on openings and reopenings

[1] Rules 80A and 80B were approved in Securities Exchange Act Release No. 26198 (October 19, 1988).

when Rule 80B is in effect is to provide guidance to specialists (and Exchange Floor Officials), by means of standard, uniform criteria for dissemination of market information, where significant price changes occur on any opening of trading.[2]

These guidelines will supplement existing Exchange policies regarding trading halts and delayed openings, and would be applicable on any trading day, including any day that trading is reopened following a trading halt put into effect pursuant to the "circuit breaker" provisions of Exchange Rule 80B. If, on any "circuit breaker" day, trading in a security has not reopened by one-half hour after the resumption of trading on the Exchange, the matter should be treated as a delayed opening.

The purpose of the mandatory trading halts with indications on any day that the "sidecar" provisions of Exchange Rule 80A are in effect is to (i) provide guidance, in a volatile market, as to how specialists may quote their market during the five-minute sidecar period, when there may be some uncertainty as to the possible build-up of significant market imbalances; and (ii) provide standard, uniform criteria (mandatory price indications) for disseminating market information where a significant price change appears likely once the sidecar period has ended.

(2) Statutory Basis for the Proposed Rule Change

The basis under the Securities Exchange Act of 1934 ("1934 Act") for this proposed rule change is the requirement under section 6(b)(5) that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors' and the public interest.

(B) Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the 1934 Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by November 17, 1988.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

October 21, 1988.

Jonathan G. Katz,

Secretary.

Exhibit A

To: All Members and Member Organizations

Subject: Guideliens for Mandatory Indications on Openings, and Reopenings When Rule 80B ("Circuit Breakers") Is In Effect, and Mandatory Trading Halts With Indications When Rule 80A ("Sidecare") Is In Effect

Effective immediately, the Exchange is instituting guideliens for mandatory indications on openings, and reopenings when NYSE Rule 80B is in effect, as well as guidelines for quotation spreads and mandatory trading halts with indications when NYSE Ruel 80A (the "sidecare") is in effect.

I. Guidelines for Mandatory Indications on Openings

Current Exchange policy requires, *and shall continue to require,* dissemination of an indication upon any delayed opening or regulatory and nonregulatory trading halt, except for a trading halt put into effect pursuant to the "circuit breaker" provisions of Exchange Rule 80B.

In addition, dissemination of an indication shall be *mandatory* for an opening which will result in a price change constituting the lesser of 10% or three points from the prior NYSE close, or five points if the previous close is $100 or higher, unless the price change is less than one point. These guidelines shall be effective prior to any opening as well as for the reopening of trading following a trading halt instituted pursuant to the "circuit breaker" provisions of Exchange Rule 80B. If, on any day that Rule 80B is in effect, trading in a security has not reopened by one-half hour after the resumption of trading on the Exchange, the matter should be treated as a delayed opening, and requires an indication as well as a Floor Official's supervision.

II. Manadatory Trading Halts With Indications When Rule 80A Is In Effect

During the five-minute period that Rule 80A is in effect and systematized orders in the NYSE-listed component stocks of the S&P 500 Index relating to program trading (as defined in Rule 80A) are diverted to an undisclosed file ("sidecare"), market conditions may warrant a widening of normal quotation spreads in a particular stock. Reasonable trade variations should nevertheless take place during that period based upon supply and demand, and ITS commitments to trade received during the five-minute "sidecar" period should receive executions at the best available bid or offer, as appropriate, in the subject security when the commitment is received in accordance with reasonable trade-to-trade continuity.

During, and at the conclusion of, the five-minute sidecar period, trading in any sidecar stock shall halt, and an indication shall be disseminated, if there is a significant imbalance in that stock. In any event, trading in such stock *shall* be halted, and a price indication disseminated, where the next sale would be:

- *More than one point* from a last sale *under $20;*
- *More than two points* from a last sale *between $20 and $99 7/8;* and
- *More than three points* from a last sale of *$100 or more.*

[2] These guidelines will be disseminated to Exchange members in an Information Memorandum attached to this release as *Exhibit A.*

In any case where trading in any of the 50 highest capitalized NYSE listes stocks in the S&P 500 index is halted, and there is an imbalance in such stock of 50,000 shares or more, the size of the imbalance in such stock will also be disseminated. A trading halt shall not be *required* on the basis of a 50,000 share imbalance alone.

Any questions on the matters described above may be directed to Mr. Michael Seeley (212) 656–6531.

Robert J. McSweeney,

Vice President.

[FR Doc. 88–24836 Filed 10–26–88; 8:45am]

BILLING CODE 8010–01–M

[Release No. 34–26207; File No. SR–NYSE–88–30]

Self-Regulatory Organizations; Filing and Accelerated Temporary Approval Until December 31, 1988 of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Mandatory Indications on Openings and Reopenings When Rule 80B Is in Effect, and Trading Halts With Indications When Rule 80A Is in Effect

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78(b)(1), notice is hereby given that on October 18, 1988, the New York Stock Exchange, Inc. filed with the Securities and Exchange, Inc. the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

(a) The proposed rule change consists of guidelines for mandatory indications on openings, and reopenings when Exchange Rule 80B is in effect, and guidelines for mandatory trading halts with indications when Exchange Rule 80A is in effect.[1]

Current Exchange policy requires, and shall continue to require, dissemination of an indication upon any delayed opening or regulatory and nonregulatory trading halt, except for a trading halt put into effect pursuant to the "circuit breaker" provisions of Exchange Rule 80B.

In addition, dissemination of an indication shall be *mandatory* for an opening which will result in a price change constituting the lesser of 10% or three points from the prior NYSE close, or five points if the previous close is $100 or higher, unless the price change is less than one point. These guidelines shall be effective prior to any opening as well as for the reopening of trading following a trading halt instituted pursuant to the "circuit breaker" provisions of Exchange Rule 80B.

During the five-minute period that Rule 80A is in effect and systematized orders in the NYSE-listed component stocks of the S&P 500 Index relating to program trading (as defined in Rule 80A) are diverted to an undisclosed file ("sidecar"), market conditions may warrant a widening of normal quotation spreads in a particular stock.

Reasonable trade variations should nonetheless take place during that period depending on supply and demand, and ITS commitments to trade received during the five-minute sidecar period should receive an execution at the best avaialble bid or offer, as appropriate, in the subject security when the commitment is received in accordance with reasonable trade-to-trade continuity.

During the five-minute period that Rule 80A is in effect and systematized orders in the NYSE-listed component stocks of the S&P 500 Index relating to program trading (as defined in Rule 80A) are diverted to an undisclosed file ("sidecar"), market conditions may warrant a widening of normal quotation spreads in a particular stock.

Reasonable trade variations should nonetheless take place during that period depending on supply and demand, and ITS commitments to trade received during the five-minute sidecar period should receive an execution at the best available bid or offer, as appropriate, in the subject security when the commitment is received in accordance with reasonable trade-to-trade continuity.

During, and at the conclusion of the five-minute sidecar period, trading in any sidecar stock shall halt if there is not sufficient trading interest on the Exchange to allow for orderly executions in that stock. In any event, trading in such stock *shall* be halted, and a price indication disseminated, where the next sale would be:

- *More than one point* from a last sale *under $20*;
- *More than two points* from a last sale *between $20 and $99 ⅞*; and
- *More than three points* from a last sale of *$100 or more*.

In any case where trading in any of the 50 highest capitalized NYSE listed stocks in the S&P 500 index is halted, and there is an imbalance in such stock of 50,000 shares or more, the size of the imbalance in such stock shall also be disseminated. A trading halt shall not be *required* on the basis of a 50,000 share imbalance alone.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below and is set forth in sections (A), (B), and (C) below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of the mandatory indications on openings and reopenings when Rule 80B is in effect is to provide guidance to specialists (and Exchange Floor Officials), by means of standard, uniform criteria for dissemination of market information, where significant price changes occur on any opening of trading.

These guidelines will supplement existing Exchange policies regarding trading halts and delayed openings, and would be applicable on any trading day, including any day that trading is reopened following a trading halt put into effect pursuant to the "circuit breaker" provisions of Exchange Rule 80B. If, on any "circuit breaker" day, trading in a security has not reopened by one-half hour after thr resumption of trading on the Exchange, the matter should be treated as a delayed opening.

The purpose of the mandatory trading halts with indications on any day that the "sidecar" provisions of Exchange Rule 80A are in effect is to (i) provide guidance, in a volatile market, as to how specialists may quote their market during the five-minute sidecar period, when there may be some uncertainty as to the possible build-up of significant market imbalances; and (ii) provide standard, uniform criteria (mandatory price indications) for disseminating market information where a significant

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[1] Rules 80A and 80B were approved in Securities and Exchange Act Release No. 26198 (October 19, 1988).

[2] Securities and Exchange Act Release No. 26198, approving new Rule 80A, stated that at the conclusion of the five minute sidecar period, the order imbalance, if any, in each of the applicable stocks would be reported to the public and the specialist. This filing explains the minimum imbalance necessary for dissemination to the public: 50,000 shares or more. This size imbalance is similar to the imbalance minimum used for the special Expiration Friday opening procedures.

price change appears likely once the sidecar period has ended.

(2) Statutory Basis for the Proposed Rule Change

The basis under the Securities Exchange Act of 1934 ("1934 Act") for this proposed rule change is the requirement under section 6(b)(5) that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors' and the public interest.

(B) Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the 1934 Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange requests that the Commission grant accelerated effectiveness to the proposed rule change pursuant to section 19(b)(2) of the 1934 Act. The Exchange's request is based on its desire to have the proposed rule change take effect concurrently with the effectiveness of new Rules 80A and 80B. This accelerated effectiveness would be for a period to expire December 31, 1988, to give the Commission sufficient time to consider giving permanent approval to the proposed rule change, which permanent approval is sought in File No. SR–NYSE–88–31 submitted concurrently with this filing. The Commission finds that the proposed rule change is consistent with the requirements of the 1934 Act and the rules and regulations thereunder applicable to a national securites exchange, in particular, the requirements of section 6 and the rules and regulations thereunder. The proposal will permit the Exchange to implement specific procedures to handle trading once the circuit breaker and "sidecar" provisions of Rules 80A and 80B go into effect. The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof because the rule change will permit the Exchange to implement trading procedures if Rules 80A and/or 80B go into effect at any time prior to Commission action on the Exchange's request for permament approval of these procedures.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rules change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted within 21 days after the date of publication.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[3] that the proposed rule change (NYSE–88–30) is approved until December 31, 1988.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.[4]

Jonathan G. Katz,

Secretary.

Dated: October 21, 1988.

Exhibit A

To: All Members and Member Organizations

Subject: Guidelines for Mandatory Indications on Openings, and Reopenings When Rule 80B ("Circuit Breakers") Is In Effect, and Mandatory Trading Halts With Indications When Rule 80A ("Sidecar") Is In Effect

Effective immediately, the Exchange is instituting guidelines for mandatory indications on openings, and reopenings when NYSE Rule 80B is in effect, as well as guidelines for quotation spreads and mandatory trading halts with indications when NYSE Rule 80A (the "sidecar") is in effect.

I. Guidelines for Mandatory Indications on Openings

Current Exchange Policy requires, *and shall continue to require,* dissemination of an indication upon any delayed opening or regulatory and nonregulatory trading halt, except for a trading halt put into effect pursuant to the "circuit breaker" provisions of Exchange Rule 80B.

In addition, dissemination of an indication shall be *mandatory* for an opening which will result in a price change constituting the lesser of 10% or three points from the prior NYSE close, or five points if the previous close is $100 or higher, unless the price change is less than one point. These guidelines shall be effective prior to any opening as well as for the reopening of trading following a trading halt instituted pursuant to the "circuit breaker" provisions of Exchange Rule 80B. If, on any day that Rule 80B is in effect, trading in a security has not reopened by one-half hour after the resumption of trading on the Exchange, the matter should be treated as a delayed opening, and requires an indication as well as a Floor Official's Supervision.

II. Mandatory Trading Halts With Indications When Rule 80A is in Effect

During the five-minute period that Rule 80A is in effect and systematized orders in the NYSE-listed component stocks of the S&P 500 Index relating to program trading (as defined in Rule 80A) are diverted to an undisclosed file ("sidecar"), market conditions may warrant a widening of normal quotation spreads in a particular stock. Reasonable trade variations should nevertheless take place during that period based upon supply and demand, and ITS commitments to trade received during the five-minute "sidecar" period should receive executions at the best available bid the commitment is received in the subject security when commitment is received in accordance with reasonable trade-to-trade continuity.

During, and at the conclusion of, the five-minute sidecar period, trading in any sidecar stock shall halt, and an indication shall be disseminated, if there is a significant imbalance in that stock. In any event, trading in such stock *shall* be halted, and a price indication disseminated, where the next sale would be:

- *more than one point* from a last sale *under $20;*
- *more than two points* from a last sale *between $20 and $99 7/8;* and
- *more than three points* from a last sale of *$100 mor more.*

In any case where trading in any of the 50 highest capitalized NYSE listed stocks in the S&P 500 index is halted, and there is an imbalance in such stock of 50,000 shares or more, the size of the imbalance in such stock will also be disseminated. A trading halt shall not be *required* on the basis of a 50 000 share imbalance alone.

[3] 15 U.S.C. 78s(b) (1982).

[4] 17 CFR 200.30–3(a)(12) (1986).

Any questions on the matters described above may be directed to Mr. Micheal Seeley (212) 656-6531.

Robert J. McSweeney,

Vice President.

[FR Doc. 88-24837 Filed 10-26-88; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Application for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Inc.

October 21, 1988.

The above named national securities exchange has filed an application with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

Atmos Energy Corp.[1]
Common Stock, No Par Value (File No. 7-3944)
First National Corporation
Common Stock, No Par Value (File No. 7-3945)
Medusa Corporation
Common Shares, Without Par Value (File No. 7-3946)
Wyse Technology, Inc.
Common Stock, $.01 Par Value (File No. 7-3947)

These securities are listed and registered on one or more other national securities exchanges and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before November 11, 1988, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

[1] Atmos Energy Corp. was formerly named Energas Co.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-24838 Filed 10-26-88; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-16605; 812-7028]

Midlantic Funding Corp.; Application

October 21, 1988.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("1940 Act").

Applicant: Midlantic Funding Corporation.

Relevant 1940 Act Sections: Exemption requested under section 6(c) from all provision is of the 1940 Act.

Summary of Application: Applicant requests an order exempting it from all provisions of the 1940 Act so that it may sell certain debt instruments and non-voting preferred stock and utilize the proceeds to finance the activities of its sole shareholder, a bank holding company, and certain companies controlled by it sole shareholder.

Filing Date: The application was filed on May 6, 1988, and amended on October 17, 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 November 17, 1988. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, Metro Park Plaza, P.O. Box 600, Edison, NJ 08818.

FOR FURTHER INFORMATION CONTACT: Jeremy N. Rubenstein, Staff Attorney at (202) 272-2847, or H.R. Hallock, Jr., Special Counsel at (202) 272-3030 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations

1. Applicant was incorported in New Jersey in 1987 as a wholly-owned subsidiary of Midlantic Corporation ("Midlantic"), a New Jersey corporation registered as a bank holding company under the Bank Holding Company Act of 1956 (the "Bank Holding Company Act"). Midlantic has as its primary and predominate business activity the management and control of, and provision of services and capital funds to, its wholly owned subsidiaries, Midlantic Banks Inc. ("MBI") and Continental Bancorp, Inc. ("CBI"), each of which is also a registered bank holding company under the Bank Holding Company Act, and its other direct and indirect subsidiaries. Midlantic also owns directly one national bank and a discount brokerage company.

2. MBI has as its primary and predominate business activity the management and control of, and provision of services and capital funds to, its subsidiaries. As of March 31, 1988, MBI owned seven national bank subsidiaries and one state bank subsidiary and a division and bank-related subsidiaries which engage in such activities as mortgage banking, equipment leasing, factoring and foreign investments.

3. CBI has as its primary and predominate business activity the management and control of, and provision of services and capital funds to, its subsidiaries. As of March 31, 1988, CBI owned three state chartered bank subsidiaries and a bank-related subsidiary engaged in credit-related reinsurance.

4. The banking services offered by Midlantic's direct and indirect bank subsidiaries (the "Bank Subsidiaries") include all the usual services of commercial banks. Certain of the Bank Subsidiaries provide financial and data processing services to customers and other banks and provide trust services, including administration of estates and trusts, pension and other employee benefit plans, investment advisory and agency accounts, and a full range of other fiduciary, corporate fiduciary and agency services.

5. Applicant was organized by Midlantic to engage in financing the business operations of Midlantic and Midlantic's other direct and indirect subsidiaries. All of Applicant's issued and outstanding securities other than

the debt securities and non-voting preferred stock described below are or will be held by Midlantic. Applicant's primary function will be to raise funds through the sale of debt securities and to invest in or loan money to Midlantic or Midlantic's other direct or indirect subsidiaries. Although Applicant has no present intention to do so, it may in the future raise funds through the sale of non-voting preferred stock. Funds raised through the sale of non-voting preferred stock, if any, will be invested in or loaned to Midlantic or Midlantic's other direct or indirect subsidiaries. The debt securities and non-voting preferred stock, if any, will be guaranteed by Midlantic as follows:

(a) Applicant's debt securities issued to or held by the public will be unconditionally guaranteed by Midlantic as to payment of principal, interest and premium, if any (except that the guarantee may be subordinated in right of payment to other debt of Midlantic);

(b) Applicant's non-voting preferred stock issued to or held by the public will be unconditionally guaranteed by Midlantic as to payment of dividends, payment of the liquidation preference in the event of liquidation, and payments to be made under a sinking fund, if a sinking fund is to be provided (except that the guarantee may be subordinated in right of payment to other debt of Midlantic);

(c) Midlantic's guarantee will provide that in the event of a default in payment of principal, interest, premium, dividends, liquidation preference or payments made under a sinking fund, if any, on any debt securities or non-voting preferred stock issued by Applicant, the holders of those securities may institute legal proceedings directly against Midlantic to enforce the guarantee without first proceeding against Applicant;

(d) The debt securities and non-voting preferred stock issued by Applicant will be convertible or exchangeable only for securities issued by Midlantic or for debt securities or non-voting preferred stock will meet applicable conditions set forth in the preceding three subparagraphs.

6. Applicant will invest or loan at least 85% of any cash or cash equivalent raised through the offering of its debt securities or non-voting preferred stock or through other borrowings as soon as practicable, but in no event later than six months after Applicant's receipt of such cash or cash equivalents, only in or to the following: (i) Midlantic, (ii) MBI, (iii) CBI, (iv) the Bank Subsidiaries, (v) Midlantic's non-bank subsidiaries excepted from the definition of investment company under section 3(c)(3), section 3(c)(4), section 3(c)(5) or section 3(c)(6) of the 1940 Act (such non-bank subsidiaries are hereinafter collectively referred to as the "section 3(c)(3)–(6) Subsidiaries") or (vi) Midlantic's other direct or indirect subsidiaries which qualify as "companies controlled by the parent company" as defined in Rule 3a–5 under the 1940 Act. At no time will Applicant invest in, reinvest in, own, hold or trade in securities other than (i) Government securities, (ii) securities of Midlantic, MBI, CBI, the Bank Subsidiaries, the section 3(c)(3)–(6) Subsidiaries or Midlantic's other direct or indirect subsidiaries which qualify as "companies controlled by the parent company" as defined in Rule 3a–5, and (iii) debt securities which are exempted from the provisions of the Securities Act of 1933 ("1933 Act") by section 3(a)(3) of the 1933 Act or (iv) bank certificates of deposit, including negotiable Eurodollar certificates of deposit and domestic bank certificates of deposit, each of which will be of such a principal amount as to not be marketed to the general public and will have a maturity no greater than that permitted for securities exempted from the provisions of the 1933 Act by section 3(a)(3) thereof (whether or not such certificates are exempted by section 3(a)(3) of the 1933 Act) ("Certificates"). All of the Certificates will be issued by internationally active financial institutions (i) which are organized in countries where such financial institutions are comprehensively regulated as to their capital adequacy and other factors relating to their financial soundness by central banks and/or other sovereign bank regulatory authorities (in the United States these entities are the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), the Comptroller of the Currency ("Comptroller"), and the Federal Deposit Insurance Corporation ("FDIC"), and (ii) which have been approved for investment for the funds of the Bank Subsidiaries by Midlantic National Bank's Investment Department, which approvals are subject to review by the Federal Reserve Board, the FDIC and the Comptroller.

7. Applicant will not engage in business with any entities other than Midlantic or Midlantic's other direct or indirect subsidiaries, apart from the issuance of debt securities or non-voting preferred stock guaranteed by Midlantic as described above and temporary investment of excess funds.

Applicant's Legal Analysis

1. The business to be conducted by Applicant may cause it to fall within the types of businesses described in section 3(a)(1) or 3(a)(3) of the 1940 Act. Applicant may not rely on the safe harbor provided by Rule 3a–5 because Midlantic may not be considered a "parent company" under Rule 3a–5(b)(2). As a bank holding company primarily engaged through its direct and indirect subsidiaries in the business of banking, Midlantic may be an investment company under section 3(a) of the 1940 Act. Midlantic's exempt status under the 1940 Act therefore is derived from section 3(c)(6) of the 1940 Act.

2. Applicant may not rely on the safe harbor provided by Rule 3a–5 because each of MBI, CBI, the Bank Subsidiaries and the section 3(c)(3)–(6) Subsidiaries may not be considered a "company controlled by the parent company" under Rule 3a–5(b)(3). Any of MBI, CBI, the Bank Subsidiaries and the section 3(c)(3)–(6) Subsidiaries may be an investment company under section 3(a) of the 1940 Act and may not be excepted or exempted under section 3(b) of the 1940 Act. Applicant states that: (i) Both MBI and CBI are bank holding companies primarily engaged through their direct subsidiaries in the business of banking, and that each MBI's and CBI's exempt status under the 1940 Act therefore is derived from section 3(c)(6) of the 1940 Act; (ii) the Bank Subsidiaries are banks involved primarily in the business of banking, and that their exempt status under the 1940 Act therefore is derived from section 3(c)(3) of the 1940 Act; and (iii) the section 3(c)(3)–(6) Subsidiaries derived their exempt status under the 1940 Act from section 3(c)(3), section 3(c)(4), section 3(c)(5) or section 3(c)(6) of the 1940 Act. The activities of MBI, CBI, the Bank Subsidiaries and the section 3(c)(3)–(6) Subsidiaries do not raise the concerns that prompted the exclusion of entities exempted from the definition of investment company under section 3(c) of the 1940 Act from the definition of "company controlled by the parent company" under Rule 3a–5(b)(3). Accordingly, the failure of MBI, CBI, the Bank Subsidiaries and section 3(c)(3)–(6) Subsidiaries to satisfy the definitional requirements of Rule 3a–5(b)(3) should not prevent issuance of the requested exemption order.

3. Applicant may not rely on the safe harbor provided by Rule 3a–5 because Applicant proposes to invest in, hold, trade and own Certificates as well as government securities, debt securities which are exempt from the provisions of the Securities Act of 1933, as amended, by section 3(a)(3) of that act, and securities of Midlantic, MBI, CBI, the

Bank Subsidiaries, the section 3(c)(3)–(6) Subsidiaries or Midlantic's other direct or indirect subsidiaries which qualify as a "company controlled by the parent company" as defined in Rule 3a–5. The Commission's stated intention in adopting Rule 3a–5 was to permit a finance subsidiary to invest in, hold, own and trade short term money market instruments so that the finance subsidiary had flexibility in short term management of the proceeds of its securities offering. Although Certificates are not expressly included in the list of securities a finance subsidiary may invest in, trade, own or hold under Rule 3a–5(a)(6), Certificates are short term money market instruments which would afford a finance subsidiary appropriate flexibility in its short term cash management without sacrificing security or otherwise impairing reasonable cash management. Applicant asserts that Certificates are at least as secure as certain investments otherwise permitted under Rule 3a–5(a)(6). Accordingly, Applicant's investment in, owning, trading and holding Certificates should not prevent issuance of the requested exemption order.

4. On the basis of the foregoing, granting the requested exemption is appropriate in the public interest and consistent with the protection of investors and the proposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 88–24839 Filed 10–26–88; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

Region III Advisory Council Meeting; Maryland

The U.S. Small Business Administration, Region III Advisory Council, located in the geographical area of Baltimore, will hold a public meeting, from 2:00 p.m. to 5:00 p.m. on Wednesday, November 30, 1988 at the Maryland Small Business Development Center, 123 West 24th Street, Baltimore, Maryland 21218, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Charles J. Gaston, District Director, U.S. Small Business Administration, 10 North Calvert Street, 3rd Floor, Baltimore, Maryland 21202, 301/962–2054.

Jean M. Nowak,

Director, Office of Advisory Councils.

October 21, 1988.

[FR Doc. 88–24807 Filed 10–26–88; 8:45 am]

BILLING CODE 8025–01–M

Region VI Advisory Council Meeting; Texas

The U.S. Small Bussiness Administration Region VI Advisory Council, located in the geographical area of Dallas, will hold a public meeting at 9:00 a.m. on Friday, November 18, 1988 at the Lincoln City Club, 5440 LBJ Freeway, Dallas, Texas, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or other present.

For further information, write or call James S. Reed, District Director, U.S. Small Business Administration, 1100 Commerce, Room 3C36, Dallas, Texas 75242, 214/767–0600.

Jean M. Nowak,

Director, Office of Advisory Councils.

October 21, 1988.

[FR Doc. 88–24808 Filed 10–26–88; 8:45 am]

BILLING CODE 8025–01–M

Region VI Advisory Council Meeting; Texas

The U.S. Small Business Administration Region VI Advisory Council, located in the geographical area of Lower Rio Grande Valley of Texas, will hold a public meeting at 1:30 p.m. on Tuesday, November 22, 1988 at the Board Room of Pan American University, Edinburg Texas, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Miguel A. Cavazos, Jr., District Director, U.S. Small Business Administration, 222 E. Van Buren, Suite 500, Harlingen, Texas 512/427–8625.

Jean M. Nowak,

Director, Office of Advisory Councils.

October 21, 1988.

[FR Doc. 88–24809 Filed 10–26–88; 8:45 am]

BILLING CODE 8025–01–M

Region III Advisory Council Meeting; West Virginia

The U.S. Small Business Administration Region III Advisory Council, located in the geographical area of Clarksburg, will hold a public meeting, on Tuesday and Wednesday, November 29–30, 1988 from 1:00 p.m. to 4:30 p.m. on the 29th and 9:00 a.m. to 12:00 noon on the 30th at the Parkersburg Community College, (Room 150) located on Route 47, East of Parkersburg in the town of Cedar Grove, WV, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Marvin P. Shelton, District Director, U.S. Small Business Administration, P.O. Box 1608, Clarksburg, WV 26302–1608, 304/622–6601.

Jean M. Nowak,

Director, Office of Advisory Councils.

October 21, 1988.

[FR Doc. 88–24810 Filed 10–26–88; 8:45 am]

BILLING CODE 8025–01–M

TENNESSEE VALLEY AUTHORITY

Privacy Act of 1974; New Routine Uses

AGENCY: Tennessee Valley Authority (TVA).

ACTION: New routine uses for TVA–15, "Land Between The Lakes Hunter Records—TVA," and TVA–30, "Land Between The Lakes Mailing Lists—TVA."

SUMMARY: As required by the Privacy Act, TVA gave notice (53 FR 30894, August 16, 1988) of its intention to establish one new routine use for the system of records entitled TVA–15, "Land Between The Lakes Hunter Records—TVA," and two new routine uses for the system of records entitled TVA–30, "Land Between The Lakes Mailing Lists—TVA." No comments were received. The new routine uses are shown below. The full text of TVA–15 may be found at 53 FR 10,983, April 4, 1988. The full text of TVA–30 may be found at 53 FR 10,990–10,9991, April 4, 1988.

EFFECTIVE DATE: October 27, 1988.

FOR FURTHER INFORMATION CONTACT: Ronald E. Brewer, 615–751–2520

TVA–15

SYSTEM NAME:

Land Between The Lakes Hunter Records—TVA.

CATERGORIES OF RECORDS IN THE SYSTEM:

Personal identifying information, State hunting license(s) number(s), and information related to the hunts.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Tennessee Valley Authority Act of 1933, 16 U.S.C. 831–831dd; Executive Order 6161.

ROUTINE USE OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To provide mailing lists to students of faculty of educational institutions for the purposes of research.

TVA–30

SYSTEM NAME:

Land Between The Lakes Mailing Lists—TVA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Personal identifying information, address, and information about their Land Between The Lakes associated interests, activities, or program participation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Tennessee Valley Authority Act of 1933, 16 U.S.C. 831–831dd; Executive Order 6161.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To provide mailing lists to students or faculty of educational institutions for the purposes of research.

To provide mailing lists to participants in Land Between The Lakes Leadership Training programs for the purpose of facilitating communication among participants.

John W. Thompson,

Vice President, Services.

[FR Doc. 88–24850 Filed 10–26–88; 8:45 am]

BILLING CODE 8120–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Intent To Prepare an Environmental Impact Statement and To Hold an Environmental Scoping Meeting for Runway 27 Departure Procedures at Logan International Airport, Boston, MA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of public environmental scoping meeting.

SUMMARY: The Federal Aviation Administration (FAA) is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for alternative aircraft departure procedures from Runway 27 at Boston-Logan International Airport. To ensure that all significant issues related to the proposed action are identified, public meetings will be held.

FOR FURTHER INFORMATION CONTACT: John Silva, Environmental Program Manager, Federal Aviation Administration, New England Region, Airports Division, 12 New England Executive Park, Burlington, Massachusetts 01803. Telephone no.: 617–273–7060.

SUPPLEMENTARY INFORMATION: During April 1988, FAA, New England Region completed an Environmental Assessment (EA) of alternative departure procedures from Runway 27 at Boston-Logan International Airport. The assessment concluded in the need to prepare an EIS. The EIS will examine promising alternative air traffic control departure procedures, which could reduce the adverse effects of aircraft noise to community residents and sensitive land uses.

Comments and suggestions are invited from federal, state, and local agencies, and other interested parties, in order to ensure that a full range of issues related to these proposed projects are addressed and all significant issues identified. Copies of the EA may be obtained by contacting FAA at the above address or telephone number. Comments and suggestions may be mailed to the same address.

Public Scoping Meetings

In order to provide public input, a scoping meeting for federal, state, and local agencies will be held on Monday, December 12, 1988, at 9:30 a.m., at the auditorium, Department of Transportation, Transportation System Center, 55 Broadway, Kendall Square, Cambridge, Massachusetts. The public is invited. Additional scoping meetings to receive citizen input are planned over the next several months. Federal, state, and local agency representatives are encouraged to attend. Information about these meetings may be obtained by contacting FAA at the above address or telephone number.

Issued in Burlington, Massachusetts, on October 12, 1988.

Vincent A. Scarano,

Manager, Airports Division, FAA, New England Region.

[FR Doc. 88–24801 Filed 10–26–88; 8:45 am]

BILLING CODE 4910–13–M

Deadline for Submission of Preapplication for Airport Grant Funds Under the Airport Improvement Program for Fiscal Year 1989

Section 509(e) of the Airport and Airway Improvement Act of 1982 (AAIA) provides that the sponsor of each airport to which entitlement funds are apportioned shall notify the Secretary, by such time and in a form as prescribed by the Secretary, of the sponsor's intent to apply for passenger and cargo entitlement funds. Notification of the sponsor's intent to apply during Fiscal Year 1989 for any of its entitlement funds, including those unused from prior years, shall be in the form of a project preapplication or application (SF 424) submitted to the FAA field office no later than January 31, 1989. Approval of preapplications or applications after that date may be deferred by the FAA until the following fiscal year. FAA field offices, in developing their regional programs, may request sponsors' input at an earlier date. Every effort should be made to have projects under grant by August 15, 1989.

The FAA also recommends that all other airports or planning agencies expecting to apply for airport grant funds do so early in the fiscal year. Such prospective applicants should contact the appropriate FAA field office for information on that office's deadline. These offices will assist in the preparation of preapplications/applications and provide procedural information as needed.

Prompt submission of complete requests will allow earlier funding decisions by the FAA. This, in turn, may be advantageous to sponsors in competing for available funds and in maximizing construction during a construction season.

This notice submitted by Mr. John Sekman, APP–520, on (202) 267–3831.

Issued in Washington, DC, on October 14, 1988.

Paul L. Galis,

Director, Office of Airport Planning and Programming.

[FR Doc. 88–24800 Filed 10–26–88; 8:45 am]

BILLING CODE 4910–13–M

Flight Service Station at Imperial, CA; Closing

Notice is hereby given that on or about October 21, 1988, the Flight Service Station at Imperial, California will be closed. Services to the general aviation public of Imperial, formerly provided by this office, will be provided

by the Flight Service Station in San Diego, California. This information will be reflected in the next reissuance of the FAA organization statement.

(Sec. 313(a), 72 Stat. 752; 49 U.S.C. 1354.)

William H. Williams, Jr.,

Acting Regional Administrator, Western-Pacific Region.

Issued in Lawndale, California, on October 12, 1988.

[FR Doc. 88-24802 Filed 10-26-88; 8:45 am]

BILLING CODE 4910-13-M

Flight Service Station at Decatur Memorial Airport, Decatur, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Closing.

SUMMARY: Notice is hereby given that on October 2, 1988, the Flight Service Station (FSS) at Decatur Memorial Airport, Decatur, Illinois was closed. Services to the aviation public in the Decatur flight plan area, formerly provided by the Decator FSS, will be provided by the new Automated Flight Service Stations at St. Louis, Missouri and Kankakeee, Illinois. This information will be reflected in the FAA organization statement the next time it is reissued.

(Sec. 313(a), 72 Stat. 752; 49 U.S.C. 1354.)

Timothy P. Forte,

Regional Administrator, Great Lakes Region.

Issued in Des Plaines, Illinois on October 12, 1988.

[FR Doc. 88-24803 Filed 10-26-88; 8:45 am]

BILLING CODE 4910-13-M

UNITED STATES INFORMATION AGENCY

Bureau of Educational and Cultural Affairs; Grant Program; Summer Institute in American Studies

Contingent upon the availability of funds, the Bureau of Educational and Cultural Affairs of the United States Information Agency (USIA) will solicit proposals for a graduate-level summer institute in American studies for approximately 35 secondary school educators in English and American literature, history, geography and language. The institute is conducted entirely in English. Participants will come from countries in Europe, Asia, Africa, Latin America and the Middle East. ESIA is asking for detailed proposals from institutions which have an acknowledged reputation in American Studies and special expertise in handling international programs.

The objective of the institute is to support and encourage the efforts of other countries to improve the quality of teaching about American society and culture at the secondary level. The program should be designed for teacher educators and/or secondary-level classroom teachers with responsibilities in curriculum planning and course and materials development whose teaching assignments required a general-up-to-date knowledge of American civilization and culture. Their academic preparation can be in the field of English and American literature, history, geography and language.

Time Frame and General Description

The institute should be programmed to last approximately 45 days, beginning on or about Thursday, July 6, and ending on or about Saturday, August 9, 1989. The participants will arrive directly at the campus site from their home countries. It is expected that the university program staff will make arrangements to have participants met upon arrival at the airport nearest the university campus. Few if any participants will have visited the United States previously. In view of this, an initial orientation to the U.S. and to the campus should be considered an integral part of the institute and should be held on the first two to three days of the progams. The applicant is asked to design a two-part program (a) A four-week academic program at the iniversity and (b) a two-week escorted tour of different regions of the United States, planned, arranged and conducted by the Program Director and principal university staff. The tour segment should be seen as an integral part of the program, complementing and reinforcing the academic material. The tour should include a three-to-four-day visit to Washington, DC, at the end of the tour before participants depart for their home countries. Programming in Washington should include a half-day briefing session at the U.S. Information Agency.

Program Objectives

The institute should be a graduate level academic program aimed at improving the participant's understanding of American society and institutions and contemporary issues most relevant to shaping of these institutions. The program should provide an intellectual framework and an organizing principle for understanding and teaching about the U.S. For the purpose of the institute, American studies is understood to include aspects of American history, literature, geography and political science. The institute should address the diversity and complexity of American contemporary life and the underlying unity of social and political institutions. The program should provide a basic overview of American institutions, current issues, and the social and political response to these issues. In addition, academic instruction should address a range of views of American values and character; social, economic and literary history; geographical features; forms of creative expression; and education, religion, industry and technology. The academic program should maintain a relative balance among plenary sessions, lectures, workshops and practicums. Academic activities should reinforce and provide opportunities to clarify the central themes and objectives of the program. Lengthy lectures should not be the usual format. The proposal should include a detailed syllabus outlining the focus of the subject matter with specific readings required for each unit.

Activities should include an orientation to the U.S. and the university community, field trips to places of local interest, home stays with families in the area (other secondary educators if possible), and events which will bring the participants into contact with Americans from different walks of life. These encounters will give the participants a chance to experience American society, its institutions and language, and observe the variety of attitudes that constitute one of our country's most striking characteristics.

In addition to the substantive presentations and discussions about American society, the institute should focus upon pedagogical concerns, materials and curricular development for teaching about the U.S., and available materials and audio-visual resources. Samples of secondary school curricula, materials and topical bibliographies in American studies fields should be provided or developed during the program. It should be noted that these participants will come from several different disciplines—EFL, history, geography, and literature—and from a variety of educational systems. Most systems have rigorous teacher training programs for certification, and classroom methods evaluated and approved by regional inspectors. Similarly, some systems require adherence to an assigned textbook while orders allow significant flexibility to teachers in determining what materials they will use in presenting a lesson. The variety of approaches and experiences should provide the basis for interaction which will be both culturally and professionally.

All programming and administrative logistics, management of the academic program and cultural tour will be the responsibility of the university. A project secretary and/or project assistant is required to carry out clerical and administrative duties required for the smooth operation of the institute during the program grant period, from the planning period to the completion of required reports to USIA. USIA will be responsible for all communications to and from the U.S. Information Service posts abroad and will be available to offer any advice or guidance the university might find useful. To assist the university with programming facilitative services during the tour, there is a possibility of utilizing the programming and hospitality services of volunteer community groups across the country that are affiliated with the National Council for International Visitors, a national-wide network that provides hospitality and program assistance to foreign visitors.

If your university decides to submit a proposal, it should provide a detailed plan in response to the needs and priorities outlined above. Applicants should draw imaginatively on the full range of resources offered by their universities but may involve outstanding professionals from other universities and organizations. The proposal must clearly demonstrate quality on-site management capabilities for both the residential and the itinerant programs. The overall effectiveness of the institute hinges upon good administrative and organizational capabilities to manage the interactions between foreign educators and Americans. The university should indicate the tour sites, not to exceed three cities in addition to Washington, DC.

A panel of senior USIA officers experienced in American studies, the exchange of international educators, and foreign affairs will use the following criteria when evaluating proposals:

(1) Quality and creative and imaginative design of the institute;

(2) Quality, rigor, and apropriateness of proposed syllabus to goals of the institute;

(3) Clear evidence of the ability to deliver a substantive academic and pedagogical American studies program;

(4) Demonstrated high quality American studies programs—experience with foreign teachers is desirable;

(5) A quality evaluation at the conclusion of the institute;

(6) Evidence of strong on-site administrative and managerial capabilities for international visitors with specific discussion of how managerial and logistical arrangements will be undertaken;

(7) The experience of professionals and staff assigned to the program;

(8) The availability of local and state resources for the orientation and Institute;

(9) A well-thought out and comprehensive cultural tour to complement the academic progam;

(10) Cost-effectiveness.

Budget Guidelines

For your guidance, our experience with similar institutes indicates that the cost to organize and administer the 45-day academic and group tour segment of this Institute would range from $1,200–1,500 per person based on a group of 30 to 35 participants, excluding international and domestic air travel expenses and cost for room and board on campus and hotel and meals on tour.

The proposal should provide a detailed line-item budget outlining specific expenditures and source(s) from which funds are anticipated. The budget should include any in-kind and cash contributions to the program from universities, contributions, cost-sharing, or private sector.

Included in the budget worksheet should be budget explanations detailing how costs were computed, i.e. salaries should include position title, annual salary, and per cent of effort used for this program.

Please note that indirect costs for American studies institutes are limited to eight percent (8%).

The budget should include and elaborate on the following information:

Administrative

(1) Salaries, benefits, and services (including support staff) for the program.

(2) Overhead costs: A copy of the indirect cost rate of the cognizant agency should be included.

(3) Administrative costs, ground transportation, (including tour and transfer buses to and from airports) and group tour admission costs for *all* activities during the course of the on-site university Institute and subsequent cultural tour.

Program

(1) Miscellaneous costs, such as honoraria, film rental, and support material, etc.

(2) University escort travel and expenses.

For Institutional Recipients of Previous Grants Only

If your university was funded for a similar program last year, the budget should include last year's detailed line-item budget. Significant differences for each item must be noted and justified.

Funding Arrangements

(1) Lodging and Meals

Each foreign participant will receive a per diem for the 45-day program. This should cover the costs of room and board while on campus and during the tour and personal expenses. Although they should not be included as part of the budget, please indicate the costs for lodging and meals and an estimated cost of the books required by the program so that the per diem calculated for the program will include sufficient funds to cover basic living expenses for the 45 days of the institute. A recommended allowance for cultural activities should also be included. Please note that grantee institutions will be funded on a per capita basis directly by Fulbright Commissions abroad and by individual grants awarded by the Division for the Study of the U.S. For participants coming from countries that cannot issue U.S. dollars, the grantee institution may be requested to disburse per diem and other allowances approved for the program. Such funds cannot be subject to indirect costs.

(2) International and Domestic Air Travel

International travel arrangements are usually made and paid by USIS Posts abroad. The university is required to book all domestic flights through a U.S. carrier. Flight information is cabled to the posts and Commissions through USIA cable services. If domestic air tickets are issued in the U.S., they should be booked and purchased through the Agency approved Travel Management Center which allows access to government discount air fares. If issued abroad, participating USIS posts will usually pay for both domestic and international air fares.

Applicants should submit *ten copies each* of a 500-word sumary, a proposal not to exceed 20 typed, double-spaced pages addressing the points outlined above, the detailed budget, and completed and signed application cover sheet (enclosed). Final proposals must be received in the Agency by COB December 19, 1988. The proposal package should be submitted to: U.S. Information Agency, Office of Academic Programs, American Studies Branch, E/AAS Attn: Kay Passias, Rm. 256, 301 4th St., SW., Washington, DC 20547. Phone (202) 485–2568.

Date: October 21, 1988.

Barry Ballow,

Chief, Division for the Study of the United States.

[FR Doc. 88-24789 Filed 10-26-88; 8:45 am]

BILLING CODE 8230-01-M

VETERANS ADMINISTRATION

Agency Information Collection Under OMB Review

AGENCY: Veterans Administration.

ACTION: Notice.

The Veterans Administration has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information: (1) The reponsible department or staff office; (2) the title of the collection(s); (3) the agency for number(s), if applicable; (4) a description of the need and its use; (5) how often the information collection must be completed, it applicable; (6) who will be required or asked to report; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to respond; and (9) an indication of whether section 3504(h) of Pub. L. 96-511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Department of Veterans Benefits (203C), Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-2744.

Comments and questions about the items on the list should be directed to the VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, (202) 395-7316.

DATES: Comments on the information collection should be directed to the OMB Desk Officer within 30 days of this notice.

Dated: October 20, 1988.

By direction of the Administrator.

David N. Stone,

Executive Assistant, Office of Information Management and Statistics.

New Collection

1. Department of Veterans Benefits.
2. Veterans Mortgage Life Insurance Inquiry.
3. VA Form 29-0543.
4. The form is used by the VA to ensure proper maintenance of Veterans Mortgage Life Insurance accounts.
5. On occasion.
6. Individuals or households.
7. 540 responses.
8. 45 hours.
9. Not applicable.

Extension

1. Department of Veterans Benefits.
2. Certificate of Balance on Deposit.
3. VA Form 27-4718a.
4. This form is completed by VA fiduciaries, as required by State courts and/or Federal statutes, to lessen the vulnerability of Federal funds to fraud, waste, and abuse.
5. On occasion.
6. Individuals or households; State or local government; Federal agencies or employees; Non-profit institutions.
7. 20,000 responses.
8. 1,000 responses.
9. Not applicable.

Extension

1. Department of Veterans Benefits.
2. Claim for Veterans Mortgage Life Insurance.
3. VA Form 29-0549.
4. The form is used by the mortgage holder to apply for the proceeds of Veterans Mortgage Life Insurance.
5. On occasion.
6. Businesses or other for-profit.
7. 250 responses.
8. 250 hours.
9. Not applicable.

[FR Doc. 88-24799 Filed 10-26-88; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register
Vol. 53, No. 208
Thursday, October 27, 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 DEPOSIT INSURANCE CORPORATION

AGENCY MEETING

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:30 a.m. on Friday, October 21, 1988, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to: (1) Assistance agreements pursuant to section 13(c) of the Federal Deposit Insurance Act; (2) the Corporation's corporate activities; and (3) certain supervisory activities.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Mr. Robert J. Herrmann, acting in the place and stead of Director Robert L. Clarke (Comptroller of the Currency), concurred in by Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(i), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(i), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 550–17th Street, NW., Washington, DC.

Dated: October 21, 1988.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 88–24891 Filed 10–24–88; 4:32 pm]

BILLING CODE 6714-01-M

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, November 1, 1988, 10:000 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.
Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

DATE AND TIME: Thursday, November 3, 1988, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC., (Ninth Floor).

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Setting of Dates for Future Meetings.
Correction and Approval of Minutes.
Eligibility Report for Candidates to Receive Presidential Primary Matching Funds.
Status of Presidential Audits.
Draft Advisory Opinion 1988–37: Martin F. Connor on behalf of the Non-Partisan Political Support Committee for General Electric Company Employees.
Administrative Matters

PERSON TO CONTACT FOR INFOMATION: Mr. Fred Eiland, Information Officer, Telephone: 202–376–3155.

Marjorie W. Emmons,

Secretary of the Commission.

[FR Doc. 88–24946 Filed 10–25–88 11:58 am]

BILLING CODE 6715-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 11:00 a.m., Wednesday, November 2, 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. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: October 25, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88–25004 Filed 10–25–88; 3:47 pm]

BILLING CODE 6210-01-M

NATIONAL CREDIT UNION ADMINISTRATION

TIME AND DATE: 9:00 a.m., Thursday, November 3, 1988.

PLACE: Edgewater Hotel, 666 Wisconsin Avenue at Lake Mendota, Madison, Wisconsin 53701, (608) 256–9071.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Open Meeting.
2. Central Liquidity Facility Report and Review of CLF Lending Rate.
3. Insurance Fund Report and Waiver of Premium.
4. Request by the State of Ohio for Exemption from NCUA Lending Rules.
5. Recommendations on Chartering and Field of Membership Issues.
6. Fiscal Year 1989 Operating Fee Assessment.
7. Legislative Update.

TIME AND DATE: 2:30 p.m., Tuesday, November 1, 1988.

PLACE: Edgewater Hotel, 666 Wisconsin Avenue at Lake Mendota, Madison, Wisconsin 53701, (608) 256–9071.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Closed Meeting.
2. Administrative Action under section 206(b) of the Federal Credit Union Act. Closed pursuant to exemptions (8) and (9)(A)(ii).
3. Request for Exemption from § 701.21(h), NCUA Rules and Regulations. Closed pursuant to exemptions (8) and (9)(A)(ii).
4. Merger. Closed pursuant to exemptions (8) and (9)(A)(ii).

FOR MORE INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (202) 357–1100.

Becky Baker,

Secretary of the Board.

[FR Doc. 88–24975 Filed 10–25–88; 2:49 pm]

BILLING CODE 7535-01-M

Corrections

Federal Register
Vol. 53, No. 208
Thursday, October 27, 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 EDUCATION

[CFDA No. 84.003]

Office of Bilingual Education and Minority Languages Affairs

Correction

In the issue of Tuesday, October 18, 1988, on page 40824, in the first column, in the correction of notice document 88-22456, a portion of the text that appeared is inaccurate and is corrected as follows:

In paragraph (3), in the third line, "January 6, 1988" should read "January 6, 1989".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-59853; FRL-3460-9]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

Correction

In notice document 88-23475 beginning on page 39787 in the issue of Wednesday, October 12, 1988, make the following corrections:

On page 39790, in the second column, under **Y 88—352**, in the second line, "(S)2 2-" should read "(S) 2-"; and in the fourth line, "Cyclohexandeimethanol" should read "Cyclohexanedimethanol".

BILLING CODE 1505-01-D

OFFICE OF MANAGEMENT AND BUDGET

Cost of Hospital and Medical Care and Treatment Furnished by the United States; Certain Rates Regarding Recovery From Tortiously Liable Third Persons

Correction

In notice document 88-22840 beginning on page 39001 in the issue of Tuesday, October 4, 1988, make the following corrections:

On page 39002, in the first column, in the table, in the 12th line, the entry for "Nursing home care" should be corrected, and entries for "Prescription" and "Spinal cord injury care" should be inserted above and below to read as follows:

	Effective October 1, 1988		
	DOD	VA	HHS
* * * * *			
Prescription		16	
Nursing home care		160	
Spinal cord injury care		539	
* * * * *			

BILLING CODE 1505-01-D

federal register

Thursday
October 27, 1988

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Study of Intercompany Pricing Rules; Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

Study of intercompany Pricing Rules

AGENCY: Internal Revenue Service, Treasury.

ACTION: Study of Intercompany pricing rules and solicitation for public comments.

SUMMARY: The Department of the Treasury and the Internal Revenue Service are soliciting public comments with respect to the discussion draft on intercompany pricing published herewith. The discussion draft was prepared at the request of the Congress. The draft discusses difficulties in administering section 482 of the Internal Revenue Code, and proposes a methodology for interpreting recent changes to section 482 made by the 1986 Tax Reform Act. It solicits comments on the application and interpretation of section 482 contained therein.

DATES: Written comments must be delivered or mailed by February 15, 1989.

ADDRESS: Send comments to Office of Associate Chief Counsel (International), Branch 1, 950 L'Enfant Plaza South SW., Room 3319, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Michael F. Patton of the Office of Associate Chief Counsel (International), Internal Revenue Service, 950 L'Enfant Plaza South SW., Washington, DC 20224, Attention: CC:INTL:Br1, telephone 202–287–4851 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Treasury Department and the Internal Revenue Service are studying the intercompany pricing rules set forth in Internal Revenue Code section 482 and the regulations promulgated thereunder. The study focuses on the 1986 Tax Reform Act's amendment to section 482 concerning income arising from the transfer of intangible property between related parties. It also explores issues relating to cost-sharing agreements and the administration of section 482.

This notice invites interested parties to submit written comments (in triplicate) on this matter. All material submitted will be available for public inspection and copying.

Charles S. Triplett,

Deputy Associate Chief Counsel (International).

A Study of Intercompany Pricing

Prepared by Treasury Department, Office of International Tax Counsel, Office of Tax Analysis; Internal Revenue Service, Office of Assistant Commissioner (International), Office of Associate Chief Counsel (International)

Discussion Draft

October 18, 1988.

I. OVERVIEW AND BACKGROUND

Chapter 1

Overview

A. Introduction

Section 482 of the Internal Revenue Code [1] authorizes the Secretary of the Treasury to allocate income, deductions, and other tax items among related taxpayers to prevent evasion of taxes or to reflect their incomes clearly. The Tax Reform Act of 1986 [hereinafter 1986 Act] amended section 482 for the first time in many years by providing that the income from a transfer or license of intangible property must be commensurate with the income attributable to the intangible. The Conference Committee report stated:

> The conferees are also aware that many important and difficult issues under section 482 are left unresolved by this legislation. The conferees believe that a comprehensive study of intercompany pricing rules by the Internal Revenue Service should be conducted and that careful consideration should be given to whether the existing regulations could be modified in any respect.[2]

In response to this recommendation, the Internal Revenue Service and the Treasury Department have reexamined the theory and administration of section 482, with particular attention paid to transfers of intangible property. This study presents the findings and recommendations of the Service and Treasury.

The study is divided into four parts. Part I recounts the history of section 482 and the evolution of issues leading to the 1986 amendments. Part I also contains recommendations and suggestions for further consideration to assure both thoughtful analysis by taxpayers in setting transfer prices and disclosure of information to permit adequate development of transfer pricing issues on examination.

[1] Unless otherwise stated, all references to sections and regulations are to the Internal Revenue Code of 1986 and the regulations promulgated thereunder.

[2] H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II–638 (1986) [hereinafter 1986 Conf. Rep.].

The problems that have been encountered in relation to transfers of intangible property are both legal and administrative. The 1986 Act clarifies the legal standard for determining arm's length pricing by stating that transfer prices for intangible property must be "commensurate with income." Part II discusses Congress' 1986 change to section 482 and explains that this standard requires periodic, and generally prospective, adjustments to transfer prices to reflect significant changes in the income attributable to intangible property. In any event, transfer prices must be determined on the basis of true comparables if they in fact exist. Part II concludes that the commensurate with income standard is fully consistent with the arm's length principle.

The primary administrative difficulty relating to transfers of intangible property is the failure of the regulations to specify a so-called fourth method of income allocation for situations in which comparable transactions do not exist. This problem has been particularly acute with respect to high profit intangibles. Part III of the study explores the economic theory underlying section 482 and proposes a methodology for allocating income, and thereby determining transfer prices in such cases, which draws upon various methods that have been used on an ad hoc basis by the Service, taxpayers, and the courts. The methodology would utilize functional analysis and allocate income by using comparable transactions when they exist, arm's length rates of return when comparables do not exist, and a profit split approach when neither comparables nor arm's length rates of return can be used to allocate all intangible income.

Part IV examines cost sharing arrangements and relevant implications arising from the 1986 legislation.

The specific chapters in each part and the appendices to the study are described below.

B. Part I: Background

Chapter 2 reviews the history of particular transfer pricing legislation and regulations before 1986, including regulations promulgated in 1968, which are still in effect today.

Chapter 3 discusses administrative problems. This chapter is supplemented by a survey of selected International Examiners and Group Managers, summarized in Appendices A and B, which sought information about how the section 482 regulations work in practice. Significant problems include access to

pricing information and difficulties in applying pricing methods to transfers of intangible assets. The chapter includes recommendations regarding the maintenance of transfer pricing information in the taxpayer's books and records, which would be required to be provided to the IRS immediately upon request in an examination, summary reporting of the taxpayer's transfer pricing methodology on Forms 5471 and 5472, and the assertion of appropriate penalties for failure to disclose information or for substantial understatements of income.

The regulations place strong emphasis on finding comparable unrelated party transactions as a guide for evaluating related party transactions. Chapter 4 discusses the search for comparables in the decided cases, and concludes that comparables are often either absent or misused when transfers of intangible property are at issue.

The regulations provide that, when comparables are unavailable, some other appropriate method of allocating income among related parties may be used. Chapter 5 examines the decided cases to see what other methods have been used, including profit splits, rates of return, income to expense ratios, and customs valuations.

C. Part II: Section 482 After the 1986 Tax Reform Act

Chapter 6 focuses on the "commensurate with income" standard incorporated into section 482 by the 1986 Act. After describing the legislative history, the chapter discusses limitations some have suggested on the scope of the standard, and explains its application to normal profit potential intangibles as well as to high profit potential intangibles.

Chapter 7 addresses an issue of major concern to the foreign trading partners of the United States: compatibility with international transfer pricing standards. The chapter concludes that the arm's length standard is the accepted international norm for making transfer pricing adjustments. The study reaffirms that Congress intended the commensurate with income standard to be consistent with the arm's length standard, and that it will be so interpreted and applied by the Internal Revenue Service and the Treasury Department.

Chapter 8 discusses the need under the commensurate with income standard to make periodic adjustments to intangible income allocations. Recommendations address the issues of the frequency of review, retroactivity, lump sum payments, and set-offs.

Taxpayers and practitioners have long advocated safe harbors as a solution to many of the problems arising under section 482. Chapter 9 discusses safe harbors in theory and analyzes some of the safe harbors that have been proposed. While the Service and Treasury do not categorically reject the possibility that some useful safe harbors might be developed, none of those currently proposed appears satisfactory.

D. Part III: Methods for Valuing Transfers of Intangibles

The current regulations adopt a market-based approach, distributing income among related parties the way a free market would distribute it among unrelated parties. Some critics have suggested that a unitary business approach, eliminating the fiction of arm's length dealing and accounting for economies of related party dealing through a formulary method, might be more theoretically sound. Chapter 10 examines these arguments and concludes that the market-based arm's length standard remains the better theoretical allocation method.

Chapter 11 discusses the formulation of a methodology for applying the arm's length standard to transfers of intangible property. Beginning with a discussion of the use of exact and inexact comparables, the chapter proposes as an additional method an arm's length return method that, with appropriate adjustments, could be used in a large percentage of cases. For cases involving intangibles in which comparables and the arm's length return method cannot account for all income to be allocated, a profit split addition to the arm's length return method is described.

E. Part IV: Cost Sharing Arrangements

Chapter 12 presents a description of cost sharing arrangements and describes the history of their tax treatment, comparing the detailed section 482 cost sharing regulations that were proposed in 1966 with the terse version actually promulgated in 1968. The chapter reviews foreign experience with cost sharing, a 1984 Congressional recommendation that the cost sharing rules be expanded, and the special rules governing cost sharing arrangements between possessions corporations and their domestic affiliates.

The legislative history regarding the change to section 482 in the 1986 Act states that Congress intended to permit bona fide cost sharing arrangements, but expected the economic results of such arrangements to be consistent with the commensurate with income standard. Chapter 13 identifies and discusses various issues related to the use of cost sharing arrangements after the 1986 Act.

F. Appendices

Appendices A and B to the study summarize the results of a survey of Service personnel about the administration of section 482. Appendix C analyzes the transfer pricing law and practices of selected jurisdictions. Appendix D describes the publicly available information about third party licensing practices. Appendix E contains 14 examples that illustrate how the principles explained in the study are applied in different factual contexts.

G. Future Agenda

This study reflects input from taxpayer groups, practitioners, and other concerned members of the public, as well as the combined experience and careful thought of those in the government charged with enforcing section 482. Nevertheless, it is only a beginning; it sets forth conclusions and recommendations in some areas, and describes the need for further study in others.

In the study, input is requested on specific issues from taxpayers and practitioners. More generally, however, readers are urged to provide any comments that would be useful in formulating a fair and workable system of administering a statute that has challenged taxpayers and the government alike. It is anticipated that comments will be taken into account in drafting proposed regulations and in examining additional issues not discussed in this study—including such areas as the services portion of the section 482 regulations, the impact of currency fluctuations on transfer pricing, a more detailed review of functional analysis, and the proper methodology for valuing assets under the various "fourth method" approaches described in Chapter 11.

Comments should be forwarded in triplicate to the Office of Associate Chief Counsel (International), Branch 1, 950 L'Enfant Plaza South SW., Room 3319, Washington, DC 20024. Comments are requested to be filed by February 15, 1989.

Chapter 2

Transfer Pricing Law and Regulations Before 1986

A. Early History

The Commissioner was generally authorized to allocate income and deductions among affiliated

corporations in 1917.[3] He could require related corporations to file consolidated returns whenever necessary to more equitably determine the invested capital or taxable income. * * *" The earliest direct predecessor of section 482 dates to 1921, when legislation went beyond authority to require consolidated accounts and authorized the Commissioner to prepare consolidated returns for commonly controlled trades or businesses to compute their "correct" tax liability.[4] This legislation was passed partly because possessions corporations, ineligible to file consolidated returns with their domestic affiliates, offered opportunities for tax avoidance.[5] As early as 1921, Congress perceived the potential for abuse among related taxpayers engaged in multinational transactions.

When the predecessor to current section 482 was incorporated into the 1928 Revenue Act (as section 45), the provision was removed from the expiring consolidated return provisions and significantly expanded.[6] The Commissioner's authority to make an adjustment under section 45 was expressly predicated upon his duty to prevent tax avoidance and to ensure the clear reflection of the income of the related parties (to determine their "true tax liability," in the words of the legislative history).[7]

B. Regulations and the Courts—Through the Early 1960s

For many years, the small number of United States companies with multinational affiliates meant that section 482 had little impact in the international context. Prior to the early 1960s, the primary focus of the Service's enforcement efforts using section 482 was domestic. Regulations issued in 1935 [8] (under section 45) remained in effect substantially unchanged until 1968.

The regulations set forth the arm's length standard as the fundamental principle underlying section 482: "The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." [9] They did not, however, mandate the use of any particular allocation method.

The case law interpreting section 482 and its predecessors took a broad approach. The concepts of "evasion of taxes" [10] and "clear reflection of income" [11] were developed into far-reaching weapons to attack a variety of tax abuses. The predecessors of section 482 were used to prevent recognition of a tax loss on securities following a tax-free transfer from the corporation that had incurred, but could not use, the loss,[12] and to prevent the mismatching of the expenses incurred by one corporation in growing crops from the income artificially realized by another corporation from harvesting and selling those crops.[13]

The courts applied a number of different standards for determining when transactions were conducted at arm's length. Transactions were scrutinized to determine if related parties received full, fair value,[14] a fair and reasonable price,[15] or a fair price including a reasonable profit.[16]

Before 1964, it was generally understood that section 482 could not be used by the Service to place taxpayers, in effect, on a consolidated return basis.[17] In 1964, the Tax Court used section 482 to combine the incomes of two separate corporations that operated a downtown clothing store and its suburban branch store.[18] This case raised concerns among taxpayers over the use of section 482 in substance to ignore separate corporate entities.

C. Developments in the 1960s

By the early 1960s, the business and regulatory climate in which U.S. and foreign multinationals operated changed substantially. In 1961, the Treasury Department urged that significant changes be made in the taxation of U.S. enterprises with foreign affiliates. In particular, Treasury contended that section 482 was not effectively protecting U.S. taxing jurisdiction.[19]

In 1962, Congress considered how to stop U.S. companies from shifting U.S. income to their foreign subsidiaries.[20] While the Ways and Means Committee observed that under existing law the Service could prevent this practice by allocating income under section 482, it proposed further legislation to minimize "the difficulties in determining a fair price," particularly in instances "where there are thousands of different transactions engaged in between a domestic company and its foreign subsidiary." [21]

The Ways and Means Committee proposal as adopted by the House would have added to section 482 a new subsection dealing with sales of tangible property between U.S. corporations and their foreign corporate affiliates.[22] Unless the taxpayer could demonstrate its use of an arm's length price under the comparable uncontrolled price method, taxable income was to be apportioned between related parties under a formula based on their relative economic activities. In addition, no income was to be allocated to a "foreign organization whose assets, personnel, and office and other facilities which are not attributable to the United States are grossly inadequate for its activities outside the United States." [23]

The Senate version of the 1962 Revenue Bill, which prevailed in conference, omitted the House provision. Instead, the Finance Committee concluded that section 482 already provided ample regulatory

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[3] Regulation 41, Articles 77–78, War Revenue Act of 1917, ch. 63, 40 Stat. 300 (1917).

[4] Rev. Act of 1921, ch. 136, section 240(d), 42 Stat. 260 (1921).

[5] S. Rep. No. 275, 67th Cong., 1st Sess. 20 (1921).

[6] Rev. Act of 1928, ch. 852, section 45, 45 Stat. 806 (1928).

[7] H.R. Rep. No. 2, 70th Cong., 1st Sess. 16–17 (1928).

[8] Treas. Reg. 86, section 45–1(b) (1935).

[9] *Id.*

[10] *Asiatic Petroleum Co. v. Comm'r*, 79 F.2d 234, 236 (2d Cir.), *cert. denied*, 296 U.S. 645 (1935) (concept of evasion for this purpose includes civil tax avoidance).

[11] *Central Cuba Sugar Co. v. Comm'r*, 198 F.2d 214, 215 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952) (application of clear reflection standard does not require proof of tax avoidance motive).

[12] *National Securities Corp. v. Comm'r*, 137 F.2d 600 (3d Cir.), *cert. denied*, 320 U.S. 794 (1943).

[13] *Central Cuba Sugar, supra* n. 11; *Rooney v. U.S.*, 305 F.2d 681 (9th Cir. 1962).

[14] *Friedlander Corp. v. Comm'r*, 25 T.C. 70, 77 (1955).

[15] *Polack's Frutal Works v. Comm'r*, 21 T.C. 953, 975 (1954).

[16] *Grenada Industries v. Comm'r*, 17 T.C. 231 (1951), *aff'd*, 202 F.2d 873 (5th Cir.), *cert. denied*, 346 U.S. 819 (1953).

[17] *Seminole Flavor Co. v. Comm'r*, 4 T.C. 1215 (1945); *cf. Moline Properties v. Comm'r*, 319 U.S. 436 (1943). In extreme cases of income shifting, other legal theories such as assignment of income, substance over form, disregard of corporate entity, or treatment of corporate entity as an agent have been used by courts to attribute income to the appropriate person or corporate entity. These theories are beyond the scope of this paper, and they are generally not used by courts when section 482 is also applicable. *See, e.g., Hospital Corporation of America v. Comm'r*, 81 T.C. 520 (1983) (foreign affiliate not treated as a sham; section 482 applied for use of U.S. parent's intangibles).

[18] *Hamburgers York Road, Inc. v. Comm'r*, 41 T.C. 821 (1964); *Aiken Drive-In Theatre Corp. v. U.S.*, 281 F.2d 7 (4th Cir. 1960) (the shifting of an abandonment loss from one corporation to another created an inaccurate picture of income, justifying use of section 482).

[19] *Hearings on the President's 1961 Tax Recommendations Before the Committee on Ways and Means*, 87th Cong., 1st Sess., vol. 4, at 3549 (1961) (statement of M. Caplin, Commissioner of Internal Revenue, "Problems in the Administration of the Revenue Laws relating to the Taxation of Foreign Income").

[20] H.R. Rep. No. 1447, 87th Cong., 2d Sess. 28 (1962).

[21] *Id.*

[22] H.R. 10650, 82d Cong., 2d Sess., section 6 (1962).

[23] *Id.; see* H.R. Rep. No. 1447, 87th Cong., 2d Sess. 537–38 (1962).

authority to prevent improper multinational allocations.[24] The Conference Committee endorsed this approach, stating:

The conferees on the part of both the House and the Senate believe that the objectives of section 6 of the bill as passed by the House can be accomplished by amendment of the regulations under present section 482. Section 482 already contains broad authority to the Secretary of the Treasury or his delegate to allocate income and deductions. It is believed that the Treasury should explore the possibility of developing and promulgating regulations under this authority which would provide additional guidelines and formulas for the allocation of income and deductions in cases involving foreign income.[25]

D. The Current Regulations

Treasury responded by promulgating regulations, issued in final form in 1968, that (with only a few changes) govern transfer pricing practices today.[26] Those regulations reaffirmed the arm's length standard as the principal basis for transfer pricing adjustments but attempted, for the first time, to establish rules for specific kinds of intercompany transactions. The final regulations applied to the performance of services, the licensing or sale of intangible property, and the sale of tangible property.[27]

1. *Services.* In determining an arm's length charge for services, § 1.482–2(b)(3) of the regulations provides:

For the purpose of this paragraph an arm's length charge for services rendered shall be the amount which was charged or would have been charged for the same or similar services in independent transactions with or between unrelated parties under similar circumstances considering all relevant facts.

The regulations do not provide any specific guidance for determining what the charge in independent transactions would have been in the absence of comparable transactions with independent parties.

2. *Intangible property.* As to the licensing or sale of intangible property, § 1.482–2(d)(2)(ii) of the regulations provides:

In determining the amount of an arm's length consideration, the standard to be applied is the amount that would have been paid by an unrelated party for the same intangible property under the same circumstances. Where there have been transfers by the transferor to unrelated parties involving the same or similar intangible property under the same or similar circumstances the amount of the consideration for such transfers shall generally be the best indication of an arm's length consideration.

The intangible property portion of the regulations contemplate a failure to find appropriate comparables. Where they are unavailable, the regulations list 12 factors to be taken into account, including prevailing rates in the industry, offers of competitors, the uniqueness of the property and its legal protection, prospective profits to be generated by the intangible, and required investments necessary to utilize the intangible.[28] The regulation offers little or no guidance, however, in determining how much relative importance particular factors are to be given.

3. *Tangible property.* Finally, the section 482 regulations set out detailed rules for determining the transfer prices of tangible personal property. Section 1.482–2(e)(2)(4) of the regulations describes three specific methods for determining an appropriate arm's length price: The comparable uncontrolled price method, the resale price method, and the cost plus method. All three rely on comparable transactions to determine an arm's length price, either directly or by reference to appropriate markups in comparable unrelated transactions. The regulations mandate that the three enumerated methods be used in the order set forth. They also authorize other unspecified methods, which have come to be known generically as "fourth methods":

Where none of the three methods of pricing * * * can reasonably be applied under the facts and circumstances as they exist in a particular case, *some appropriate method of pricing* other than those described in subdivision (ii) of this subparagraph, or variations on such methods, can be used. [Emphasis supplied.][29]

The specific transaction-oriented models described above for making transfer pricing determinations were adopted in lieu of "mechanical safe havens" based on profit margins, percentage mark-ups or mark-downs, and the like, which had been suggested by various taxpayers commenting on proposed regulations issued in 1965 and 1966. Such safe harbors were rejected for two reasons. First, because of the extraordinary range of returns earned at arm's length, even within a single industry or company, no principled and equitable basis for such safe harbors could be devised. Second, any effective safe harbor income allocation would inevitably serve as a "floor," applying only to those taxpayers not able to document a more advantageous fact pattern.[30] As discussed in Chapter 9, *infra*, the concerns raised by safe harbors still have not been satisfactorily dispelled.

E. Conclusion

In general, the section 482 regulations relating to services, intangible property, and tangible property rely heavily on finding comparable transfer prices or comparable transactions. The regulations provide little guidance for determining transfer prices in the absence of comparables.

Chapter 3

Recent Service Experience in Administering Section 482

In order to determine what difficulties International Examiners are encountering in administering the regulations, a questionnaire was prepared through the joint efforts of Treasury, Chief Counsel, and International Examination personnel. The questionnaire was sent to selected International Examiners (IEs) and IE Group Managers. In addition, selected IRS economists, IEs, Group Managers, and IRS trial attorneys were interviewed.

The results of the analysis of the questionnaires have been compiled and are set forth in Appendix A. Included in Appendix B is a completed questionnaire reflecting the aggregate data supplied by the respondents.[31] In

[24] *See, e.g., Hearings on H.R. 10650 Before the Senate Committee on Finance*, 87th Cong., 2d Sess., pt. 7, at 2913, 3011–3012 (1962) (statements by P. Seghers and D.N. Adams).

[25] H.R. Rep. No. 2508, 87th Cong., 2d Sess. 18–19 (1962).

[26] Proposed regulations were issued in 1965, were withdrawn and reproposed in 1966, and were issued in final form in 1968. Proposed Treas. Reg. §§ 1.482–1(d) and 2, 30 FR 4256 (1965); Proposed Treas. Reg. §§ 1.482–1(d) and 2, 31 FR 10394 (1966); and T.D. 6952, 1968–1 C.B. 218.

[27] In addition to the tangible and intangible property and the services regulations, there are safe harbors and other rules for interest rates on related party loans, Treas. Reg. § 1.482–2(a), and rules similar to the services rules for related party leasing transactions, Treas. Reg. § 1.482–2(c). These rules are generally not discussed in this paper.

[28] Treas. Reg. § 1.482–2(d)(2)(iii).

[29] Treas. Reg. § 1.482–2(e)(1)(iii).

[30] Surrey, *Treasury's Need to Curb Tax Avoidance in Foreign Business through the Use of Section 482*, 28 J. Tax'n 75 (1968).

[31] IEs and Group Managers were requested to complete one questionnaire for each of the three cases they considered to be their most important section 482 cases. In some instances respondents had not had experience with three important section 482 cases, so that fewer responses were made to some questions. In others, some respondents answered based on their general experience, rather than the particular case for which the questionnaire was completed. In many instances the categorization of particular issues entails a great deal of judgment. For example, a case such as *Hospital Corporation of America, supra* n. 17, could be viewed as a services case, an allocation of income case, a profit split case, or an intangibles case. For these reasons we have used the results of

Continued

general, the survey and interviews revealed no surprises. The two primary problems in administering section 482 have been the difficulty of obtaining pricing information from the taxpayers during an examination and the difficulty of valuing intangibles—including the valuation of intangible property in connection with sales of tangible property. This chapter discusses these problems, makes several related suggestions regarding disclosure of information and penalties, and suggests that the early use of counsel and economic experts would alleviate these problems.

A. Service's Access to Pricing Information

A significant threshold problem in the examination of section 482 cases has been IRS access to relevant information to make pricing determinations. In some cases, relevant information is not furnished by the taxpayer to the examining agent.[32] In other cases, long delays are experienced by agents in receiving information, in most cases without explanation for the delays. In many cases, delays in responding to IE requests for information exceed one year.[33] Because of the emphasis upon timely closing of large cases in the recent past, section 482 cases have been closed without receiving necessary information or without the opportunity for agents to follow up on information that has been provided.[34]

The experience of the agents has been that the vast majority of taxpayers, when asked, are unable to provide an explanation of how their intercompany pricing was established.[35] This may account in large part for the denial of access to information and delays encountered by IEs.

In recent years the Service has placed an emphasis on examination of transactions with subsidiaries located in tax haven jurisdictions.[36] Because of the financial and commercial secrecy laws that exist in tax haven jurisdictions, IRS access to third party data has been significantly hampered. Problems with access to information because of foreign secrecy laws have been to some extent alleviated by the enactment of section 982 [37] and by a broad interpretation of the IRS administrative summons power by the courts.[38] However, as will be subsequently discussed, agents have failed to use the section 982 and administrative summons procedures aggressively.

Because of the dramatic increase in recent years in direct foreign investment in the United States,[39] the examination of transactions between foreign parents and their U.S. affiliates will become an increasingly more important part of the international examination program. A survey of rates of return on these companies based on IRS statistics of income ("SOI") data reveals a substantially lower than average profit in this country reported by these companies, which may involve transfer pricing policies.[40]

In practice, examinations of United States subsidiaries of foreign parents have developed into some of the Service's most difficult examinations. A primary reason for the difficulty is that agents are unable to obtain timely access to necessary data, which is typically in the hands of the parent company. In many cases, foreign parent companies refuse to produce this information upon request. An additional difficulty encountered by agents is that foreign parent corporations may not be subject to information reporting requirements similar to U.S. requirements.[41]

Both the administrative summons procedures [42] and the formal document request procedures [43] are tools that are available to IEs to compel production of information necessary to determine whether a section 482 adjustment is appropriate. Unfortunately, for a variety of reasons, IEs seldom serve administrative summonses or section 982 requests.[44] The most common reason given for failing to use these procedures is the time delay necessary to follow them, which conflicts with the need to close the examination. Another reason given in many cases was the necessity of maintaining a good working relationship with the taxpayer, which IEs feared would be harmed if these procedures were used.

Although section 6001 contains a general requirement that a taxpayer maintain adequate books and records, the section 482 regulations are generally silent with regard to records and their accessibility to either support or to determine arm's length prices.[45] Thus, the current regulations do not advise taxpayers specifically of the type of information that is necessary in order to determine compliance with section 482. Specific information on transactions between parent and subsidiary corporations is required on forms 5471 and 5472, which have been widely used by agents in planning and conducting section 482 examinations.

Service experience has been that many taxpayers do not rely upon any form of comparable transactions or other contemporaneous information either in planning or in defending intercompany transactions.[46] Although the legislative history to the 1986 Act expresses concern that industry average royalty rates are used by taxpayers to justify royalties for high profit intangibles,[47] the more serious problem

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the questionnaire throughout this paper primarily for purposes of illustration. However, the results, where used, represent and correspond with the experiences of persons interviewed and others in the Service responsible for administering section 482.

[32] Many of the requests for information that are not honored concern transactions with third parties that would provide comparables for analyzing a potential section 482 adjustment. Appendix B, *infra*, at Question 18C.

[33] Appendix B, *infra*, at Question 19.

[34] Appendix B, *infra*, at Question 13, and Appendix A, *infra*, at 4–5.

[35] Appendix B, *infra*, at Question 14.

[36] General Accounting Office, Report to the Chairman, Committee on Ways and Means, *IRS Audit Coverage: Selection Procedures Same for Foreign and other U.S. Corporations* 26–29 (1986) [hereinafter GAO, *IRS Audit Coverage*].

[37] Under section 982, a taxpayer which, without reasonable cause, fails to produce, within 90 days, foreign based documents sought by the agent during the course of the examination through the use of a formal document request may be precluded from introducing the documents sought in a subsequent court proceeding. A special court proceeding is established at which the taxpayer may show reasonable cause for failing to produce the requested documents or otherwise move to quash the formal document request.

[38] *Vetco v. United States*, 644 F.2d 1324 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1982) (summons for books and records of Swiss controlled foreign corporation enforced notwithstanding potential violations of the Swiss Penal Code).

[39] Foreign direct investment in the United States increased from about $34.6 billion in 1977 to about $100.50 billion in 1984. GAO, *IRS Audit Coverage*, *supra* n. 36, at 10.

[40] Hobb, *Foreign Investment and Activity in the United States through Corporations, 1983*, SOI Bulletin 53–68 (Summer 1987); *see BNA Daily Tax Report*, April 1, 1987, at G2.

[41] Wheeler, *SEC Requires Less Disclosure from Foreign Corporations*, Tax Notes, October 12, 1987, at 195–197.

[42] Section 7602; *United States v. Toyota Motor Corp.*, 561 F. Supp. 348 (C.D. Cal. 1983); *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158 (C.D. Cal. 1983).

[43] Section 982.

[44] In the survey conducted as part of this study, IEs reported using summonses and section 982 requests in approximately 5% and 4%, respectively, of the cases reported in the survey. Appendix B, *infra*, at Questions 21, 22.

[45] An exception in Treas. Reg. § 1.482–2(b)(7) requires adequate records to verify costs or deductions used in connection with a charge for services to an affiliate.

[46] Appendix B, *infra*, at Question 57.

[47] H.R. Rep. No. 426, 99th Cong., 1st Sess. 424 (1985) [hereinafter 1985 House Rep.]. The survey revealed that in approximately 41% of the cases in which taxpayers relied upon comparables, industry averages were used. Appendix A, *infra*.

has been that the taxpayer, not having structured the transaction with any comparable in mind, seeks to defend its position by finding whatever transaction or method gets closest to the transfer price initially chosen, whether that be an industry average rate of return or some other type of comparable.

Problems related to information and aggressive return positions would be alleviated if the regulations specifically set out a taxpayer's responsibility to document the methodology used in establishing intercompany transfer prices prior to filing the tax return and to require that such documentation be provided within a reasonable time after request. The documentation should include references to any comparable transactions, rates of return, profit splits, or other information or analyses used by the taxpayer in arriving at transfer prices. In general, a taxpayer making relatively minor investments would not be required to obtain information regarding comparable transactions outside of its own knowledge of its business affairs and those of its competitors, but to use information and analyses that generally would have been produced by the taxpayer in the course of developing its business plan. However, a taxpayer engaging in a major transaction or one involved in a complex profit split analysis involving significant high profit intangibles [48] would be expected to gather and analyze the types of information illustrated by the examples in Appendix E which, once again, is information likely to be produced by the taxpayer in developing its business plan. In the absence of comparables, taxpayers should be required at a minimum to apply a rate of return analysis or profit split methodology that may be prescribed in regulations under which the taxpayer would identify assets and functions performed by it and its affiliates and identify the rate of return or profit split that the taxpayer believes should be assigned or allocated to each activity or function.

Furthermore, Forms 5471 and 5472 should be revised to include summary information describing how intercompany prices were determined and an attestation that the documentation required to be maintained under the section 482 regulations, as described above, was available at the time of preparation of the return and will be made available at the start of an IRS examination. Requiring information to be made available at the beginning of an audit would alleviate problems of receiving either too little or too much information near the expiration of the statute of limitations.

The Service and Treasury believe that taxpayer compliance in the transfer pricing area with respect both to disclosure of information and to conformity with the arm's length standard would be enhanced by the proper assertion of appropriate penalties. While the penalty imposed by section 6661 for substantial understatement of tax can apply, to date the Service has only infrequently imposed penalties in connection with making section 482 adjustments.[49] The Internal Revenue Service is currently engaged in a comprehensive study of the role of civil tax penalties,[50] as are many other interested parties. It, therefore, seems timely to focus now on the effectiveness of existing penalties in encouraging compliant taxpayer behavior and penalizing unjustified positions in the transfer pricing area. Consideration should be given to when the section 6661 penalty should be raised and whether it is adequate to deter instances where taxpayers do not make intercompany pricing decisions upon a reasonable basis, or whether a new penalty should be proposed.

The Service and Treasury are interested in recommendations in this area, including such specific comments as to the type and amount of penalties, and whether there should be certain transaction oriented thresholds that ought to apply before any penalty could be asserted. For example, a transaction specific penalty (similar to the overvaluation penalty of section 6659) may be an appropriate means of deterring substantial deviations from the commensurate with income standard. Specific consideration should be given to whether the applicable penalty provisions should be amended to apply if there is a substantial deviation from the appropriate commensurate with income payment regardless of whether there is disclosure on the tax return of the manner in which taxpayers computed transfer prices. Disclosure of the taxpayer's method of computing a transfer price can not adequately inform the Service as to whether such a transfer price substantially deviates from the appropriate section 482 transfer price absent a thorough audit. Consequently, such disclosure should not prevent the imposition of a penalty for substantial deviation from the correct section 482 transfer price.[51] Since it is possible to use the provisions of section 367(d) to deter abusive situations (*see* discussion of section 367(d) *infra* Chapter 6), it may also be appropriate to clarify how taxpayers may avoid imposition of penalties in the context of section 367 adjustments.

B. Intangibles

A significant portion of section 482 adjustments proposed in recent years have involved an adjustment for pricing with respect to the licensing or other transfer of intangibles.[52] Because of the absence of comparables in many cases, intangible transfers generally are the most problematic of adjustments due to the inherent difficulty of valuing intangibles under the existing regulations. As previously noted in Chapter 2, the intangible property portion of the regulations contemplate a failure to find appropriate comparables and list 12 factors to be taken into account in valuing intangibles in the absence of comparables. No guidance is given, however, in determining the relative importance of particular factors.

In a significant number of cases, IEs relied upon sections of the regulations other than the intangibles portion to make a transfer pricing adjustment.[53] Intangibles are often transferred by incorporation into tangible property that is sold or rented. In these types of cases, the taxpayers have not been required to isolate the value of the intangible.[54] Incorporating a return on an intangible in a transfer price for tangible property does not alleviate, however, the difficulty of valuing the intangible.

A common example is the transfer of tangible property with a trademark, trade name, or recognizable logo attached. It is clear from the regulations that a trademark, trade name, or logo is an intangible.[55] The regulations

[48] *See* discussion *infra* Chapter 11.

[49] Under Rev. Proc. 88-37, 1988-30 I.R.B. 31, a taxpayer that reports intercompany transactions, on Schedules G and M of Form 5471, may avoid the substantial understatement penalty. *See* Rev. Proc. 85-26, 1985-1 C.B. 580 (amended returns or statements made following commencement of a CEP examination may avoid assertion of the substantial understatement penalty).

[50] Commissioner's Penalty Study, *A Philosophy of Civil Tax Penalties* (discussion draft June 8, 1988).

[51] *See* discussion of the commensurate with income standard and periodic adjustments *infra* Chapters 6 and 8.

[52] In the survey conducted for the study, an adjustment was made under Treas. Reg. § 1.482-2(d) in about 50% of the reported cases. Appendix B, *infra*, at Question 68.

[53] In approximately 40% of the cases reported in the survey, IEs cited the inability to value an intangible as the reason why they failed to follow the intangibles section of the regulations. Appendix B, *infra*, at Question 72.

[54] Rev. Rul. 75-254, 1975-1 C.B. 243.

[55] Treas. Reg. § 1.482-2(d)(3).

governing the sales of tangible property specify that, in applying the comparable uncontrolled price, resale price, and cost plus methods, adjustments must be made for sales with or without trademarks, provided there is a reasonably ascertainable effect on the price.[56] In some cases adjustments for trademarks are relatively easy to make. The analysis, however, becomes much more complex if there are no similar products sold (with or without trademarks) on which to base a comparison. Setting a transfer price for a product in such a case involves the same difficult exercise as setting a royalty rate for a licensed intangible. One of the recent pharmaceutical cases presents an example of this latter situation since it involved the sale of unique pharmaceutical products.[57]

Intangibles may also be transferred in the form of services. In some circumstances, taxpayers have attempted to shift large amounts of income to tax haven subsidiaries by "loaning" a few key employees to a tax haven affiliate. By loaning employees, the parent company may simultaneously provide services and transfer valuable intangible know-how. In transactions which are structured as an intangibles transfer, it is difficult to value services rendered in connection with the transfer of intangible property, which may be necessary for purposes of determining the source of the income.[58]

A particularly difficult aspect of valuing intangibles has been determining what part of an intangible profit is due to manufacturing intangibles and what part is due to marketing intangibles.[59] This problem has particular significance in section 936, since the possessions corporation is generally entitled to a return only on manufacturing intangibles when it elects the cost sharing method under section 936(h).

Problems with intangibles underlie the amendment made to section 482 by the 1986 Act, as discussed in Part II. The intangibles section of the section 482 regulations should be modified to provide a specific analysis to be used when comparable uncontrolled transactions do not exist. The method should provide for appropriate allocations of income when multiple intangibles (such as marketing and manufacturing intangibles) are present in the same set of transactions. Part III is devoted to the subject of an appropriate methodology for allocating intangible income.

C. Application of Pricing Methods for Transfers of Tangible Property

When considering an adjustment with respect to the transfer price for tangible property, the regulations require both the taxpayer and the Service to follow a priority of pricing methods: first, the comparable uncontrolled price method must be attempted, then resale price method, then cost plus method, and, if none of them are applicable, some other method or combination of the prior methods.[60] Five prior studies using data available from both the Service and multinational corporations have examined the frequency with which each of these methods has been used. The results of these surveys are set forth below:

PERCENTAGE OF CASES IN WHICH VARIOUS SECTION 482 PRICING METHODS WERE USED

Report	CUP	Resale	Cost plus	Other
1973 Treas. Report [61]	20	11	27	40
Conference Bd Report [62]	28	13	23	36
Burns Report [63]	24	14	30	32
GAO [64]	15	14	26	47
1984 IRS Survey [65]	41	7	7	45
1987 IRS Survey (overall)	32	8	24	36

PERCENTAGE OF CASES IN WHICH VARIOUS SECTION 482 PRICING METHODS WERE USED—Continued

Report	CUP	Resale	Cost plus	Other
1987 IRS Survey [66] (tangible property)	31	18	37	14

Recent Service experience has been that the starting point for analyzing any pricing issue begins with the search for a comparable uncontrolled transaction. For a significant number of cases, these transactions can be found, although frequently not without a great deal of ingenuity and persistence by the examining agent or other Service personnel.[67] If comparable uncontrolled prices do not exist, IEs or Service economists will seek to locate comparable transactions based on functions performed and risks borne by the entity at issue. This type of an issue lends itself to resale price or cost plus, depending upon the circumstances. If neither comparable uncontrolled prices nor comparable uncontrolled transactions can be found, a variety of fourth methods may be used.

One justification given for the current priority of methods in the regulations is that both the taxpayer and the Service are thus directed to a common frame of analysis to avoid the problem of the Service using one method while the taxpayer uses another method. However, as currently structured, the

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[56] *See, e.g.*, Treas. Reg. § 1.482-2(e)(2)(ii) and example (2), 1.482-2(e)(3)(ii) example (2), and 1.482-2(e)(4)(iii)(c).

[57] *Eli Lilly & Co. v. Comm'r*, 84 T.C. 996 (1985), *rev'd in part, aff'd in part* and *remanded*, Nos. 86-2911 and 86-3116 (7th Cir. August 31, 1988) [*Lilly*]. *See* the discussion of *Lilly, infra*, Chapters 4 and 5.

[58] In certain circumstances, no separate allocation is required for services performed in connection with the transfer of intangible property. Treas. Reg. § 1.482-2(b)(8). Services are rendered in connection with the transfer of intangible property if they are merely ancillary or subsidiary to the transfer of the intangible property. The regulations give as an example of ancillary services start-up help given to a related entity in order for it to integrate a trade secret manufacturing process into its operations. The regulations then state that, should the transferor continue to render services after the process has been integrated into the manufacturing process, a separate allocation for services would be required under the regulations. The experience of the IEs is that the current regulations fail to give them specific guidance on how to determine when services rendered in connection with the transfer of an intangible require a separate allocation.

Appendix D discusses results of a preliminary survey of data available at the SEC. This data has the potential to determine when unrelated parties would extract a specific charge for services rendered in connection with the transfer of an intangible.

[59] In *Lilly, supra* n. 57, the Tax Court ultimately determined the parent company's marketing return based upon using its "best judgment." *Lilly*, 84 T.C. at 1167; *See also G. D. Searle and Co. v. Comm'r [Searle]*, 88 T.C. 252, 376 (1987).

[60] Treas. Reg. § 1.482-2(e)(1) (ii) and (iii).

[61] Treasury Department News Release, *Summary Study of International Cases Involving Section 482 of the Internal Revenue Code* (Jan. 8, 1973), reprinted in 1973 *Standard Federal Tax Report* (CCH) par. 6419.

[62] *Tax Allocations and International Business: Corporate Experience with Section 482 of the Internal Revenue Code*, Conference Board Report No. 555 (1972).

[63] Burns, *How IRS Applies the Intercompany Pricing Rules of Section 482: A Corporate Survey*, 54 J. Tax'n 308 (1980).

[64] General Accounting Office, Report by the Comptroller General to the Chairman, House Committee on Ways and Means, *IRS Could Better Protect U.S. Tax Interests in Determining the Income of Multinational Corporations* (1981) [hereinafter GAO, *IRS Could Better Protect U.S. Tax Interests*].

[65] IRS Publication No. 1243, *IRS Examination Data Reveal an Effective Administration of Section 482 Regulations* (1984).

[66] As stated earlier, the percentages from the 1987 survey do not represent a scientifically valid random sample. They are based upon responses to a questionnaire sent to selected groups of International Examiners who responded with respect to a small number of cases selected by them. Compared to the 1984 survey undertaken by the Assistant Commissioner (Examination), however, they suggest one significant trend: A substantial increase in the use of the cost plus method with a corresponding decrease in cases classified as either "comparable uncontrolled price" or "other." Such a trend would probably be due to an emphasis during the last several years on examining cases that involved manufacturing activities in tax haven jurisdictions. *See* GAO, *IRS Audit Coverage, supra* n. 36, at 26-29.

[67] Appendix B, *infra*, at Questions 62-64.

regulations literally require that both the taxpayer and the agent attempt to apply the methods in priority order. Because the resale price method generally applies only to distributors of goods, while the cost plus method applies generally to manufacturers, there does not seem to be any reason in theory why the agent or taxpayer should attempt to apply the resale price method before applying the cost plus method.[68] In practice, taxpayers and agents rely upon comparable uncontrolled prices or transactions, when they exist. When they do not exist, agents or taxpayers use whatever method they believe best reflects the economic realities of the transaction at issue. While there are valid theoretical reasons for retaining the priority of the comparable uncontrolled price method,[69] there do not seem to be any valid reasons for preferring resale price over cost plus or another method, or for preferring resale price or cost plus over some other economically sound method. Rather, the method used should generally be the one for which the best data is available and for which the fewest number of adjustments are required.

One technique that is missing from the section 482 regulations that in practice is used extensively by the international examiners is functional analysis. This analysis focuses on the economic functions performed by the affiliated parties to a transaction and the economic risks borne by each of the parties.[70] This technique is used by IEs and Service economists not as a method standing alone but rather as a means of verifying that prices or transactions are truly comparable to the situation under examination or as a basis for a fourth method.

As discussed in section B, intangibles are often transferred by incorporation into tangible property that is sold, and setting a transfer price for a product in such a case involves the same difficult exercise as setting a royalty rate for a licensed intangible. The difficulty of valuing intangibles is, therefore, as much a problem in the context of sales of property as in the case of licenses or other transfers of intangibles.

[68] In *Lilly, supra* n. 57, the IRS notice of deficiency was based upon the cost plus method while the taxpayer initially attempted to rely upon the resale price method. The Tax Court rejected application of the cost plus method and, also, the taxpayer's analysis under both the resale price and "fourth" methods. It ultimately adopted a profit split method for the first two years at issue and a CUP method for the final year. *See* discussion of *Lilly infra* Chapters 4 and 5.

[69] *See* discussion of this issue *infra* Chapter 11.

[70] I.R.M. § 4233 (523.2). The Manual states that almost all cases can be analyzed using a functional analysis.

D. Use of Specialists and Counsel

The use of counsel and economic specialists at the examination level would ameliorate some of the problems, discussed above, of obtaining information and dealing with difficult intangible pricing cases. Legal assistance during examination is needed to assist in obtaining relevant information and in determining whether an appropriate legal basis exists for a proposed adjustment. Economists are needed in many cases to perform a functional analysis and to help evaluate the proper returns to be accorded to the related parties. Other experts may be required to analyze practices within the taxpayer's industry. The goal of the attorney, the economist, and other specialists should be to assist the IE in obtaining all relevant facts and to determine whether an adjustment may be sustained on appropriate legal and economic theories if the matter ever results in litigation.

For section 482 cases developed 10 years ago, it would have been normal for the IE to develop the case without the assistance of an economist or without the assistance of a Chief Counsel attorney. Authority and expertise in international tax matters were then split between the National Office Examination function and the Director, Foreign Operations District. Legal expertise in international tax matters was diffused among at least four national office divisions and was limited in field offices.

In May 1986 the Office of the Assistant Commissioner (International) was created to provide an emphasis upon, and a focal point for, development of international issues at the examination stage. The Office of Associate Chief Counsel (International) was created in March 1986 to provide a similar focal point for legal issues. In addition, a network of International Special Trial Attorneys and senior District Counsel attorneys has been created to litigate significant international tax cases, including section 482 cases. More importantly, these field attorneys and their National Office counterparts have been encouraged to assist the field in developing these cases, and IEs are encouraged to use their assistance.[71]

Within the last several years, the Service has substantially increased the number of economists available to assist IEs and has decentralized those activities from the national office to three key District offices: Baltimore, New York, and Chicago. Use of economists in major section 482 examinations that do not involve safe harbors is now required.[72]

One criticism that has been made concerning the more extensive use of counsel and experts at the examination stage is that the time necessary to complete an examination (already lengthy) will be further extended. Service experience has been, however, that increased use of specialists has not unduly delayed disposition of the examination in the vast majority of the cases.[73] Furthermore, the early use of specialists in some cases will prevent erroneous adjustments from ever being made, thus saving both taxpayers and the government substantial sums of time and money.

E. Conclusions and Recommendations

Access to Pricing Information

1. The failure of the taxpayer to document the methodology used to establish transfer prices under the section 482 regulations and delays or failure by taxpayers in supplying information to IEs are significant problems that hamper the IRS in its administration of section 482.

2. The section 482 regulations are deficient in not requiring taxpayers to document intercompany pricing policies and to supply information upon examination. The section 482 regulations should be amended to require taxpayers to document the methodology used to establish transfer prices prior to filing the tax return and to provide such documentation during examination within a reasonable time after request. The documentation should include references to any comparable prices or transactions, rates of return, profit splits or other information or analysis used by the taxpayer in arriving at the transfer price.

3. Forms 5471 and 5472 should be revised to include: (a) Summary information describing how intercompany prices were determined; and (b) an attestation that the documentation described in paragraph 2, *supra*, was available at the time of preparation of the return and will be made available at the start of an IRS examination.

4. IEs experiencing difficulties in obtaining transfer pricing information have failed to deal with noncompliant taxpayers through the issuance of section 982 requests and administrative summonses. The Service should more aggressively pursue noncompliant

[71] I.R.M. § 4233 (524).

[72] I.R.M. § 42 (12)3.

[73] Appendix B, *infra*, at Question 32.

taxpayers that delay, without justification, in producing relevant pricing information by using the section 982 and administrative summons procedures.

5. The assertion of appropriate penalties is a necessary but often ignored element of transfer pricing compliance. In conjunction with the Service's broad-based review of penalties, the Government should determine whether existing penalties are sufficient to: (a) Compel taxpayers to provide thorough and accurate information as set forth in paragraphs 2 and 3 *supra*; and (b) deter taxpayers from setting overly aggressive and unjustified transfer prices that are inconsistent with the commensurate with income standard. If it is felt that existing penalties are inadequate, legislative solutions should be pursued. The Service and Treasury encourage comments in this area, including the type of penalty, such as a transaction based penalty, that might be proposed.

Intangibles

6. Establishing appropriate transfer prices for intangibles has been a significant problem because of the inherent difficulty of valuing intangibles—particularly when intangibles are transferred simultaneously with the transfer of tangible property or the provision of services.

7. The intangibles section of the section 482 regulations should be modified to provide a specific method of analysis to be used when comparable uncontrolled transactions do not exist. This method should provide for appropriate allocation when multiple intangibles (such as marketing and manufacturing intangibles) are present in the same set of transactions. Part III is devoted to the subject of an appropriate methodology for allocating intangible income.

Application of Pricing Method for Transfers of Tangible Property

8. The current priority for the comparable uncontrolled price method should be retained, since such prices generally provide the best evidence of what unrelated parties would do in an arm's length transaction. There does not appear to be any reason to retain the current priority of the resale price method over the cost plus method, or for preferring resale price or cost plus over some other economically sound method. Rather, the method used should generally be the one for which the best data is available and for which the fewest number of adjustments are required.

9. Since intangibles are often incorporated into tangible property that is sold, the difficulty of valuing intangibles is as much of a problem in many transfers of tangible property as in the context of licenses or other transfers of intangible property.

Use of Specialists and Counsel

10. The use of counsel and economic specialists at the examination level would ameliorate the problems of obtaining information and dealing with the difficult intangible pricing cases. Chief Counsel attorneys familiar with transfer pricing issues should be involved in significant cases at an early stage to make sure that relevant information necessary for the examination is being obtained and that a technical basis for a potential adjustment exists. An economist needs to be involved at an early stage to perform a functional analysis and to evaluate the proper returns to be accorded to the related parties. The goal of the attorney, the economist, and other specialists should be to assist the IE in obtaining all relevant facts and to determine whether an adjustment may be sustained on appropriate legal and economic theories if the matter ever results in litigation.

Chapter 4

The Search for Comparables

A. Introduction

As explained in Chapter 2, the section 482 regulations rely heavily on finding comparable goods, services, and intangibles to determine whether an arm's length price has been used. Where such comparables exist—where arm's length transactions bearing a reasonable economic resemblance to those being examined have occurred in the free market—application of the regulations is relatively straightforward. Where no comparables can be found, or where similar items are only distantly comparable, the regulations leave the Service, the taxpayers, and the courts with little guidance.

This chapter examines several recent cases decided under section 482 to assess the use of comparables by the parties and the courts, whether in the context of either sales of tangible property, the provision of services, or licenses or other transfers of intangible property. These cases show that comparables are often difficult to locate, and may be misused or misinterpreted even if they are found. In most of the cases discussed in this chapter, no comparables were available. The courts' resolution of the issues in the absence of comparables is discussed in Chapter 5.

B. Specific Comparables

In recent years, transfer pricing cases involving highly profitable products—which usually are associated with unique intangibles—have severely tested the comparables approach of the present section 482 regulations. This problem is illustrated by the *Lilly* [77] case. In *Lilly*, the U.S. parent corporation, Lilly U.S., transferred highly profitable manufacturing intangibles, including patents and know-how (primarily relating to the drugs Darvon and Darvon-N), to its newly-formed U.S. subsidiary in Puerto Rico, Lilly P.R., in a tax-free exchange for Lilly P.R. stock under section 351. The Service took the position that the income associated with those intangibles should be allocated to Lilly U.S., notwithstanding their tax-free transfer to Lilly P.R.

In preparation for trial, the government's experts surveyed the most successful U.S. pharmaceutical products. They discovered that the patents to such products were rarely transferred, except to a related party. The government argued that unrelated parties would not have transferred the Darvon intangibles and that, accordingly, there were no comparable marketplace transactions. While the Tax Court did not fully subscribe to the government's theory of the case, it nevertheless was not able to find appropriate comparables for the patented products in question for the first 2 years at issue, 1971 and 1972.[78] The court proceeded to make its own allocations, basing its adjustments on the proposition that a distortion of income was created by the transfer of intangibles from Lilly U.S. to Lilly P.R. in exchange for Lilly P.R. stock. In the Tax Court's view, the distortion arose because it felt that Lilly would have demanded a stream of income from the transferred Darvon intangibles in order to fund a proportionate part of its ongoing general research and development efforts. The Tax Court also used a profit split approach to increase the return of Lilly U.S. on marketing expenditures and intangibles.[79] On appeal, the Seventh Circuit rejected the Tax Court's allocation to support research and development, but affirmed its profit split methodology.

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[77] *Supra* n. 57.

[78] For 1973, the Tax Court was able to use a comparable uncontrolled price approach because the Darvon patent had expired. However, numerous adjustments were made to reach a transfer price.

[79] *See* discussion of the Tax Court's profit split analysis *infra* Chapter 5.

In *Searle*,[80] the petitioner transferred the patents (or licenses) on its most successful pharmaceutical products to its U.S. subsidiary, SCO, operating in Puerto Rico. These intangibles represented products accounting for approximately 80 percent of the petitioner's profits and sales. As in *Lilly*, the government argued that a section 482 allocation from SCO to the petitioner was appropriate.

The petitioner, relying on § 1.482–2(d)(2)(ii) of the regulations, argued that, since it had originally acquired two of the transferred intangibles by licensing agreements carrying royalties of ten percent and eight percent of net sales, an unrelated party would not have paid more than a royalty in this range for the intangible property transferred to SCO. The court, however, found that the original licenses were not comparable; the products were licensed from European pharmaceutical firms prior to their approval by the FDA, and thus could not have been marketed in the United States at the time of the license. The court concluded that the intangibles to SCO were significantly more valuable than the "mere licensing agreements" upon which the taxpayer relied.[81]

Ultimately, the court found, despite the voluminous record, that "there is little hard evidence from which we can determine what consideration petitioner would have demanded had the transactions under scrutiny here taken place between unrelated parties dealing at arm's length." [82]

Problems with finding or applying comparables for valuable intangibles have not been limited to pharmaceutical companies. In *Hospital Corporation of America*,[83] a U.S. hospital management company, HCA, entered into negotiations to recruit professional and non-professional staff to manage a state-of-the-art hospital in Saudi Arabia. It formed a Cayman Islands corporation, LTD, ostensibly to negotiate and perform the management contract. HCA performed services for LTD and made available at little cost all of its know-how, experience, management systems knowledge, and other intangibles. The parties offered no evidence of comparable transactions, and the court identified none. Nevertheless, the court allocated 25% of the income to LTD as compensation for its management service.

The Tax Court was also unable to find appropriate comparables in *Ciba-Geigy Corp. v. Comm'r.*,[84] where the Service sought to reduce royalties paid by a U.S. subsidiary to its foreign parent for the rights to manufacture and sell a herbicide. Unlike the approach taken by the courts in *Lilly* for 1973, where multiple adjustments were made to a third party transaction in order to determine a comparable price, the court in *Ciba-Geigy* rejected as comparables licenses of the same product to unrelated parties because of differences in geographic markets, years of the license, and differences in required purchases of raw materials.[85] Instead the court relied upon testimony from an unrelated party about what his company would have been willing to pay in the form of a royalty for the same rights.

The comparability of third party resale price margins was at issue in *E.I. DuPont de Nemours & Co. v. United States* [*DuPont*].[86] In that case, the U.S. parent company incorporated DuPont International S.A., DISA, in Switzerland to serve as a super distributor of DuPont products in Europe. Internal DuPont memos indicated that DuPont planned to sell its goods to DISA at prices below fair market value, so that on resale most of the profits would be reported in a foreign country having much lower tax rates than the United States.[87] Although for many products DISA performed no special services for either DuPont or its customers, DuPont structured its pricing to DISA anticipating that the latter would capture 75 percent of the total profits involved, although DISA actually realized less than this percentage. The Service reallocated much of this profit back to the parent.

The government introduced expert testimony at trial to the effect that, after the allocations, DISA's ratio of gross income to total operating costs was greater than that achieved by 32 specific firms that were functionally similar to DISA. Additionally, it was shown that, after the allocations, DISA's return on capital was greater than that of 96 percent of 1133 companies surveyed.[88]

The taxpayer, on the other hand, relied solely upon the resale price method. It contended that similar companies selling similar products experienced average markups of between 19.5 and 38 percent, comparing favorably with DISA's 26 percent gross profit margin. In rejecting the taxpayer's position the court made the following comments:

> Taxpayer tells us that a group of 21 distributors, whose general functions were similar to DISA's, provides the proper base of comparison. Beyond the most general showing that this group, like DISA, distributed manufactured goods, there is nothing in the record showing the degree of similarity called for by the regulation. No data exist to establish similarity of products (with associated marketing costs), comparability of functions, or parallel geographic (and economic) market conditions. Rather, the record suggests significant differences. Defendant has introduced evidence that the six companies plaintiff identifies most closely with DISA all had average selling costs much higher than DISA. Because we agree with the trial judge and defendant's expert that, in general, what a business spends to provide services is a reasonable indication of the magnitude of those services, and because plaintiff has not rebutted that normal presumption in this case, we cannot view these six companies as having made resales similar to DISA's. They may have made gross profits comparable to DISA's but their selling costs, reflecting the greater scale of their services or efforts, were much higher in each instance. Moreover, the record shows that these companies dealt with quite different products (electronic and photographic equipment) and functioned in different markets (primarily the United States).[89]

Another case that raised questions of comparability is *United States Steel v. Comm'r.*[90] There, the Service contended that Navios, the petitioner's wholly owned shipping company, was charging the petitioner more than an arm's length rate for shipping ore from Venezuela to United States ports. The government relied on evidence that, had U.S. Steel contracted with other shippers for the same tonnage per year, it would have paid considerably lower rates. The petitioner countered that, because Navios charged unrelated steel producers the same rate as the petitioner, a perfect comparable was available from which to determine an arm's length price. The government contended that the unrelated third party transactions were not comparable because they were few in number, they were not based on a continuing long-term relationship, and the volume shipped was much smaller than the ten million tons annually shipped by Navios for U.S. Steel.

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[80] *Supra* n. 59.

[81] *Id.* at 375.

[82] *Id.* at 376.

[83] *Supra* n. 17.

[84] 85 T.C. 172 (1985).

[85] *Id.* at 225–26.

[86] 608 F.2d 445 (Ct. Cl. 1979).

[87] The facts in *DuPont* are similar to the abuse relating to the use of foreign base sales companies to defer the taxation of income in the United States that Congress sought to end through the Subpart F provisions enacted in the Revenue Act of 1962. H.R. Rep. No. 1447, 87th Cong., 2d Sess. 28 (1962).

[88] *See* discussion *infra* Chapter 5 regarding the income to costs ratio and return on capital methods used in *DuPont*.

[89] *Supra* n. 86.

[90] 617 F.2d 942 (2d Cir. 1980), *rev'g* T.C. Memo. 1977–140.

The Tax Court did not decide the case on the basis of comparables. Instead, the court focused on constructed freight charges and on the profit that the tax haven subsidiary was projected by the taxpayer to earn on the activities it undertook.

On appeal, the Second Circuit held that, if appropriate comparables were available to support the petitioner's prices, no section 482 allocation would be sustained despite evidence tending to show that the activities resulted in a shifting of tax liability among controlled taxpayers.[91] The appellate court accepted the third party transactions as comparables and reversed the Tax Court on this issue, notwithstanding the substantial economic differences from the related party transactions.

C. Industry Statistics as Comparables

The Service and taxpayers have relied on industry statistics in several cases to justify or defend against section 482 allocations. Industry statistics have generally been offered as evidence of comparable uncontrolled prices or for markup percentages under the resale price or cost plus methods. The courts, however, have been reluctant to accept such statistics in the absence of a specific showing of comparability.

In the *DuPont* case, discussed *supra*, the taxpayer relied on gross profit margins of drug and chemical wholesalers contained in the Internal Revenue Service's Source Book of Statistics of Income for 1960 to support a gross profit margin of 26 percent. The gross profit margins of these companies averaged 21 percent and ranged from 9 to 33 percent. The court noted that in applying the resale price method it was necessary to find substantially comparable uncontrolled resellers. Because there was no indication from the Source Book that the necessary degree of comparability was present, the court rejected the taxpayer's industry statistics.

The government relied upon the Source Book of Statistics of Income in *PPG Industries Inc. v. Comm'r*,[92] to allocate a substantial portion of the income of a Swiss corporation to its U.S. parent. Rejecting this approach, the court found the Source Book evidence wanting because it could not be determined whether comparable transactions were involved.

In *Ross Glove Co. v. Comm'r*,[93] the Service allocated income from a foreign glove manufacturer to its U.S. parent. The government relied upon expert testimony that the glove manufacturing industry was not a high profit industry, and that a typical glove manufacturer rarely had a year in which gross profits equalled three percent of sales. The court rejected this testimony because it did not relate to the rate of return earned by Philippine glove manufacturers, such as the taxpayer's subsidiary, whose profits generally were higher than those of U.S. manufacturers. Industry statistics were also rejected as unreliable in *Edwards v. Comm'r*[94] and in *Nissho Iwai American Corp. v. Comm'r*.[95]

D. The Regulations in the Absence of Comparables

The only detailed transfer pricing methods in the regulations rely in one way or another on comparables. The cases discussed in this chapter, in which comparables were generally unavailable, suggest that the regulations fail to resolve the most significant and potentially abusive fact patterns. This failure was noted both in the Court of Claims opinion and the trial judge's opinion in *DuPont*. Trial Judge Willi, after finding for the government, suggested that the current regulatory structure was wholly inadequate:

> At least where the sale of tangible property is involved, the Commissioner's regulations seem to accommodate nothing short of a "pricing method" to determine the question of an arm's length price. Treas. Reg. § 1.482–2(3)(e)(1)(iii). Moreover, as plaintiff has correctly noted, the regulation approach seems to rule out net profit as a relevant consideration in the determination of an arm's length price, this despite Congress' encouragement to the contrary, as expressed in H.R. Rep. No. 2508, 87th Cong., 2d Sess. 18–19 (1962) (Conference Report).
>
> As evidenced by the magnitude of the record compiled in this case, the resolution by trial of a reallocation controversy under section 482 can be a very burdensome, time-consuming and obviously expensive process—especially if the stakes are high. A more manageable and expeditious means of resolution should be found.[96]

In difficult cases for which comparable products and transactions do not exist, the parties and the courts have been forced to devise ad hoc methods of their own—so-called "fourth methods"—to determine appropriate allocations of income. The next chapter describes the methods that the courts have used to resolve these issues.

E. Conclusion

The failure of the regulations to provide guidance in the absence of comparable products and transactions has created problems in cases involving sales of tangible property, the provision of services, and licenses or other transfers of intangible property. Taxpayers and the courts have been forced to devise ad hoc "fourth methods" to resolve such cases.

Chapter 5

Fourth Method Analysis Under Section 482

A. Introduction

Although the "other method" provision of § 1.482–2(e)(l)(iii) (commonly known as the "fourth method") by its terms applies only to tangible property transfer pricing cases, the term "fourth method" has been used to describe any case resolved by using a method not specifically described in the regulations, typically when comparable uncontrolled transactions were unavailable. This chapter discusses the use of the "fourth method" approach in the decided cases, including cases involving the sale of tangible property, the licensing or other transfer of intangible property, and the provision of services.

B. Profit Splits

The most frequent alternative method used by the courts in the absence of comparables is the profit split approach. Under this approach, the court determines the total profits allocable to the transactions at issue and simply divides them between the related parties in some ratio deemed appropriate by the court. The validity of the method, of course, rests on the accurate determination of total profits and the reasonableness of the factors used to set the profit split ratio.

An illustration of the profit split method is found in *Lilly*.[97] After rejecting the resale price and cost plus pricing methods advocated by the parties because of the absence of comparables, the Tax Court attempted to find an appropriate fourth method under § 1.482–2(e)(1)(iii) of the regulations. The court cited a number of studies and surveys indicating that fourth methods were used by the Service approximately one-third of the time, and determined that a profit split approach was permissible.[98]

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[91] 617 F.2d at 951.

[92] 55 T.C. 928 (1970).

[93] 60 T.C. 569 (1973).

[94] 67 T.C. 224 (1976).

[95] T.C. Memo. 1985–578.

[96] 78–1 USTC para. 9374, at 83.910 (Ct. Cl. Trial Div. 1978).

[97] *Supra* n. 57. See discussion of *Lilly supra* Chapter 4.

[98] 84 T.C. at 1148–49. The results of these surveys and studies are referenced in Chapter 3, *supra*.

In adopting the profit split approach, the Tax Court relied heavily on *PPG Industries Inc.*[99] The court there, in considering the allocation of income between PPG and its foreign subsidiary, applied a profit split analysis (which produced a 55–45 profit split in favor of PPG) to buttress the court's primary analysis using the comparable uncontrolled price method.

The Tax Court in *Lilly* also found support in *Lufkin Foundry & Machine Co. v. Comm'r,*[100] in which it had used a profit split method. On appeal, the Fifth Circuit rejected the Tax Court's profit split approach because the court had not attempted to apply the three specific pricing methods in the regulations and because, by itself, a profit split approach was not sufficient evidence of what parties would have done at arm's length. However, the Court in Lilly distinguished the Fifth Circuit's reversal of the Tax Court's holding on the following grounds:

> The three preferred pricing methods detailed in the regulations are clearly inapplicable due to a lack of comparable or similar uncontrolled transactions. Petitioner's evidence amply demonstrates that some fourth method not only is more appropriate, but is inescapable.[101]

After providing for location savings,[102] manufacturing profit, marketing profit, and a charge for ongoing general research and development performed by the parent, the Tax Court in *Lilly* arrived at undivided profits of $25,489,000 for 1971 and $19,277,000 for 1972.[103] It considered these amounts to be the profits from intangibles, consisting of manufacturing intangibles belonging to Lilly P.R. and marketing intangibles belonging to Lilly U.S. The court rejected the taxpayer's argument that its marketing intangibles were of little value and assigned 45 percent of the intangible income to Lilly U.S. as a marketing profit and 55 percent of the intangible income to Lilly P.R. as a manufacturing profit. The court did not explain how it arrived at the 45–55 split, other than stating that it used its best judgment and that it bore heavily against the taxpayer because it failed to prove the arm's length prices for Lilly P.R.'s products.[104] On appeal, the Seventh Circuit affirmed the Tax Court's profit split.[105]

The *Searle*[106] case was tried by the Tax Court shortly after *Lilly*. The primary facts that distinguished *Searle* from *Lilly* were that Searle transferred nearly all of its highly profitable manufacturing intangibles to its Puerto Rican subsidiary and that Searle did not purchase the products produced in Puerto Rico, but instead marketed them in the United States as an agent for its subsidiary. While the court could not technically apply a fourth method under the regulations governing sales of tangible property (since there were no intercompany sales), the court nevertheless imposed a profit split similar in result to the profit split imposed in *Lilly*.

In *Searle*, the Tax Court did not specifically determine the revenue that each of the parties should earn from manufacturing and marketing or which party should bear the expenses of research and development and administration. While suggesting that additional royalties were due Searle for the intangibles provided to SCO, the court stated that "whether our allocation herein is considered an additional payment for services or for intangibles that were not transferred or as a royalty payment for intangibles themselves, the result is the same."[107]

A profit split approach is also contained in section 936(h) of the Code, added by the Tax Equity and Fiscal Responsibility Act of 1982, effective for years beginning after December 31, 1982. In general, section 936(h) authorizes a profit split election under which the combined taxable income of the possessions affiliate and the U.S. affiliate, with respect to products produced in whole or in part in the possession, will be allocated 50 percent to the possessions affiliate and 50 percent to the U.S. affiliate. If a profit split election is made, section 482 is not available for any further allocation.

The section 936(h) 50–50 profit split does not, however, provide any logical support for 50–50 profit splits in cases not falling within the narrow scope of the section. Thus, even though the Tax Court and Congress have moved in the direction of 50–50 profit splits in some limited cases, it would appear that profit splits should only be used in the absence of appropriate comparables, and then only after a careful analysis of what functions each party has performed, what property they have employed, and what risks they have undertaken. When one affiliate's role in the transactions has been extremely limited, a 50–50 profit split may not be at all appropriate.

Such a lopsided division of relevant factors occurred in *Hospital Corporation of America.*[108] The court's opinion recites in great detail the numerous services HCA provided for LTD in negotiating the management contract and in staffing and operating the hospital, as well as the numerous intangibles that HCA provided, such as its substantial experience, know-how, and management systems. Under these circumstances it would be extremely difficult to estimate accurately the arm's length value for the large volume of services and intangibles made available. It was certainly easier for the court to look at the relative value of the functions that each party performed, so that a profit split ratio could be developed. The court in *HCA* did just that, adopting a 75–25 (75 for HCA and 25 for LTD) split of the profits previously reported by LTD.[109] Unfortunately, there is no discernible rationale contained in the opinion for such a split.

Hospital Corporation of America, like *Searle*, was not a transfer pricing case and therefore was not a fourth method case under the tangibles pricing regulation. However, both of these cases illustrate that, when highly profitable, unique intangibles are at issue, traditional methods of valuation will often fail because comparables are unavailable. In these circumstances a profit split approach appears reasonable as long as it is based on a careful functional analysis to determine each party's economic contribution to the combined profit.

C. Rate of Return; Income to Expense Ratios

Although profit splits are being used more frequently, the courts have used other methods as well to justify transfer pricing adjustments. Two of these methods are illustrated by the *DuPont*[110] case.

In defending the Service's section 482 allocations, the government used two different methods. The first method was computing the ratio of gross income to total operating costs (known as the "Berry ratio" because it was first used by the Government's expert witness, Dr. Charles Berry). DISA's Berry ratio

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[99] *Supra* n. 92.

[100] T.C. Memo. 1971–101, *rev'd.* 468 F.2d 805 (5th Cir. 1972).

[101] 84 T.C. at 1150–51.

[102] "Location savings" were specifically authorized for certain Puerto Rican affiliates by Rev. Proc. 63–10, 1963–1 C.B. 490, 494. Location savings do not otherwise automatically accrue to an affiliate, but under the arm's length standard of section 482 are distributed as the marketplace would divide them.

[103] 84 T.C. at 1168, n. 102.

[104] 84 T.C. at 1167.

[105] *See* discussion *supra* Chapter 4.

[106] *Supra* n. 59. *See* discussion of *Searle supra* Chapter 4.

[107] 88 T.C. at 376.

[108] *Supra* n. 17. *See* discussion *supra* Chapter 4.

[109] 81 T.C. at 601.

[110] *Supra* n. 86. *See* discussion *supra* Chapter 4.

before the allocation was 281.5 percent of operating expenses for 1959 and 397.1 percent for 1960. After the section 482 allocation, DISA's Berry ratio was 108.6 for 1959 and 179.3 for 1960. A survey of six management firms, five advertising firms, and 21 distributors (firms which were generally functionally similar to DISA) revealed average Berry ratios ranging from 108.3 to 129.3. Thus, DISA's combined Berry ratio for 1959 and 1960 before the allocation was about three times higher than the average for the other firms. As noted by the court, in over a hundred years of those companies' experience, none of them had ever achieved the ratios claimed by DISA. Even after the allocation, its Berry ratio was somewhat higher than that of the comparable firms.[111]

The second approach, developed by Dr. Irving Plotkin, was to compare DISA's rate of return on capital to that of 1133 companies that did not necessarily have functional similarities to DISA, but instead reflected a comprehensive selection from industry as a whole. Prior to the allocation, DISA had a rate of return of 450 percent in 1959 and 147.2 percent in 1960—rates higher than those of all 1133 other companies. Even after the allocation, DISA's rate of return exceeded that of 96 percent of the 1133 companies surveyed.[112] Based on this evidence the court sustained the Service's allocations.

While the Berry ratio and the rate of return analysis found in *DuPont* are interesting, it should be kept in mind that the court may have looked favorably on this evidence partly because it indicated that even after the allocation DISA earned greater profits than almost any other corporation, whether comparable or not. These methods were not used directly to make a section 482 adjustment, but rather to support the reasonableness of the Service's allocation.

Evidence relating to rates of return was also presented in *Lilly*.[113] No general research and development costs for new drugs were being charged by the parent to the subsidiary. The Tax Court determined that a substantial adjustment should be made to the income of the Puerto Rican subsidiary to reflect a proportional payment by the subsidiary of the general research and development expense of the parent.[114] The difference between the rates of return to the two entities was not, however, due solely to the understating of the subsidiary's research and development expense (as determined by the court), but was also attributable to the presence of valuable intangibles that were not properly reflected in the transfer price. A rate of return analysis was used to identify what appeared to be excessive rates of return on assets, so that further inquiry could be made to determine if the returns were in fact excessive and, if so, why.

The rate of return analysis and other information contained in the report by Dr. Wheeler was as follows: [115]

	Percent		
	1971	1972	1973
Return on average employed assets: [116]			
Parent (consolidated return)	19.9	23.8	30.4
Puerto Rican subsidiary	138.4	142.6	100.7
Adjusted taxable income to net sales: [117]			
Parent (consolidated return)	16.9	20.4	24.7
Puerto Rican subsidiary	69.6	68.9	58.8
Operating expenses to sales:			
Parent (consolidated return)	41.5	39.8	38.9
Puerto Rican subsidiary	9.8	11.6	16.2

[116] These assets must also have been recorded on Lilly's financial books of account; thus some intangible assets are not included. In a recent article, it was noted that Eli Lilly had a five year average return on shareholders equity of 23 percent (on an after-tax basis). *Who's Where in Profitability*, Forbes, January 11, 1988, at 216. Compare this consolidated return on assets with the return in excess of 100 percent earned by the Puerto Rican subsidiary during the years 1971–1973.

[117] The adjusted taxable income for the subsidiary does not reflect the exclusion provided by section 931 of the Internal Revenue Code of 1954 and excludes interest income.

Computations based on the record in *Searle* [118] and reflected in the companies' income tax returns (also part of the record) show a similar disproportion. By way of indirect comparison, in 1968 (the year before intangibles were transferred to Puerto Rico), Searle reported taxable income of approximately $46,700,000 on sales of approximately $81,800,000. In the years before the Tax Court, Searle's sales declined to approximately $38,200,000 in 1974 and $46,700,000 in 1975, resulting in losses of $9,800,000 in 1974 and $23,100,000 in 1975. During these years the Puerto Rican subsidiary had net sales and income of:

Year	Net sales	Net income
1974	$114,784,000	$74,560,000
1975	138,044,000	72,240,000

The rates of return on assets based on the company's tax return position were as follows: [119]

	Percent	
	1974	1975
Return on average employed assets:		
Parent (consolidated return)	(31.2)	(42.3)
Puerto Rico Subsidiary	109.2	119.0
Cost of goods sold to sales:		
Parent (consolidated return)	54.0	56.2
Puerto Rico subsidiary	13.3	13.6
Operating expenses to sales:		
Parent (consolidated return)	98.7	106.5
Puerto Rico subsidiary	35.4	35.6

It is important to note that the data regarding rate of return and other evidence presented by the government in *Lilly* and *Searle* did not necessarily provide the court or the parties with a definitive, quantitative transfer price or charge for intangibles. Rather, like Dr. Plotkin's testimony in *DuPont*, it was used to support the reasonableness of a resulting allocation or determination.[120] As discussed in Chapter 11, the Service and Treasury believe that, in cases where no comparables exist, a more refined rate of return analysis can be used to establish a transfer price and not merely to verify the reasonableness of an allocation.

D. Customs Values

An additional approach to transfer pricing that has occasionally been used in litigation is that of adopting the values set by the United States Customs Service. For example, in *Ross Glove Co.*,[121] the Tax Court accepted the taxpayer's use of the markup used by Customs in valuing gloves imported from the Philippines for purposes of applying the cost plus method. However, in *Brittingham v. Commissioner*,[122] the Tax Court made it clear that it would not bind taxpayers to their own declared Customs' valuations where it

[111] *Id.* at 456.

[112] *Id.*

[113] 84 T.C. at 1157, 1161.

[114] The court relied upon testimony by the Service's accounting expert, Dr. James Wheeler, to show that, if the taxpayer had transferred the rest of its successful products to Puerto Rico under terms similar to its transfer of Darvon, its return would have been insufficient to enable it to continue funding its R&D program, which the court characterized as the "life-blood" of a successful pharmaceutical company. 84 T.C. at 1160–1161. As noted previously in Chapter 4, *supra*, the Tax Court was reversed on this issue.

[115] 84 T.C. at 1086–88, 1092–93. *See* Wheeler, *An Academic Look at Transfer Pricing in a Global Economy*, Tax Notes, July 4, 1988, at 91.

[118] *Supra* n. 59.

[119] Wheeler, *supra* n. 115, at 91.

[120] The Seventh Circuit in *Lilly*, *supra* n. 57, discounted this type of evidence because it called into question Lilly P.R.'s ownership of the intangibles at issue.

[121] *Supra* n. 93. *See* discussion *supra* Chapter 4.

[122] 66 T.C. 373 (1976), *aff'd*, 598 F.2d 1375 (5th Cir. 1979).

could be shown that those values were erroneous.[123]

E. Conclusions and Recommendations

1. Over the years the courts, and in particular the Tax Court, have used various fourth methods for determining appropriate arm's length prices for section 482 allocations. A profit split is appropriate in some cases to establish a transfer price on an arm's length basis because unrelated parties are concerned about the respective shares of potential profits when entering into a business arrangement.[124] The problem with the profit split approach taken by the courts, however, is not that the courts have focused on the wrong elements of the transaction, but that they generally have failed to adopt a consistent and predictable methodology.

2. The rate of return on assets and costs to income ratio methods used in *DuPont* provide some reasonable basis for allocating income and determining transfer prices in the absence of comparables. However, these methods have not yet been sufficiently developed by the courts to fill the gap in analysis left by the section 482 regulations when comparable uncontrolled transactions cannot be located. A profit split or other method should be developed to determine transfer prices in the absence of comparables, which is the subject of Part III of this study.

II. SECTION 482 AFTER THE 1986 TAX REFORM ACT

Part I of the study described the history of section 482, its administration by the Service, and its interpretation by the courts. The lack of specific guidance in the tangible property, intangible property, and services provisions of the section 482 regulations to resolve cases for which appropriate comparables do not exist—notably cases involving high profit intangibles—has caused significant problems for taxpayers, the Service, and courts alike.

The amendment made by the 1986 Act to section 482 is Congress' response to the problem described in Part I of determining transfer pricing for high profit intangibles. Specifically, section 482 was amended to provide that income from a transfer or license of intangible property shall be commensurate with the income attributable to the intangible. This Part II discusses the scope of the commensurate with income standard and the requirement for periodic adjustments. The compatibility of these changes with the international norm for transfer pricing—the arm's length principle—is also discussed. Finally, this part explores the role of safe harbors for avoiding adjustments under section 482.

Chapter 6

The Commensurate With Income Standard

A. Legislative History

The 1986 Act amended section 482 to require that payments to a related party with respect to a licensed or transferred intangible be "commensurate with the income" [124] attributable to the intangible. The provision applies to both manufacturing and marketing intangibles.[125] The legislative history clearly indicates Congressional concern that the arm's length standard as interpreted in case law has failed to allocate to U.S. related parties appropriate amounts of income derived from intangibles.[126] The amendment is a clarification of prior law. Accordingly, it should not be assumed that the Service will cease taking positions that it may have taken under prior law.

The primary difficulty addressed by the legislation was the selective transfer of high profit intangibles to tax havens. Because these intangibles are so often unique and are typically not licensed to unrelated parties, it is difficult, if not impossible, to find comparables from which an arm's length transfer price can be derived. When justifying the compensation paid for such intangibles, however, taxpayers often used comparisons with industry averages, looked solely at the purportedly limited facts known at the time of the transfer, or did not consider the potential profitability of the transferred intangible (as demonstrated by post-agreement results). Taxpayers relied on intangibles used in vastly different product and geographic markets, compared short-term and long-term contracts, and drew analogies to transfers where the parties performed entirely different functions in deriving income from the intangible.

Congress determined that the existing regime, which depends heavily upon the use of comparables and provides little clear guidance in the absence of comparables, was not in all cases achieving the statutory goal of reflecting the true taxable income of related parties. Congress therefore decided that a refocused approach was necessary in the absence of true comparables. The amount of income derived from a transferred intangible should be the starting point of a section 482 analysis and should be given primary weight.[127] Further, it is important to analyze the functions performed, and the economic costs and risks assumed by each party to the transaction, so that the allocation of income from the use of the intangible will be made in accordance with the relative economic contributions and risk taking of the parties.[128] The application of the functional analysis approach to the actual profit experience from the exploitation of the intangible allocates to the parties profits that are commensurate with intangible income. Looking at the income related to the intangible and splitting it according to relative economic contributions is consistent with what unrelated parties

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[123] Largely in response to the *Brittingham* case, Congress enacted section 1059A in 1986. This section generally forces an importer to use a value for income tax purposes no greater than the value declared for customs purposes.

[124] *See* J. Baranson, *Technology and the Multinationals* at 64 (1978).

[124] (e) Treatment of Certain Royalty Payments.—

(1) In General.—Section 482 (relating to allocation of income and deductions among taxpayers) is amended by adding at the end thereof the following new sentence: "In the case of any transfer (or license) of intangible property (within the meaning of section 936(h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible."

(2) Technical Amendment.—Subparagraph (A) of section 367(d)(2) (relating to transfers of intangibles treated as transfer pursuant to sale for contingent payments) is amended by adding at the end thereof the following new sentence: "The amounts taken into account under clause (ii) shall be commensurate with the income attributable to the intangible."

Section 1231(e)(1), Tax Reform Act of 1986, 100 Stat. 2085 (1986).

[125] For this purpose, intangibles are broadly defined by reference to section 936(h)(3)(B) under which intangible property includes any:

(i) Patent, invention, formula, process, design, pattern, or know-how;

(ii) Copyright, literary, musical, or artistic composition;

(iii) Trademark, trade name, or brand name;

(iv) Franchise, license, or contract;

(v) Method, program, system, procedure, campaign, survey, study, forecast, estimate, customer list, or technical data; or

(vi) Any similar item,

which has substantial value independent of the services of any individual. *See also* Treas. Reg. § 1.482-2(d)(3)(ii) and Rev. Rule 64-56, 1964-1 C.B. 113, regarding the treatment of know-how as property in a section 351 transfer.

[126] 1985 House Rep., *supra* n. 47, at 420-427; 1986 Conf. Rep., *supra* n. 2, at II-637-638. Several commentators have suggested that the phrase "commensurate with income" derives from *Nestle Co., Inc. v. Comm'r*, T.C. Memo. 1963-14, where the Tax Court sanctioned a taxpayer's post-agreement increase in royalties paid by an affiliate for a very profitable intangible license. The opinion states that "[s]o long as the amount of the royalty paid was *commensurate with the value of the benefits received and was reasonable*, we would not be inclined to, nor do we think we would be justified to, conclude that the increased royalty was something other than what it purported to be." (Emphasis supplied). There is, however, nothing in the legislative record to indicate that this is the case or to indicate Congressional approval or disapproval of the result in *Nestle*.

[127] 1985 House Rep., *supra* n. 47, at 426.

[128] 1986 Conf. Rep., *supra* n. 2, at II-637.

do. The general goal of the commensurate with income standard is, therefore, to ensure that each party earns the income or return from the intangible that an unrelated party would earn in an arm's length transfer of the intangible.

In determining the income that forms the basis for application of the commensurate with income standard, what time frame should be used as a point of reference: The time of the transfer alone, or an annual or other periodic basis? The legislative history reflects Congressional concern that, by confining an analysis of an appropriate transfer price to the time a transfer was made, taxpayers could transfer a high profit potential intangible at an early stage and attempt to justify use of an inappropriate royalty rate by claiming that they did not know that the product would become successful.[129] Accordingly, for these reasons, Congress determined that the actual profit experience should be used in determining the appropriate compensation for the intangible and that periodic adjustments should be made to the compensation to reflect substantial changes in intangible income as well as changes in the economic activities performed and economic costs and risks borne by the related parties in exploiting the intangibles.[130] As discussed further below, this is consistent with what unrelated parties would do.

The legislative history indicates that the commensurate with income standard does not prescribe a specific, formulary approach for determining an intangible transfer price. For example, it does not automatically require that the transferor of the intangible receive all income attributable to the exploitation of the intangible. It does not prescribe (nor depend for its application upon) a specific legal form for transfers of intangible property. Thus, it applies to licenses of intangible property, sales of tangible property which incorporate valuable intangibles, and to transfers of intangibles through the provision of services. Nor does it mandate any specific treatment of the transferor or transferee. In particular, the provision does not mandate a "contract manufacturer" return for the licensee in all cases.[131]

B. Scope of Application

The scope of the commensurate with income standard is not discussed in the legislative history. Two proposals have been made for limiting the scope of the standard, one based on potential double taxation and one limiting the application of the provision to the types of cases that prompted the legislative change.

1. *Double taxation and related issues.* Double taxation can occur when two countries have different rules of allocation; have the same rules but interpret or apply them differently in actual operation; have the same rules and interpret and apply them in the same way, but do not allow correlative adjustments; or permit correlative adjustments in theory but do not remove procedural barriers (*e.g.*, statutes of limitation on refund claims).[132]

Taxpayers and others have argued that the commensurate with income standard will necessarily increase the incidence of double taxation, and that therefore Congressional intent should not be fully implemented. As described more fully in the next chapter, the correct application of the commensurate with income standard is premised soundly on arm's length principles. The Service and Treasury therefore do not believe that the commensurate with income principle will increase the incidence of double taxation.

Indeed, in fairly common cases where the commensurate with income standard will be applied—outbound transfers of intangibles from U.S. parents to foreign subsidiaries—the issue of double taxation does not arise. In these situations, the foreign tax credit provisions of U.S. domestic law (including the foreign sourcing and characterization of royalties relating to intangibles used overseas) will normally prevent the double taxation of earnings.[133] Furthermore, the outbound transfer patterns that were the subject of Congressional concern involve transfers to manufacturing affiliates located in tax havens, where there is no potential for double taxation. The question of whether the appropriate amount of income is attributed to foreign operations in these cases is, therefore, whether the correct amount of income is eligible for deferral from U.S. tax and whether it is properly characterized for foreign withholding tax purposes, rather than the issue of double taxation.

2. *Legislative impetus.* The commensurate with income standard was clearly intended to overcome problems encountered in applying the section 482 regulations to transfers of high profit potential intangibles, such as those at issue in *Lilly* and *Searle*. Because of its origin as a response to the problem of high profit intangibles, it has been suggested that the commensurate with income standard should be limited to transfers of high profit intangibles to affiliates in low tax jurisdictions.[134] The statute, however, applies to all related party transfers of intangibles, both inbound and outbound,[135] without quantitative or qualitative restrictions. Furthermore, the economic theory of arm's length dealing underlying the methods set forth in this study apply to all transfers of intangibles, regardless of the type of intangible or residence of the licensee. Consequently, the commensurate with income standard should apply to transfers of all related party intangibles, not just the high profit potential intangibles. The analysis set forth in Chapter 11 provides a framework for implementing the commensurate with income standard that can be applied to all intangible transfers, rather than merely to high profit potential intangibles.

C. Application of Commensurate With Income Standard to Normal Profit and High Profit Intangibles

1. *Normal profit intangibles.* In related party transfers of normal profit intangibles, there are likely to be comparable third party licenses. Such licenses can produce evidence of arm's length dealings. The arm's length bargaining of the unrelated parties over the terms of the arrangement reflects each party's judgment about what its share of the combined income (or appropriate expense reimbursement) ought to be. Hence, each has made a judgment that the remuneration it expects to receive is commensurate with the income attributable to its exploitation of the intangible.

Application of the commensurate with income standard to normal profit intangibles will ordinarily produce results consistent with those obtained under pre-1986 law in those cases where economically appropriate comparables were used. For example, the licensing

[129] 1985 House Rep., *supra* n. 47, at 424.

[130] *Id.* at 425–426.

[131] *Id.* at 426.

[132] International Fiscal Association, *Cahiers de Droit Fiscal International* (Studies on International Fiscal Law), Vol. LVI, at 1–6 (1971).

[133] So long as the foreign affiliate ultimately pays out its residual earnings as a dividend and exhausts its remedies for obtaining an adjustment in the foreign jurisdiction, the total amount of foreign source income on the U.S. return in the relevant limitation category (and, therefore, the amount of limitation under section 904) will be the same no matter what the amount of royalty, and the taxes paid by the foreign affiliate will be deemed paid by the U.S. parent. The operation of the foreign tax credit will thus prevent any double taxation on those earnings irrespective of the amount of the royalty payment for U.S. tax purposes.

[134] Wright & Clowery, *The Super-Royalty: A Suggested Regulatory Approach*, Tax Notes, July 27, 1987, at 429–436.

[135] 1986 Conf. Rep., *supra* n. 2, at II–637.

agreement for the formula to a particular brand of perfume is likely to have many "inexact" comparables.[136] If appropriate comparables exist, they can be examined to determine an arm's length, or commensurate with income, return. Thus, in many cases the appropriate income allocation under both the existing regulations and the commensurate with income standard will be the same, provided that internal and external standards of comparability are met.[137]

2. *High profit potential intangibles.* As described in Chapter 4, the difficulty in applying section 482 to high profit potential intangibles[138] is that unrelated party licenses of comparable intangibles almost never exist. Consequently, if the appropriate related party transfer price for a high profit potential intangible is expressed in terms of a royalty, the result may not bear any resemblance to a third party license for a normal intangible. That is, owing to the intangible's enormous profitability, an allocation under the commensurate with income standard, if made solely through a royalty rate adjustment, might be so large compared to normal product royalty rates that it does not look like an arm's length royalty. Therefore, one might argue that an extraordinarily high rate could never be an arm's length royalty merely because third party royalties are never that high.

From an economic perspective, however, an unprecedented or "super-royalty" rate may be required to appropriately reflect a relatively minor economic contribution by the transferee and achieve a proper allocation of income.[139] As discussed in Chapter 11, the commensurate with income standard, in requiring a "super-royalty" rate in order to achieve a proper allocation of income in such a case, does not mandate a rate in excess of arm's length rates. Nor does it permit taxpayers to set a "super-royalty" rate in excess of arm's length rates. For example, enactment of the commensurate with income standard would not justify royalty increases in excess of arm's length rates by U.S. affiliates of foreign parent corporations (or vice versa).

Rather than creating a new class of royalty arrangements, the enactment of the commensurate with income standard reflects the recognition that, for certain classes of intangibles (notably high profit potential intangibles for which comparables do not exist), the use of inappropriate comparables had failed to produce results consistent with the arm's length standard. Enactment of the commensurate with income standard was thus a directive to promulgate rules that would give primary weight to the income attributable to a transferred intangible in determining the proper division of that income among related parties. In the rare instance in which there is a true comparable for a high profit intangible, the royalty rate must be set on the basis of the comparable because that remains the best measure of how third parties would allocate intangible income.

D. Special Arrangements

1. *Lump sum sales or royalties.* Some commentators have suggested that the commensurate with income standard should not prohibit the use of non-contingent, lump sum royalty or sale payments. While the Service and Treasury agree that parties are free to structure their transactions as either a sale or license, the economic consequences of a lump sum payment arrangement generally must resemble those under a periodic payment approach in order to satisfy the commensurate with income standard, unless the taxpayer can demonstrate, by clear and convincing evidence, that such treatment is inappropriate on the basis of arm's length arrangements, *i.e.*, an exact or inexact comparable transaction.[140] By its terms, the amendment to section 482 applies to *any* transfer of an intangible, which includes an outright transfer by sale or license for a non-contingent, lump sum amount.[141] Furthermore, exempting such arrangements from the commensurate with income standard would elevate form over substance and encourage non-arm's length lump sum arrangements designed to circumvent the new rules. Thus, periodic adjustments may be required under the commensurate with income standard even in the case of lump sum sale or royalty arrangements.[142]

2. *Interaction with section 367(d).* Section 367(d), enacted as part of the 1984 Tax Reform Act, provides that when intangible property is transferred by a U.S. person to a foreign corporation in a transaction described in sections 351 or 361, the transferor shall be treated as receiving annual payments, over the useful life of the property, contingent on productivity or use of the property, regardless of whether such payments are actually made. These payments are treated as U.S. source income. A subsequent disposition to an unrelated party of either the intangible property or the stock in the transferee triggers immediate gain recognition. The 1986 Act made the commensurate with income standard applicable in computing payments attributable to the transferor under section 367(d). The periodic adjustment of lump sum royalty or sale payments would merely achieve parity with section 367(d) transfers.[143] Section 367(d) may also suggest that certain exceptions from the periodic payment approach may be appropriate—*e.g.*, transfers to corporations in which an unrelated corporation has a substantial enough interest that an objective valuation of the transferred intangible can be considered to be arm's length.[144]

Sales and licenses of intangibles are generally not subject to section 367(d), since they are not transactions described in sections 351 or 361. The temporary regulations state that, when an actual license or sale has occurred, an adjustment to the consideration received by the transferor shall be made solely under section 482, without reference to section 367(d).[145] However, if the purported sale or license to the related person is for no consideration[146] or if the terms of the

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[136] *See* discussion of the concepts of inexact and exact comparables *infra* Chapter 11.

[137] *See* discussion of the concepts of internal and external comparability *infra* Chapter 11.

[138] The term high profit potential intangibles refers to those products which generate profits far beyond the normal returns found in the industry. No specific definition or formula for determining whether an item is a high profit potential product is suggested herein. Nonetheless, hypothetical products such as an AIDS vaccine, a cure for the common cold, or a cheap substitute for gasoline would all fit into this concept because of the enormous consumer demand for such a product, the market protection provided by a patent, and the corresponding potential for enormous profitability. Similarly, a patented product that just happens to work better than others, or produces the same result with fewer side effects, may also qualify.

[139] The German tax authorities have faced a similar situation, and the imputation of very high royalty rates has led to the charge that the imputed royalties are not arm's length. *See* Jacob, *The New "Super-Royalty" Provisions of Internal Revenue Code 1986: A German Perspective*, 27 European Taxation 320 (1987).

[140] *See infra* Chapter 11.

[141] 1985 House Rep., *supra* n. 47, at 425.

[142] *See* discussion of the mechanism for making adjustments to lump sum payments *infra* Chapter 8.

[143] Staff of Joint Comm. on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, 98th Cong., 2d Sess. 432–433 (1984) (hereinafter *General Explanation of the DRA of 1984*).

[144] The Service and Treasury invite comments as to whether this possible exception should be under a different standard than the concept of control under section 482.

[145] Treas. Reg. § 1.367(d)–1T(g)(4)(i).

[146] *Id.*

purported sale or license differ so greatly from the substance of an arm's length transfer that the transfer should be considered a sham,[147] the transfer will be treated as falling within section 367(d).

In essence, the commensurate with income standard treats related party transfers of intangibles as if an intangible had been transferred for a license payment that reflects the intangible's value throughout its useful life, a result similar to section 367(d). Because the section 367(d) source of income rule can apply to certain transactions cast in the form of a sale or license, the temporary regulations could be amended to specify which sales or licenses are subject to both the commensurate with income standard and the U.S. source income characterization of section 367(d). Moreover, a license payment that is less than some specific percentage of the appropriate arm's length amount could be considered so devoid of economic substance that the arm's length charge should be subject to section 367(d). Thus, those related party transfers which deviate substantially from the proper commensurate with income payment would be subject to 367(d), even if cast in the form of a sale or license.

3. *Cost sharing agreements.* The legislative history envisions the use of bona fide research and development cost sharing arrangements as an appropriate method of attributing the ownership of intangibles *ab initio* to the user of the intangible, thus avoiding section 482 transfer pricing issues related to the licensing or other transfer of intangibles.[148] Use of cost sharing arrangements had previously been encouraged in connection with the enactment in 1984 of section 367(d).[149] Cost sharing arrangements are discussed in detail in Chapters 12 and 13, *infra.*

E. Conclusions

1. Congress enacted the commensurate with income standard because application of existing rules had not focused appropriate attention upon the income generated by the transfer of an intangible in situations in which comparables do not exist.

2. Application of the commensurate with income standard requires the determination of the income from a transferred intangible, and a functional analysis of the economic activities performed and the economic costs and risks borne by the related parties in exploiting the intangible, so that the intangible income can be allocated on the basis of the relative economic contributions of the related parties. The commensurate with income standard does not mandate a "contract manufacturer" return for the licensee in all or even most cases.

3. The commensurate with income standard requires that intangible income be redetermined and reallocated periodically to reflect substantial changes in intangible income, or changes in the economic activities performed and economic costs and risks borne by the related parties.

4. The application of the functional analysis approach to the actual profit experience from the exploitation of intangibles is consistent with what unrelated parties would do and is, therefore, consistent with the arm's length principle.

5. Because the commensurate with income standard is consistent with arm's length principles, it should not increase the incidence of double taxation.

6. The commensurate with income standard applies to all types of intangible property transfers between related parties, not just high profit potential intangibles, including both inbound and outbound transfers of intangibles. In the cases of normal profit intangibles in which comparables normally exist, the new standard, like prior law, will ordinarily base the analysis on comparable transactions, with refinements in the definition of appropriate comparables. In any event, intangible income must be allocated on the basis of comparable transactions if comparables exist.

7. Lump sum sale and royalty payments for intangibles generally will be subject to the commensurate with income standard.

Chapter 7

Compatibility With International Transfer Pricing Standards

A. Introduction

Shortly after passage of the 1986 Act, various U.S. taxpayers and representatives of foreign governments expressed concern that the enactment of the commensurate with income standard was inconsistent with the "arm's length" standard as embodied in tax treaties and adopted by many countries for transfer pricing matters. As a result, they argued, the application of the commensurate with income standard would lead to double taxation for which no remedy would exist under treaties, because of application of transfer pricing standards by the United States that would be inconsistent with those applied by various other foreign governments.[150]

To allay fears that Congress intended the commensurate with income standard to be implemented in a manner inconsistent with international transfer pricing norms and U.S. treaty obligations, Treasury officials publicly stated that Congress intended no departure from the arm's length standard, and that the Treasury Department would so interpret the new law.[151] Treasury and the Service continue to adhere to that view, and believe that what is proposed in this study is consistent with that view.

B. The Arm's Length Standard as an International Norm

The problem of double taxation arising from different transfer pricing methods has been addressed through intergovernmental negotiation and agreement, principally in bilateral tax treaties that specifically provide for certain adjustments by the treaty partners to the tax liability of any entity when its dealings with related entities differ from those that would have occurred between unrelated parties. For example, an OECD model income tax convention permits adjustments to the profits of an enterprise where, in dealing with related enterprises, "conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises * * *." [152] If the adjustment is consistent with that standard, the OECD Model Convention calls for the other contracting state to make an adjustment to the profits of the enterprise in its jurisdiction to take into account the first state's adjustments.[153]

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[147] Treas. Reg. § 1.367(d)-1T(g)(4)(ii).

[148] 1986 Conf. Rep., *supra* n. 2, at II-638.

[149] *General Explanation of the DRA of 1984, supra* n. 143, at 433.

[150] *See* discussion *supra* Chapter 6 regarding relief from double taxation pursuant to the foreign tax credit provisions and sourcing rules of United States internal law.

[151] Letter from J. Roger Mentz, Assistant Secretary (Tax Policy) of the Department of Treasury to Representative Philip M. Crane (May 26, 1987); Remarks of Stephen E. Shay, International Tax Counsel of the Department of Treasury before the International Fiscal Association (February 12, 1987). Appendix C to this study summarizes the legal and administrative approaches similar to those described throughout this study taken by some of our major treaty partners in dealing with transfer pricing issues.

[152] Organization of Economic Cooperation and Development, Committee on Fiscal Affairs, *Model Double Taxation Convention on Income and on Capital*, Art. 9(1) ["Associated Enterprises"] (1977) [hereinafter OECD Model Convention].

[153] *Id.* at Art. 9(2).

If differences of opinion arise between the two states as to the proper application of this standard, the OECD Model Convention calls for the competent authorities of the respective jurisdictions to consult with one another.[154] The other major model used by countries in negotiating their tax treaties, the United Nations Model Double Taxation Convention Between Developed and Developing Countries, contains an Article 9 entitled "Associated Enterprises" that is not materially different.[155]

In 1981, the Treasury Department released a model income tax treaty that it uses as a starting point for negotiating income tax treaties with other countries.[156] Although this model has been revised in a number of particulars to account for the many changes in U.S. tax law since the time of its release, the provisions governing associated enterprises have not changed. The basic provision is virtually identical to the OECD Model Convention.[157]

The arm's length standard is embodied in all U.S. tax treaties; it is in each major model treaty, including the U.S. Model Convention; it is incorporated into most tax treaties to which the United States is not a party; it has been explicitly adopted by international organizations that have addressed themselves to transfer pricing issues; [158] and virtually every major industrial nation takes the arm's length standard as its frame of reference in transfer pricing cases.[159] This overwhelming evidence indicates that there in fact is an international norm for making transfer pricing adjustments and that the norm is the arm's length standard.[160]

It is equally clear as a policy matter that, in the interest of avoiding extreme positions by other jurisdictions and minimizing the incidence of disputes over primary taxing jurisdiction in international transactions, the United States should continue to adhere to the arm's length standard.

C. Reference to Profitability Under the Arm's Length Standard

Because the arm's length standard is the international norm, a serious potential for disputes over primary taxing jurisdiction would exist if the United States were to implement the commensurate with income standard in a manner that violates arm's length principles. Does a system which, only in the absence of appropriate comparable transactions, places primary emphasis upon the income (or profits) related parties earn from exploiting an intangible violate the arm's length standard, as understood in the international context?

Probably the most commonly referenced expression of the arm's length standard as understood by the nations that have adopted it is a report issued in 1979 by the OECD.[161] This report adopts the general principle of arm's length pricing for all transactions between related parties. Concerning transfers of intangible property, the report states:

> The general principle to be taken as the basis for the evaluation for tax purposes of transfer prices between associated enterprises under contracts for licensing patents or know-how is that the prices should be those which would be paid between independent enterprises acting at arm's length.[162]

It is useful to refer to those methods that the report considers inconsistent with its arm's length concept to aid in defining such concept. These the report refers to as "global" methods for transfer pricing. They would include, for example, "allocating profits in some cases in proportion to the respective costs of the associated enterprises, sometimes in proportion to their respective turnovers or to their respective labour forces, or by some formula taking account of several such criteria." [163] The report criticizes these methods as necessarily arbitrary.[164]

The report also notes that the effect of its arm's length approach, as distinguished from those it criticizes, is:

> [T]o recognise the actual transactions as the starting point for the tax assessment and not, in other than exceptional cases, to disregard them or substitute other transactions for them. The aim in short is, for tax purposes, to adjust the price for the actual transaction to an arm's length price.[165]

Nowhere, however, does the report suggest that the profits of the related enterprises are irrelevant to this determination. Indeed, there are several instances where the report specifically authorizes an inquiry into profits or profitability. For example, the report notes:

> [Its criticism of global methods] is not to say, however, that in seeking to arrive at the arm's length price in a range of transactions, some regard to the total profits of the relevant [multinational enterprise] may not be helpful, as a check on the assessment of the arm's length price or in specific bilateral situations where other methods give rise to serious difficulties and the two countries concerned are able to adopt a common approach and the necessary information can be made available.[166]

In arriving at an arm's length price, the report specifically authorizes an analysis of economic functions performed by each related party in determining "when a profit is likely to arise and roughly what sort of profit it is likely to be." [167]

Other references to profits occur in the report. For example, in the section of the report relating to the sale of tangible goods entitled "Methods of Ascertaining an Arm's Length Price," methods are outlined that permit reference to comparable profits or returns on capital invested as a means of determining the appropriate transfer price. These methods are viewed by the report as a supplement to the traditional approach of looking to comparable transactions, but they are clearly suggested as

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[154] *Id.*

[155] *United Nations Model Double Taxation Convention Between Developed and Developing Countries*, U.N. Doc. ST/ESA/102, at 27 (1980) [hereinafter U.N. Model Convention].

[156] U.S. Treasury Dept., Proposed Model Convention Between the United States of America and * * * for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital (1981).

[157] The United States model adds a third paragraph to the OECD Model Convention Article 9 that reserves to each state the right to make adjustments under its internal law. The purpose of this paragraph is only to make explicit that the use of the word "profits" in the OECD model does not constrain either jurisdiction to make adjustments, consistent with the arm's length standard of paragraph 1, with respect to deductions, credits, or other allowances between related persons. This provision reads as follows:

> 3. The provisions of paragraph 1 shall not limit any provisions of the law of either Contracting State which permit the distribution, apportionment or allocation of income, deductions, credits, or allowances between persons, whether or not residents of a Contracting State, owned or controlled directly or indirectly by the same interests when necessary in order to prevent evasions of taxes or clearly to reflect the income of any of such persons. *Id.*

[158] U.N. Model Convention, *supra* n. 155, at 106; *see generally* Organization for Economic Cooperation and Development, Report of the Committee on Fiscal Affairs, *Transfer Pricing and Multinational Enterprises* (1979) [hereinafter OECD, *Transfer Pricing and Multinational Enterprises*].

[159] *See, e.g., Cross-Border Transactions Between Related Companies: A Summary of Tax Rules* (W. R. Lawlor, ed. 1985) (discussion of transfer pricing practices of twenty-five different countries, most of which take the arm's length standard as their basic rule of transfer pricing).

[160] A recent article has suggested that the arm's length standard for transfer pricing should not limit the transfer pricing practices of governments. Langbein, *The Unitary Method and the Myth of Arm's Length*, Tax Notes, Feb. 17, 1986, at 625.

[161] OECD, *Transfer Pricing and Multinational Enterprises*, *supra* n. 158.

[162] *Id.* at 51.

[163] *Id.* at 14.

[164] *Id.* at 14–15.

[165] *Id.* at 19.

[166] *Id.* at 15.

[167] *Id.* at 17.

appropriate tools for arriving at a proper transfer price.[168]

With regard to valuing transfers of intangible property, the report notes that, "[o]ne of the common approaches employed in practice is to make a pragmatic appraisal of the trend of an enterprise's profits over a long period in comparison with those of other unrelated parties engaged in the same or similar activities and operating in the same area." [169] The report questions whether this approach is practical, because it would be difficult to isolate respective profits due to different accounting methods, and difficult to know-how to apportion the overall profit between the two parties. No suggestion is made, however, that such a method could never be used in the absence of comparable transactions because it conflicts in principle with the arm's length standard.[170]

D. Periodic Adjustments Under the Arm's Length Standard

The next chapter describes an important element of the commensurate with income standard—periodic adjustments must be made in appropriate cases to reflect actual profit experience under the license. As noted in that chapter, there are sound arm's length reasons to require such adjustments—principally the rarity of long-term, fixed licenses negotiated at arm's length, particularly with respect to high profit potential intangibles, and the fact that actual profit experience under a license indicates in most cases anticipated profits that would have been considered by unrelated parties. Moreover, that chapter permits taxpayers to avoid adjustments over time if they can demonstrate on the basis of arm's length evidence that no such adjustments would have been made by unrelated parties. The Service and Treasury therefore believe that such periodic adjustments as will be made under the new standard will be consistent with the arm's length standard as embodied in U.S. double taxation treaties.

E. Resolution of Bilateral Issues

The Service and Treasury recognize that implementation of the commensurate with income standard in all its particulars, including periodic adjustments, treatment of lump-sum payments [171] and access to information to perform the necessary analysis, may lead to differences with the competent authorities of our treaty partners and perhaps more general issues of treaty policy and interpretation. Recognizing this, the United States competent authority and the Treasury Department should be receptive to the concerns of foreign governments, and endeavor to seek bilateral solutions insofar as those concerns can be accommodated in a manner consistent with Congressional intent in enacting the commensurate with income standard.

F. Conclusions

1. The arm's length standard requires that each entity calculate its profits separately and that related party transactions be priced as if unrelated parties had entered into them. Reference to the profits (including the trend of those profits over time) of related parties to determine a royalty in a licensing transaction is intended to reflect what unrelated parties would do and, therefore, is consistent with the arm's length standard.

2. The arm's length standard as accepted by the international community does not preclude reference to profits of related parties to allocate income, but in fact encompasses such an approach as a supplement to the traditional approach of looking to comparable transactions. It is, therefore, reasonable to conclude that such an approach is consistent with international norms as applied to situations in which comparables do not exist.

3. The approach taken by Congress in enacting the commensurate with income standard and the approaches suggested in Chapters 8 and 11, *infra*, for implementing that standard, including the provision for periodic adjustments, are consistent with internationally recognized arm's length principles. Applied in a manner consistent with arm's length principles, the commensurate with income standard is not likely to increase international disputes over the right of primary taxing jurisdiction.

4. The United States competent authority and the Treasury Department should endeavor whenever possible to seek bilateral solutions to problems that may arise with our treaty partners in the interpretation and administration of the commensurate with income standard.

Chapter 8

Periodic Adjustments

A. Introduction

As discussed in Chapter 6, an intangible transfer price that is commensurate with the income attributable to the intangible must reflect the "actual profit experience realized as a consequence of the transfer." [172] The "commensurate with income" language requires that changes be made to the transfer payments to reflect substantial changes in the income stream attributable to the intangible as well as substantial changes in the economic activities performed, assets employed, and economic costs and risks borne by related entities.

The Congressional directive to the Service to make adjustments to intangible returns that reflect the actual profit experience is in part a legislative rejection of *R.T French v. Comm'r.*[173] That case endorsed the view that a long-term, fixed rate royalty agreement could not be adjusted under section 482 based on subsequent events that were not known to the parties at the original contract date. Thus, underlying the directive is perhaps a view that contractual arrangements between unrelated parties—particularly those involving high profit intangibles—are not entered into on a long term basis without some mechanism for adjusting the arrangement if the profitability of the intangible is significantly higher or lower than anticipated. A very preliminary review of unrelated party licensing agreements obatined from the files of the Securities and Exchange Commission, discussed in Appendix D, and other input received to date, seems to support this view. Indeed, as a matter of long term business strategy, unrelated parties may renegotiate contractual arrangements even absent explicit renegotiation provisions to reflect revised expectations regarding an intangible's profitability.[174]

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[168] *Id.* at 42–43.

[169] *Id.* at 54.

[170] The objection raised in the report regarding the type of analysis advocated in this report is not that it violates the arm's length standard, but that it may call for more information than can be practically obtained and analyzed by the tax authorities. See *id.* at 15. As noted in Appendix D, the degree of detail and analysis that will be called for under the new methodology will depend in each case on the magnitude of the potential for income shifting. Further, in cases of transfers of routine intangibles, available comparable licenses will generally obviate the need for almost all of this information.

[171] See the discussion *infra* Chapter 8.

[172] 1985 House Rep., *supra* n. 47, at 425.

[173] 60 T.C. 836 (1973).

[174] Since related parties always have the ability to renegotiate contractual arrangements, explicit contractual provisions permitting renegotiation of related party arrangements would have little meaning and, therefore, should not be a prerequisite for making adjustments. Furthermore, related party contracts that contain these provisions will not necessarily lead to results that conform to the experience of unrelated parties operating under similar circumstances. If the contract proves more profitable than expected, the parties can refuse to

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Aside from the empirical evidence of what unrelated parties seem to do, actual profit experience is generally the best indication available absent comparables, of anticipated profit experience that arm's length parties would have taken into account at the outset of the arrangement. It is, therefore, perfectly consistent with the arm's length standard to treat related party license agreements generally as renegotiable arrangements and to require periodic adjustments to the transfer price to reflect substantial changes in the income stream attributable to the intangible.[175]

Intangible transfer prices will in any event be determined on the basis of comparables if they exist. If a particular taxpayer demonstrates that it has comparable long-term, non-renegotiable contractual arrangements with third parties, the arm's length standard will preclude periodic adjustments of the related person intangible transfer price. In that event, a comparable would exist by definition, which would determine the consideration for the related person transfer, both initially and over time. Comparables are always the best measure of arm's length prices. In the case of a high profit intangible, however, a third party transaction generally must be an exact comparable in order for the transaction to constitute a valid comparable.[176]

It may also be possible in certain other cases to exclude subsequent profit experience from consideration under the arm's length standard. To do so, the taxpayer would need to demonstrate each of the following to avoid an adjustment based on subsequent profit experience:

1. That events had occurred subsequent to the license agreement that caused the unanticipated profitability;

2. That the license contained no provision pursuant to which unrelated parties would have adjusted the license; and

3. That unrelated parties would not have included a provision to permit adjustment for the change that caused the unanticipated profitability.

For example, assume that there are twelve heart drugs that perform similar therapeutic functions, none of which has a dominant market share. Several of these drugs are licensed to unrelated parties under long term arrangements which do not provide a mechanism for adjusting the royalty payments because of subsequent changes. The taxpayer's drug, which is licensed to a related party, uses an active ingredient which is different from the other products with which it competes. The competitor's drugs, however, lose all of their market share during the course of the license agreement because their products are found to cause serious side effects, and the licensed product's profits increase dramatically. In this case, if the taxpayer could prove the three factors above, the taxpayer could avoid an adjustment based on the increase in profitability.

As noted earlier, Congress was particularly concerned about taxpayers attempting to justify low-royalty transfers at an early stage based on the purported inability to predict subsequent product success.[177] Because of this concern, it would be appropriate to impose a high standard of proof, such as a clear and convincing evidence standard, on taxpayers in order to demonstrate that subsequent profitability could not have been anticipated. In no event should this test be available to taxpayers if inexact comparable licenses with no provision for periodic adjustments cannot be found in the marketplace.

A substantial change in intangible income will not necessarily result in an adjustment. As dicussed in Chapter 6 and described in Chapter 11, determining the intangible income is merely the first step in the analysis of allocating intangible income. The second step involves allocating income on the basis of the activities performed and economic costs and risks borne by the parties. If intangible income increases solely due to the efforts of the transferee, then the increase in intangible income will be allocated exclusively to the transferee, and no adjustment will be made to the income of the transferor.

B. Periodic Review

Annual adjustments may not be required to reach the appropriate amount of income under the commensurate with income standard. Adjustments are not required for minor variations in intangible income, only for substantial changes in intangible income.[178] Several issues are raised by this requirement. How often should the taxpayer review its transfer pricing structure to determine whether income is being properly reported and to avoid potential penalties? How often may the Service make adjustments in the course of examination? Should the regulations define substantially? Should the adjustments be applied retroactively or prospectively? Should periodic adjustments be made in the case of a sale of intangibles and other situations involving lump sum payments? Should set-offs be permitted?

The frequency with which a taxpayer should review its related party intangible transfer agreements and how often the Service should be able to make adjustments are not questions that can be governed by inflexibles rules. When the transferee experiences a substantial change in its profits from the intangible resulting from some particular event (whether anticipated or not), a review by the taxpayer is clearly warranted; further, an adjustment by the Service is warranted unless the taxpayer can demonstrate, by clear and convincing evidence, that the conditions discussed above for avoiding an adjustment based on subsequent profit experience are met Even absent a clear-cut event, it is possible that gradual changes over time may create a substantial deviation from the parties' expectations at the time they entered into the contract.

In general, taxpayers should review transfer pricing arrangements relating to intangibles (especially high profit intangibles) as often as necessary to assure that their transfer prices are consistent with substantial changes in intangible income that may have occurred since the inception of the current transfer pricing arrangements. For industries that undergo rapid technological change or for products that have a relatively short life, this standard may dictate annual review. In short, the taxpayer should review its pricing structure relating to intangibles as often and thoroughly as necessary to assure that income is reported on its U.S. tax return in a manner that is consistent with the commensurate with income standard. Taxpayers that fail to do so risk the imposition of the substantial understatement or other appropriate penalty.[179]

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renegotiate or adjust it, despite explicit provisions in the contract which permit or require them to do so. Thus, requiring that related party contracts mimic the terms of unrelated party contracts will not alone ensure that the results experienced by the related parties under those contracts will approximate arm's length dealing. 1985 House Rep., *supra* n. 47 at 425–426. Without the ability to make changes for adjustments over time, related party agreements will be observed when they suit the tax needs of the parties and amended or changed when they work to their detriment. *Compare R.T. French Co. v. Comm'r*, 60 T.C. 836 (1973), *with Nestle Co., Inc. v. Comm'r*, T.C. Memo. 1963–14.

[175] Periodic adjustments will also obviate the need for the often fruitless inquiry into the state of mind of the taxpayer and its affiliate at the outset.

[176] *See* the discussion *infra* Chapter 11, regarding the role of comparables in determining whether an adjustment over time is necessary.

[177] 1985 House Rep., *supra* n. 47, at 424.

[178] *Id.* at 426.

[179] As discussed *supra* in Chapter 3, the regulations or statute should be amended to ensure

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On the other hand, the Service should be permitted to make a transfer pricing adjustment without necessarily having to demonstrate that its proposed adjustment is justified by identifiable changes in intangible income compared with a prior taxable year. In other words, if the adjustment can be supported on the basis of exact or inexact comparables, or on the basis of the rate of return analysis or such other methodology as is adopted by the Service for use in cases in which exact or inexact comparables to do not exist,[180] then the Service should not have to demonstrate that the adjustment specifically relates to identifiable changes in intangible income occurring since the last taxable year examined. An approach whereby the Service would be estopped from making an adjustment, absent clearly identifiable changes in intangible income, because of the Service's prior acceptance of some commensurate with income amount in a prior year would present problems of proof that are not necessarily relevant to the appropriateness of the adjustment. At most, consideration should be given only to requiring that the proposed adjustment to income be substantial in relation to the income reported by the taxpayer from the transaction—and then only for audits subsequent to the first in-depth audit of transfer prices conducted for taxable years after 1986.

It may be advisable to publish in the Internal Revenue Manual a list of factors that, if one or more changes substantially, would indicate that there may be a substantial change in intangible income that may warrant an examination of the taxpayer's intangible transfer pricing. These factors might include: (a) The size and number of markets penetrated; (b) the product's market share; (c) the product's sales volume; (d) the product's sales revenue; (e) the number of uses for the technology; (f) improvements to the technology; (g) marketing expense; (h) production costs; (i) the services provided by each party in connection with the use of the intangible; and (j) the product's profit margin or the process' cost savings.[181]

Any periodic adjustments that are made under the commensurate with income standard generally should be made prospectively—*i.e.*, for the taxable year under audit and subsequent taxable years (provided that there is no further substantial change in the intangible income and other relevant facts). Unless unrelated parties would have set a different royalty rate on the date of the transfer based upon expectations of future high profitability or other facts known on the date of transfer, the arm's length standard would require only that the transfer price be commensurate with actual income—*i.e.*, that the transfer price be changed only as the intangible income changes.

C. Lump Sum Payments

As discussed in Chapter 6, the commensurate with income standard applies to transfers of intangibles by sale or license for noncontingent, lump sum amounts. Thus, periodic adjustments may be required under the commensurate with income standard in the case of lump sum sale or royalty arrangements as well as periodic royalty arrangements. In the case of a lump sum sale, how should the Service make a section 482 allocation if it is not apparent until many years after the sale that the lump sum payment was insufficient under the commensurate with income standard?

One possibility would be to recharacterize the sale as a license, thereby giving the Service the ability to require additional royalty payments sufficient to satisfy the commensurate with income standard. It is clear, however, that parties dealing at arm's length occasionally sell intangibles. Thus, failure to recognize sale arrangements for related party transactions could be viewed as a deviation from the arm's length standard.

Alternatively, the Service could recognize the transfer as a sale but make a section 482 allocation to increase the initial lump sum payment. Unless taxpayers using lump sum sale arrangements were required by regulation or statute to keep the statute of limitations open for the payment year, the statute of limitations could bar adjustments to a lump sum payment in closed taxable years, contrary to Congressional intent. Moreover, other problems would exist in adjusting the lump sum even if the statute of limitations were open. For example, any mid-stream adjustment to the initial lump sum made before the statute of limitations expires on the year of sale would necessarily be based on a projection of future profits over the remaining life of the intangible that could be too high or too low. Furthermore, any mechanism, whether elective or mandatory, that would keep the statute of limitations for the year of transfer open for extended periods would disrupt the examination process by unduly delaying the closing of audits.

A lump sum sale arrangement should instead be treated as an open transaction to assure that the sale over time satisfies commensurate with income standard. This approach is the only approach which recognizes the transaction as a sale, allows for adjustments of the sale price under the commensurate with income standard, and minimizes the statute of limitation and other problems inherent in making adjustments to income in the year of the sale. Under this approach, a lump sum sale payment made in the year of the transfer would result in gain taxable in the year of transfer but would then be treated as a prepayment of the commensurate with income amounts. No section 482 allocation would be required until the aggregate commensurate with income amount exceed the prepayments.

Under this method, the lump sum is treated as invested on the date of the lump sum payment in a hypothetical certificate of deposit ("C.D.") maturing on the last day of taxpayer's current tax year bearing interest at the appropriate federal funds rate based on the anticipated life of the intangible (for U.S. developed intangibles) or the appropriate rate in the development country. At the end of year one the balance of the C.D. investment would be computed. From this amount, the amount of the commensurate with income amount would be subtracted. The remaining balance would then be treated as invested in a C.D. maturing at the end of year two. At the end of each tax year a computation similar to that done at the end of year one would be made. When the C.D. balance is exhaused, the taxpayer would be required thereafter to include the entire commensurate with income amount in income each year.

Consider, for example, an intangible that is transferred for $1,000 and that would demand a commensurate with income amount in each of ten years as shown:

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adequate disclosure of transfer pricing methodology and penalize unjustified substantial understatements of tax resulting from nonconformity to the arm's length standard.

[180] *See infra* Chapter 11.

[181] *See also* the factors set forth in Treas. Reg. § 1.482-2(d)(2)(iii).

	Lump sum $1000 payment increased by time value return (assume 10%) at end of year (Col. 3 plus returns on Col. 3 amount)	Commensurate with Income (assumed)	Remaining lump sum payment at beginning of year (prior year Col. 1 less prior year Col. 2)
	Col. 1	Col. 2	Col. 3
Year:			
1	$1100	$100	$1000
2	1100	100	1000
3	1100	200	900
4	990	200	790
5	850	200	650
6	715	500	215
7	237	500	0
8		500	0
9		200	0
10		200	0

The $1,000 lump sum payment would be converted as shown in column 1 into a stream of income which is offset by the commensurate with income amount in column 2 until the stream of income is exhausted in year 7. Thereafter, the commensurate with income amount would be fully included in the transferor's income.[182]

Because section 482 may be applied only by the Service, no refunds could be allowed if an excessive lump sum was paid. However, to prevent abuse of outbound lump sum payments in inbound licensing arrangements, the Service would be allowed to adjust excessive lump sum payments that clearly exceed the commensurate with income standard.

D. Set-Offs in Royalty Arrangements

It is possible that the initial royalty rate set by the parties could be too large in some years and too small in other years when analyzed under the commensurate with income standard. Under existing regulations, section 482 adjustments traditionally have been made on a year-by-year basis. Only intra-year set-offs of proposed adjustments against excessive income derived on related party transactions are authorized under § 1.482–1(d)(3) of the regulations.[183] Thus, the Service could make adjustments in some years without making an allowance for excessive royalties paid in other years. Assume, for example, that a license generates a fixed royalty amount on an intangible that produces fluctuating income due to business cycles or changes in demand. Over time, the royalty may be an appropriate one on average, but in some years it may be too low and in others too high.

Because of the problems inherent in an open transaction approach, the current rule prohibiting multi-year set-offs should be retained. The potentially harsh effect of this rule will be mitigated by the fact that periodic adjustments generally should be made only in cases of substantial changes in circumstances and by the ability of taxpayers to adjust their own arrangements prospectively, reducing or increasing the royalty, to account for changed circumstances. It will also create an incentive for taxpayers to examine their arrangements periodically to see whether an adjustment favorable to them would be appropriate.

E. Conclusions

1. Periodic adjustments are necessary in order to reflect substantial changes in the income stream produced by a transferred intangible, taking into account the activities performed, assets employed, and economic costs and risks borne by the related parties.

2. Requiring periodic adjustments is consistent with the arm's length principle, since unrelated parties generally provide some mechanism to adjust for change in the profitability of transferred intangibles and since actual profit experience generally is the best indication available of the anticipated profit experience that unrelated parties would have taken into account at the outset of the arrangement.

3. Taxpayers should review transfer pricing arrangements relating to transferred intangibles as often and as thoroughly as necessary to assure that income is reported over time in a manner consistent with the commensurate with income standard.

4. Periodic adjustments made under the commensurate with income standard generally should be prospective unless a different royalty rate would have been set on the date of transfer based upon expectations of the parties and the facts known as of the date of transfer.

5. A lump sum sale of an intangible should be characterized as an open transaction whereby the lump sum sale payment results in gain at the time of transfer, but is then treated as a prepayment of the commensurate with income amounts. No section 482 allocation would be required until the aggregate commensurate with income amounts exceed the prepayment.

6. Multi-year set-offs of proposed adjustments against excessive related party income derived in other taxable years will not be permitted.

Chapter 9

The Need for Certainty: Are Safe Harbors the Solution?

A. Introduction

One of the most consistent criticisms of the section 482 regulations is that they do not provide taxpayers with enough certainty to establish intercompany prices that will satisfy the Service without overpaying taxes. Based on the government's experience in litigation, the current section 482 regulations also fail to provide the Service and the courts with sufficiently precise rules to make appropriate section 482 adjustments, especially when third party comparables are not available.[184] One of the most common suggestions for solving these problems is to amend the section 482 regulations to adopt safe harbors, or simple, mechanical, bright-line tests that may be used in lieu of the fact-specific arm's length inquiry under section 482.[185]

B. General Problems With Safe Harbors

While numerous safe harbors have been proposed, they generally have taken two forms: (1) Absolute safe harbors that grant the taxpayer total freedom from a section 482 adjustment

[182] It has been suggested that the commensurate with income standard will result in all gains from the sale of intangibles being treated as royalties under the Internal Revenue Code and under our tax treaties, because of the provision in the Code and those treaties covering gains contingent on productivity, use or disposition of the relevant intangible. There is no intention by the Service or Treasury to eliminate the possibility of sale treatment for transfers of intangibles in appropriate cases, either for treaty purposes or for U.S. withholding tax purposes. Further, the Service and Treasury believe that the mere fact that subsequent profits may be taken into account in appropriate cases by U.S. tax authorities in determining transfer prices on audits, or that a lump sum is treated as a deposit on the appropriate section 482 transfer price in order to assure that a commensurate with income adjustment can be made notwithstanding the statute of limitations, does not have this effect. The terms of the transaction itself (*i.e.*, whether it provides for contingent consideration based, *e.g.*, on sales volume or units sold) will determine treatment under the royalty article. Further, even if the commensurate with income standard were incorporated by reference into the relevant sales document, there is no necessary relationship between productivity, use or disposition and a proper commensurate with income payment. For example, sales might increase dramatically in a given year, but the method called for may result in no increase in payments, or the taxpayer may have an arm's length basis for making no adjustment.

[183] *But see* Treas. Reg. § 1.482–2(d)(1)(ii)(d), Ex. 3, which appears to allow an inter-year set-off.

[184] GAO, *IRS Could Better Protect U.S. Tax Interests*, *supra* n. 64, at 63; ABA Comm. on Affiliated and Related Corporations, *Administrative Recommendation No. 8* (1986) [hereinafter ABA *Admin. Rec.*]; Langbein, *supra* n. 160, at 655.

[185] *See* GAO, *IRS Could Better Protect U.S. Tax Interests*, *supra* n. 64, at 48–50.

once the criteria for the safe harbor are satisfied, and (2) conditional safe harbors that produce a rebuttable presumption or a shift in the burden of proof in the taxpayer's favor, but that may be overcome by the Service through evidence showing that a section 482 adjustment is necessary.

Although various types of safe harbors are available, they all have one common element that makes them both attractive to the taxpayer and potentially troublesome to the government: they generally would serve only to reduce tax liability. Taxpayers for which a safe harbor would produce a lower tax liability than the appropriate normative rule would use it. Those for which a safe harbor would produce a higher tax liability than the appropriate normative rule generally would not seek the protection of the safe harbor but would apply the normative rule. Reducing administrative costs, or the need for certainty, may encourage some taxpayers to use a safe harbor in marginal situations even if application of the normal rule would result in a tax savings. In general, however, the only benefit a safe harbor offers from the Service's perspective is a savings of administrative costs.

Ideally, safe harbor standards should be easy and inexpensive vehicles for selecting cases that warrant closer scrutiny. The perfect safe harbor would result in the elimination of all insignificant cases and the selection of cases for detailed analysis by taxpayers and further examination by the Service that would more likely produce sustainable, significant adjustments if analyzed incorrectly by the taxpayer. The question is whether there are any safe harbors that are capable of approaching these goals.

A look at the Service's experience with section 482 safe harbors is instructive. The best example is the safe harbor for interest rates found in § 1.482-2(a)(2)(iii). From the Service's point of view, results under this safe harbor have been mixed at best. The safe harbor was originally set between 4 and 6 percent. This was probably sufficient in 1968, but it soon became inappropriately low. However, the government was very slow to change the safe harbor range as interest rates rose.[186] The safe harbor for interest now tracks the Federal rates required to be determined for purposes of the original issue discount rule under section 1274(d), which reflect market rates and are adjusted monthly. While this is probably a satisfactory solution, many taxpayers were able to gain a substantial windfall while the government made successive attempts to choose an appropriate safe harbor rate.

Another example of a safe harbor is found in § 1.482-2(c)(2)(iii) of the regulations, which provides a safe harbor computation of an arm's length rental for the use of tangible property. Experience has demonstrated that this safe harbor was overly generous to taxpayers (*i.e.*, requiring too little rent). It was repealed by regulations finalized this year.[187] No substitute safe harbor has been provided to date.[188]

The government's experience in the section 482 area has been that safe harbors have generally treated amounts as arm's length that were usually different from market rates. This result is even more likely to occur in the transfer pricing area because of the inherent difficulty of constructing valuation safe harbors for the types of intangible and tangible property that have created transfer pricing problems under section 482 . Furthermore, because of the complexity of the regulatory process and the difficulty in obtaining reliable data, adjustments or corrections to safe harbor standards would be slow. In any event, the fundamental deficiencies of safe harbors are not resolved by continually reviewing and revising the rates, or by intentionally setting the safe harbor on the conservative side for protection of the revenue. If safe harbors are set at non-market rates, they will be used only by taxpayers that will benefit by making or receiving payments at those rates.

C. Specific Proposals

The following lists some of the safe harbors that have been proposed and includes a short explanation of some of the reasons why they have not been endorsed by the Service and Treasury.

1. *Pricing based on industry norms.* This approach is contrary to the legislative history of the section 482 changes in the 1986 Act.[189] Industry norms generally do not reflect arm's length prices for highly profitable intangibles. Accordingly, any safe harbors based on industry norms or statistics would permit transfer prices that would be far different from the arm's length standard in the most significant cases.

2. *Profit split—minimum U.S. profit.* This approach would guarantee that the United States would capture a certain minimum of the profit in transfer pricing cases, perhaps 50 percent. The commensurate with income standard is designed to divide the income involved between related parties to "reasonably reflect the relative economic activity undertaken by each.[190] A safe harbor that splits profits a certain way in all cases would be inconsistent with the case-by-case factual determination that is necessary to measure the economic contribution made by each of the related parties. Furthermore, a fixed U.S. profit requirement would be objectionable to other countries when intangibles were developed outside the United States.

3. *Profit split based on taxpayer's proportionate share of combined costs (ABA Proposal).*[191] The problem with this safe harbor is that it presumes that different types of expenses contribute equally to the combined profit. For example, expenses incurred for highly skilled technical services might contribute proportionately more to the combined profit than those incurred for unskilled services. Furthermore, it might be very difficult to determine what indirect expenses (including, for example, research and development expenses) are attributable to particular products, and taxpayers might be able to manipulate the profit split by shifting expenses from one product to another or one entity to another (such as by "loaning" employees).

4. *Profit split based on share of combined costs and assets (ABA Proposal).*[192] The second ABA safe harbor is a modification of the first one. Instead of relying entirely on relative expenses, it relies 50 percent on expenses, and 50 percent on the fair market value of the assets used in the production of the property involved in the sale. However, at a minimum not less than 25 percent of the combined taxable income would be allocated to the buyer. If one of the parties employed its assets in a very inefficient manner, it would nevertheless be rewarded in the same manner as if it were highly efficient. Additionally, assets could be

[186] The following changes have been made to the safe harbor interest rate: 6-8 percent effective January 1, 1975; 11-13 percent effective July 1, 1981; 100-130 percent of the applicable Federal rate effective May 9, 1986. Final regulations were published on June 13, 1988, T.D. 8204, 1988-24 I.R.B. 11.

[187] T.D. 8204, 1988-24 I.R.B. 11.

[188] *See* Treas. Reg. § 1.482-2(c)(2)(ii).

[189] 1985 House Rep., *supra* n. 47, at 424-25.

[190] *Id.*

[191] ABA, *Admin. Rec., supra* n. 184, at 14. The ABA proposals are applicable only to the transfer of tangible property. Other proposals apply only to intangible property. Because many of the safe harbors would have the same advantages and disadvantages regardless of the type of property involved, this discussion does not address the different types of property separately.

[192] *Id.* at 14-15.

arbitrarily shifted from one entity to another; difficult questions of property valuation could arise; and property could be purchased just to tip the balance of profits. Because of those problems, a party could receive a substantial amount of the combined taxable income, yet be doing very little to earn the income.

5. *Insubstantial tax benefit test.* This safe harbor would be available if the rate of tax in the foreign jurisdiction was at least 90 percent of the U.S. rate. The theory behind this safe harbor is that taxpayers will use arm's length pricing if no overall tax savings result from doing otherwise. While this approach may have some pragmatic appeal, there are still several problems with it. An adjustment under section 482 does not depend on an intent to avoid taxes. Even if the taxpayer is overpaying its worldwide tax liability, if U.S. income is being understated, an adjustment should be made. Furthermore, as a policy matter the United States will not cede its taxing jurisdiction to a foreign country other than by treaty. Accordingly, if a taxpayer intentionally or inadvertently shifts income to a high tax jurisdiction it should be subject to a section 482 adjustment without the benefit of a safe harbor. As a practical matter, however, the Service proposes relatively few adjustments between a U.S.-based parent company and its affiliates located in another jurisdiction whose effective tax rate is nearly the same or higher. Different problems are presented by foreign-based parents and their U.S. affiliates.

6. *Profit distribution test.* This safe harbor would be satisfied if at least 25 percent of the pre-royalty net profit of an affiliate was distributed to the parent. This test is directly contrary to the commensurate with income concept. If an affiliate is responsible for only 10 percent of the economic activity in question it should not be able to keep up to 75 percent of the profit involved.

7. *Prior settlement test.* Under this proposal, when the Service had accepted a specific pricing method in a prior examination, the burden would be on the Service to show that the pricing method is unreasonable for the current year. This safe harbor is unacceptable because there could be any number of reasons why the Service had accepted a particular pricing method. To force the Service to demonstrate that the previously agreed upon method has become unreasonable could help perpetuate an error or make it more difficut to adjust to changing circumstances.

D. Burden-Shifting Safe Harbors

Some of the safe harbor proposals would operate by shifting the burden of proof to the Service. It has been proposed, for example, that a taxpayer's full disclosure of the method by which it determines its transfer prices would shift the burden of proof to the government. (See Chapter 3, *supra*, for a description of IEs' experiences in seeking information.) Section 6001 requires all taxpayers to maintain adequate books and records to substantiate positions taken on the tax return, including section 482 issues. Thus, a taxpayer could obtain a shift in the burden of proof merely by complying with the law.

The Service and Treasury do not believe that "burden-shifting" safe harbors are a viable approach. The critical issues presented in the section 482 area are almost always factual in nature, and taxpayers are almost always uniquely familiar with—and in exclusive possession of—the relevant facts. To place the burden of proof on the government in this situation would be unworkable.

E. Conclusions and Recommendations

1. Historical experience with safe harbors indicates that they generally result in unwarranted windfalls for taxpayers, without significant benefits for the government.

2. In the highly factual section 482 context, no one safe harbor or combination of safe harbors has yet been proposed that would be useful but not potentially abusive.

3. While the possibility that useful safe harbors could be developed is not categorically rejected, additional section 482 safe harbors are not recommended at the present time.

III. METHODS FOR VALUING TRANSFERS OF INTANGIBLES

A significant reason for the enactment of the commensurate with income standard was the failure to properly take into account the income earned by related parties in exploiting intangibles. As detailed in earlier chapters, inappropriate comparables or ad hoc profit split approaches have been used to analyze cases involving related party transfers of unique intangibles.

This part of the study seeks to define the appropriate use of comparable transactions. It also proposes an alternative method of analysis that does not directly rely upon comparable transactions. Fourteen detailed examples applying the methods described in this part are set forth in Appendix E. These methods are generally consistent with various methods of income allocation used by the Service, taxpayers, and the courts under pre-1986 Act law and, if adopted, would appropriately be applicable to cases arising prior to the 1986 Act.

Chapter 10

Economic Theories Concerning the Implementation of Section 482

A. Introduction

The current section 482 regulations use a market-based approach to income allocation. The goal of this approach is to distribute income in the same way that the market would distribute the income; that is, related parties should earn the same returns that unrelated parties would earn under similar circumstances. This approach is implemented through separate accounting in which an individual transfer price is determined for each transaction.[193]

The argument for the market-based method to allocate income was articulated by Stanley Surrey, former Assistant Secretary (Tax Policy), who discussed the way that unrelated parties are taxed:

> Tax administrators do not question transactions that are governed by the marketplace. If Company A sells goods to unrelated Company B at a certain price or furnishes services at a particular price, the income of both companies is determined by using that price. One company may be large and the other small; one may be a monopoly; one may be financially strong and the other in a weak condition. But these and other factors which may affect the price at which the transaction occurs are not the concern of the tax administrator.[194]

Having established the tax system's acceptance of the marketplace, he concludes:

> Presumably, most transactions are governed by the general framework of the marketplace and hence it is appropriate to seek to put intra-group transactions under that general framework. Thus, use of the standard of arm's length, both to test the actual allocation of income and expense resulting under controlled intra-group arrangements and to adjust that allocation if it does not meet such standard, appears in theory to be a proper course.[195]

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[193] A variation of this approach retains the goal of a market-based allocation but claims that in some situations the target is best reached by an estimate, or that average prices can be used for certain transactions. The estimate can be provided by some type of formulary apportionment.

[194] Surrey, *Reflections on the Allocation of Income and Expenses Among National Tax Jurisdictions*, 10 Law and Policy in International Business 409, 414 (1978).

[195] *Id.* at 414.

Recent criticism has questioned whether the market-based arm's length approach is flawed as a matter of general principle. An alternative approach might be based on the concept of an integrated business. Loosely defined, an integrated business consists of firms under common control and engaged in similar activities. Proponents of the alternative approach assert that one cannot assume that related parties conduct market-based transactions within the entity. They claim that, because an entity will not act as if its parts are unrelated, it does not make sense to try to account for individual transactions in the way that unrelated parties subject to market forces would account for similar transactions. Under this theory, the allocation of income can only be accomplished by applying some formula chosen by the government.

This chapter explores the tension between these alternative approaches, and suggests a way to apply the arm's length principle to an integrated business. It concludes that the market-based arm's length approach remains the best theoretical allocation method.

B. The Arm's Length Approach in an Integrated Business: Theory

The goal of a market-based approach is to ensure that the return to an economic activity is allocated to the party performing the economic activity. Critics of the market-based approach argue that an arm's length price will not achieve this goal. Relevant practical issues are how close one can get to the right price and whether getting that price is costly relative to settling for an estimate.

One commentator has suggested that the difficulties encountered in administering the current regulations stem not from practical considerations, but rather from fundamental problems inherent in applying a market-based approach to transactions of integrated businesses.[196] Specifically, it has been argued that the flaw in an arm's length approach is that it does not allow a return to the form of organization. That is, because an integrated enterprise is presumably more efficient, it will be able to execute an integrated economic activity at a lower cost than a series of independent firms whose joint efforts are necessary to execute the same series of transactions. This omission creates a "continuum price problem," a situation in which the sum of the returns for separate services rendered by independent parties is less than the actual return of the combined group. This argument grows out of the literature on the reasons for the existence of multinationals.[197]

That multinationals may exist because of integrated or "firm-specific" economies does not require a rejection of the arm's length principle. Transfer prices are supposed to reflect the contribution of the activity and assets utilized in each location to economic income. Therefore, each party should earn at least as much as it could have earned as an unrelated party under alternative arrangements.

Furthermore, an analysis of "alternative arrangements" need not be restricted to analyzing conventional arm's length transactions. Consider a U.S. firm that owns the worldwide rights to a unique patented drug that it wishes to sell into a new market (and assume that the drug or patent is valuable in its own right and that marketing activity, for example, is not an important factor). The firm could license the use of the patent to unrelated parties to produce the drug in the new market. Alternatively, the firm could enter into a joint venture by affiliating with a company that has the ability to produce the drug. If the pharmaceutical firm entered into a joint venture it would probably be able to negotiate a very large share of the profits given the value of the patent, because any number of local firms could provide the labor and capital necessary to mix and package the drug.

There are, therefore, two types of arm's length transactions to consider—one in which the parties remain independent and another in which the two parties make an arm's length agreement to affiliate by merger, joint venture, acquisition, or simply through the hiring of local labor and capital within a subsidiary. Restricting attention to transactions between parties that remain unrelated can fail to accomplish the objective of allocating to each party its contribution to income, if such transactions do not accurately reflect the actual relations between the related parties.

Another way of describing the arm's length agreements that have to be considered is to say that they are the arrangements that would be made between unrelated parties if they could choose to have the costs of related parties—*i.e.*, to use the related party technology. In general, tax rules should distort business decisions as little as possible because rules that minimize such distortions will lead to the greatest possible production efficiency. Transfer pricing rules will allow the most efficient production technology to come to the fore if, holding the cost functions constant, they result in the same tax burdens whether or not the parties are related. In other words, if unrelated parties somehow had access to the technology available to related parties, their operations should not result in more or less total taxes than would be paid by a multinational using this technology. The difficulty, of course, is the practical application of this interpretation of the arm's length standard.

C. The Arm's Length Approach in an Integrated Business: Practice

The arm's length approach can be more correctly applied to an integrated business by using certain tools of microeconomic theory. The continuum price problem arises when a vertically or horizontally integrated production technology that is available to multinational corporations results in lower costs than a nonvertically or horizontally integrated technology, which unrelated parties would have to use. How can an examination of unrelated party transactions lead to a satisfactory resolution of the transfer pricing problems?

As a first step, consider an industry in which there is no difference in costs between related party and unrelated party dealings; there is only one production technology, and it is available to the parties in both types of arrangements. There is thus no continuum price problem, and the arm's length standard, as traditionally interpreted, can be applied. It is likely that both unrelated party and related party transactions will actually occur in the marketplace, and it should be possible to observe prices from the former and use them to determine the incomes of each party in the latter.

This procedure satisfies the objective described in section B above of using information about unrelated parties operating at arm's length to determine the allocation of income in the related party setting. The related parties that sell intermediate goods will be given the same gross revenues as the corresponding unrelated parties; related parties that purchase them will have the same cost of goods sold as corresponding unrelated parties.

[196] Langbein, *supra* n. 160, at 627.

[197] Caves explains that many multinationals exist because of a failure in the market for intangibles. R. Caves, *Multinational Enterprise and Economic Analysis* (1982). In essence, intra-firm transactions can be more profitable than inter-firm transactions because of the expense of negotiating complete contracts or the inability of a firm to capture the full value of a piece of knowledge through contracts with unrelated parties without fully explaining the knowledge and thus eliminating its value.

Further, it has already been assumed that the two sets of parties operate in the same market and have the same cost structure; therefore, the external prices and internal costs will be equal. Thus, the related parties will have the same net taxable incomes as the corresponding unrelated parties. They should therefore have the same total tax burden as the unrelated parties with which they are competing.

Now return to the situation in which a vertically or horizontally-integrated technology, available only to multinational companies, is dominant. If multinational corporations are able to produce at lower cost, then in the long run it should be difficult for the smaller companies to continue in existence. Therefore, arm's length prices may be unavailable. An appropriate transfer pricing result will be achieved if each related party were assigned the income that the corresponding unrelated party would earn, if the latter were using the efficient cost structure.

Microeconomic theory leads to an unambiguous and natural statement of what the income of unrelated parties should be in these circumstances. As long as the industry under analysis is competitive and the factors of production are homogeneous and mobile between sectors, it is assumed that "economic," "excess," or "above-normal" profits will be zero in the long run.[198] That is, each firm will earn just enough to be able to pay for the land, labor, capital, and other factors of production that it uses to produce its outputs.

The zero economic profit concept does not state that taxable income should be zero. If owners of the firm have supplied it with capital or other inputs, the firm should earn enough to be able to reward the shareholders for these factors; otherwise, the shareholders would be wise to find a better investment. Rather, the zero profit concept implies that in a competitive industry there should be an equality between the gross revenues of a firm and the summation of the market returns that are or could be earned by all of the factors of production that the firm employs. If gross revenues were higher than this amount, then the firm would be earning "above-normal" profits; the existence of "above-normal" profits would attract other firms to enter the industry until these "above-normal" profits disappeared through competition. If gross revenues were lower than this amount, a firm would not be able to earn enough to reward all of the factors it employs and, in the long run, would have to shrink or disappear.

This equality between revenue and the sum of returns to each factor of production may be used to determine the proper allocation of income among the related parties within the multinational. Specifically, subject to the discussion in section D *infra* regarding monopoly situations and intangibles, one should measure the factors of production used by each related party and compute the returns that each one would earn on its best alternative use in the marketplace. The sum of these amounts yields total input returns that each related party would have to earn if it were an unrelated enterprise. The sum also equals the amount that the multinational enterprise would have to pay an unrelated party to get it to produce the same outputs (employing the same inputs and using the same technology) as the related party does. Attributing this gross income to each related party will result in its tax base being equal to the hypothetical unrelated party alternative; therefore, the tax burden will be equal. Thus, there will be no tax incentive or disincentive to related party transactions.

The theory discussed above implies that a competitive firm's gross revenue, which equals price times quantity of output, will be equal to the returns that the factors it employs could earn in the marketplace. The traditional arm's length approach looks at the gross revenue side of this equation; the alternative procedure outlined above looks at the input side. It starts by identifying the factors of production employed by the firm, determining the returns that these factors would earn in the marketplace, and computing the sum. In short, the traditional approach looks for the prices that the firm's outputs would command in the marketplace, whereas the alternative approach seeks to determine the returns that the firm's factors would earn in the marketplace. Both approaches are equally consistent with the basic goal of the arm's length principle, which is to use information about unrelated parties operating at arm's length to determine the allocation of income in a related party setting.

D. Further Practical Problems

There are two further practical difficulties in applying the arm's length approach to integrated business economies: application of the approach to monopoly situations and valuation of intangibles. This section briefly describes these difficulties and suggests possible approaches to solving them.

1. *Monopoly situations.* In a market that cannot be entered by more than one for a few firms, the existence of "above-normal" profits cannot be ruled out, because potential competitors will not be able to compete them away. The equality discussed above between gross revenue and the returns that factors could earn in the marketplace, and the results deried from it, cannot then be assumed to hold.

However, it may still be possible to apply the basic idea. For example, consider a situation in which a corporation has been granted worldwide patent rights to a unique product. The company still can choose between exploiting this patent through related party or unrelated party dealings, and it would be worthwhile for this decision to be made free of distortions that could be caused by transfer pricing rules. To get an unrelated corporation to provide a good or service, the company would have to pay the unrelated corporation the sum of the returns that would be earned by the factors it would employ. Therefore, it would still be proper to use the alternative procedure to determine the income of the related corporation.[199]

2. *Valuation of intangibles.* The starting point for the alternative application of the arm's length approach is to measure the factors of production employed by the related parties, and to determine the returns that they would earn in the marketplace. This procedure can be implemented in a straightforward fashion only if the factors can be identified and measured.

However, there is at least one factor of production, intangible assets, for which it is often difficult to assign a precise value. These assets are often unique and it is frequently difficult to decide what returns they would earn if separately employed in the marketplace.

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[198] For a narrative explanation of the zero profit condition, *see* R. Lipsey and P. Steiner, *Economics* 229–231 (6th ed. 1981). For a mathematical presentation of the implications of this condition, *see* J. Henderson and R. Quandt, *Microeconomic Theory* 107–110 (3d ed. 1980).

[199] In more complicated situations, both the affiliated corporation and any potential unrelated party participant may each possess monopoly rights that allow them to earn above-normal profits. In deciding whether to use such an unrelated party, a corporation would have to consider what would happen if it attempted to bargain with it. There are analyses, relating to economic game theory, that attempt to predict what the range of outcomes would be in such a bilateral monopoly situation. If the outcome, specifically the income of the potential unrelated party, can be predicted, then it would be proper to use it to determine the income of the corporation's affiliate. This is so, to repeat, because this procedure would allow the corporation's choice between using an affiliate versus an unrelated party to be made free of tax distortions. To implement this procedure, however, one would need to analyze the theoretical models of bargaining situations in detail, and this analysis is beyond the scope of the present discussion.

One should not conclude that the presence of any intangible asset will make the alternative procedure impossible to implement. It may be that only one of the related parties employs intangible assets to any significant degree. In this situation it suffices to measure the factors of production employed by the party with measurable assets and to allocate the residual income to the related party employing significant intangible assets. If both parties employ intangible assets, valuation becomes more difficult and, in some cases, judgmental, but not impossible.

E. Conclusions

1. The arm's length standard remains the theoretically preferable approach to income allocation Microeconomic theory can be utilized to apply the arm's length standard to an integrated operation.

2. In certain situations, production technologies may be such that unrelated parties operating at arm's length can be expected to coexist with vertically or horizontally integrated multinational corporations. In these cases, arm's length prices should exist and their application to related party transactions should lead to appropriate results. This is the traditional approach embodied in the section 482 regulations.

3. In other situations, vertically or horizontally integrated technologies available only in related party dealings may dominate. Third party prices will be difficult to find in these cases; moreover, the use of the rare third party prices that occur may be inappropriate. However, since information may exist as to the arm's length returns attributable to the factors of production employed by one or both of the related parties, this information can be used to modify the traditional approach and take account of the integrated businesses.

Chapter 11

Arm's Length Methods for Evaluating Transactions Involving Intangible Property

A. Introduction

This chapter discusses the methodology for implementing the arm's length principle for transactions involving intangible property. The goal of the chapter is to propose a theoretical framework for analyzing the situations that have caused the greatest amount of difficulty in the transfer pricing area in order to generate further consideration of the difficult issues involved.

B. Role of Comparable Transactions

"Exact comparables," which are those involving the transfer of the same intangible property, supply the best evidence of what unrelated parties would do in a related party transaction. The weight to be given to evidence of "inexact" comparables, which generally are those involving different but economically similar intangible property, is not so clear. Nor is the resort to inexact comparables automatically justified by the arm's length principle. This section first outlines the standards for exact comparables. It then discusses the appropriate role for inexact ones.

1. *Exact comparables: two examples.* Exact comparables are most likely to occur in connection with the transfer of common products that embody intangibles that are widely available to producers, such as the once unique technology now employed in pocket calculators, digital watches, or microwave ovens. Comparability in such cases of widely available technology is usually easy to demonstrate.

The existence of an exact comparable for unique intangible property, however, is not inconceivable. Consider a multinational company that acquires an unrelated company whose only assets are a small amount of cash, equipment, and the rights to a valuable new invention. If, immediately after this acquisition, the multinational sells those rights to a subsidiary, there really can be no question as to the proper transfer price: It is the acquisition price minus the cash and value of the equipment. In fact, because this comparable is available, any other arrangement could be held suspect. Assume further that the subsidiary and the parent have no other transactions in the initial and following years. The subsidiary's income should include the return to the intangible in all future years, assuming that the subsidiary paid the arm's length consideration at the time of the initial transfer.

As a second example, consider a U.S. corporation that decides to exploit one of its intangibles. It sets up a Mexican subsidiary to serve the Latin American market, while it licenses the Asian rights to an unrelated Korean company. Assume further that the Asian and Latin American markets, and the parent's dealing between the Korean company and the Mexican subsidiary, are comparable in all important aspects. The Korean licensing arrangement should determine the Latin American subsidiary's allocation of income from the transfer of the intangible.

2. *Standards for Exact Comparables.* The assumptions made in these examples raise the crucial question: How is one to know if a potential comparable is indeed exact? The first requirement is that the comparable transaction involve the same intangible property transferred under substantially similar circumstances. Thus, an exact comparable should involve the same patent, product design, process, trademark, or other intangible transferred to the related party.

However, licenses of intangibles are usually exclusive. Therefore, it is extremely unlikely that the same intangible would be licensed to two different parties for the same use and geographic market. The standards for exact comparables should not require these aspects to be identical.

Instead, two types of additional standards should be met. First, the comparable transaction and the related party arrangement must take place in substantially similar economic environments; these standards may be called "external" ones. Second, the transactions must contain substantially similar contractual features; they must satisfy "internal" standards of comparability.

No amount of general discussion of these standards is likely to turn them into objective tests. As in all matters concerning transfer pricing, facts and circumstances must determine the outcome of specific cases. The following observations, however, may suggest some useful guidelines.

a. "External" standards. In examining external standards, the essential question is whether unrelated parties would regard the economic environment of the transaction under examination as similar to that of the proposed comparable transaction. In other words, would unrelated parties earn substantially similar profits from a substantially similar transaction? For example, the size and level of economic development of the markets should be substantially similar.[200] If one market is much larger, or if the product is already accepted in one market and not the other, one can presume that unrelated parties would not arrive at the same arrangements to license an intangible into these two markets. As another example, one market may contain many competitors, but in the other a licensee can expect to have a monopoly for a number of years. Again, it is reasonable to conclude that unrelated parties would come to different terms in negotiating licenses for these markets.

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[200] Rev. Rul. 87-71, 1987-2 C.B. 148.

Another set of external standards concerns transactions between the licensor and licensee that are collateral to the transfer of the intangible in question. If the parties to one transaction have substantial dealings in the intangible with third parties (such as a cross-licensing arrangement) but the parties to the other set of transactions do not, external standards of comparability are not satisfied. There are clearly reasons why unrelated parties will reach different outcomes if they expect to have further dealings than if they do not. For example, an isolated exchange should not be taken as exactly comparable to a continuing transactional relationship. The comprable used in the *U.S. Steel* decision [201] has been criticized on this basis.

Finally, the level of economic risks being assumed and the functions performed by each party must be similar. Clearly, it would be inappropriate to compare a related party transaction where the affiliate engages solely in manufacturing a product with a transaction in which the unrelated party not only manufactures but also must market the product.

b. "Internal" standards. To meet this set of standards, the contractual aspects of the transactions being compared must be substantially similar in all important aspects. The most obvious ones include the amount and form of compensation for the transferred intangible. The most common compensation form is a royalty determined as a percentage of sales or quantity produced, but, as Appendix D discusses, other forms are sometimes used. If the comparable transaction contains accelerator or decelerator clauses under which the royalty increases or decreases as sales increase, for example, such clauses should appear in the related party transaction. Other elements of a transaction can have a significant effect on the income realized by unrelated parties to a license or similar agreement. These elements must be substantially similar in order for the unrelated party transaction to be an exact comparable. For example, if the unrelated party agreement provides for the licensee to receive a specified level of technical assistance and training, the related party transaction should contain similar rights. Similarly, if one agreement calls for the licensee to perform significant marketing or product development, while in the other the licensor performs the marketing, the agreements lack internal comparability.

3. *Exact comparables and periodic adjustments.* A comparable that is exact at the outset of a transaction may lose its exactness over time. There should therefore be two requirements of continued use of the exact comparable over time. First, the arrangements must be consistent in their provision for options and other types of contingency clauses so that they provide for substantially the same types and amounts of adjustments for changing circumstances. Second, the comparables will not remain exact over time unless related parties perform these adjustments as unrelated parties do, under circumstances that are comparable.

Is the concept of an exact comparable so rigid that the results of related party and unrelated party agreements must be the same? Consider a U.S. company that licenses an intangible to two unrelated parties, one in Asia and one in Latin America. It is reasonable to predict that the arrangements will be similar if the economic environments are similar. However, it will probably not be the case that the U.S. company will realize the same income from the two transactions in every year. Business cycles, for example, vary across locations over time. The Asian licensee may have a very profitable experience when times are "lean" in Latin America, or vice versa.

The standards for exact comparables should not require year-by-year equality between the results of the unrelated party arrangement and of the related party one if it is reasonable to conclude that the long-term results will be comparable. Related parties should not be required to exercise rights they might have, if unrelated parties do not in fact exercise them.

4. *The role of inexact comparables.* This section describes the appropriate role for unrelated party transactions that cannot satisfy one or more of the standards for exact comparables. Because of the unpredictable outcomes that inexact comparables have caused in the past, one might argue that they simply should not be used. However, the data presented in Appendix A suggests that some continued use of inexact comparables would be appropriate. The International Examiners reported that they made some use of comparables in making transfer pricing adjustments 75 percent of the time.[202] Although the reported use of comparables for transfers of intangibles in general was lower, it was higher (76.5 percent) for marketing intangibles.[203] The IEs did not report making final determinations based solely on these comparables in all these cases, but that they made some use of them. Clearly, in practice, inexact comparable transactions provide significant information, even with respect to transfers of intangible property.

The problem, therefore, is not that inexact comparables are useless or misleading. Rather, either they have been given too much emphasis in many cases or inappropriate comparables have been used. This proper conclusion is that it is appropriate to make use of them, but that it is inappropriate to determine transfer prices solely on the basis of inexact comparables. This conclusion is fully consistent with the arm's length principle. The arm's length approach requires that exact comparables, when they are available, should determine transfer pricing allocations of income. However, it does not follow that the same is true of inexact comparables. That is, inexact comparables should be resorted to only when exact comparables are unavailable. Further, they should not be given priority over the alternative method outlined in section C of this chapter in all cases.

5. *Selection of appropriate inexact comparables.* Once it is determined that an exact comparable does not exist, how should inexact comparables be selected? The most obvious point is that the external and internal standards discussed previously should parallel those in the transaction at issue as closely as possible. For example, if the unrelated parties in the potential comparable operate in a very different economic environment—if the market is much smaller or the related parties carry on a much broader set of transactions—then the comparable should not be used to justify the related party arrangement. Similarly, if the intangible in the unrelated party transaction is at a very different stage of development or concerns a dissimilar product or service, then its use as a comparable is inappropriate.

In more traditional terms, an unrelated party arrangement should be used as an inexact comparable if the differences between it and the related party transaction can be reflected by a reasonable number of adjustments that have definite and ascertainable effects on the terms of the arrangement. The current regulations for section 482, although silent on this issue in connection with transfers of intangible

[201] *See* discussion *supra* Chapter 4.

[202] Appendix A, *infra*.

[203] *Id.*

property, discuss it quite carefully in connection with transfers of tangible property. They mention that adjusting a sale for differences in transportation costs or minor physical modifications would probably be appropriate, but that an adjustment for the presence or absence of a trademark would not.[204]

This approach should be extended to transfers of intangible property. For example, unrelated party arrangements frequently require the licensor to provide a specified amount of training or expert assistance to the licensee for a brief period.[205] It may be possible to adjust a comparable that includes such a provision by comparing it with an arrangement that does not, or that provides for less assistance.

At the other extreme, consider an attempt to compare an unrelated party license with a related party license when the unrelated party licensee performs different functions than the related party licensee. For example, the former may be responsible for substantial marketing, while the latter may not. It seems clear that the effect of this difference would not be definite and ascertainable. Therefore, an adjustment for it would be too speculative to be appropriate.

Similarly, intangibles differ in their fundamental profitability. Attempting to compare a low-profit intangible to a high-profit one by adjusting for this difference would clearly be too speculative to be appropriate. Comparable transactions involving intangibles that are likely to be of typical or average profitability are therefore appropriate inexact comparables only if the related party intangible under analysis is typical or average.

The current regulations contain a list of twelve factors which are essentially internal and external standards that might be examined in order to determine whether an unrelated party license is an appropriate inexact comparable. As many observers have pointed out, however, it is difficult to derive useful guidance from this list, because it does not discuss the relative weights to be placed on the factors in a given situation. For example, prospective profits to be realized from the intangible appears late in the list, but after the 1986 Tax Reform Act this factor must be given special consideration. In contrast, the first listed item cites prevailing industry rates, which should not be relied upon unless the intangible being transferred is demonstrably average, based on observable indicators of profitability.

Another approach that provides a framework for use of inexact comparables is "functional analysis." Although not explicitly mentioned in the regulations, this procedure is outlined in the IRS Manual [206] and has been found to be a useful place to start in transfer pricing situations. In essence, the goal of functional analysis is to identify the economic activities actually undertaken or to be undertaken by the parties in both the related party situation and unrelated party situation. The most appropriate comparables may be chosen by identifying the ones in which the unrelated parties carry on the same major economic activities as the related parties. Section C of this chapter examines functional analysis in the context of the arm's length rate of return method. Functional analysis is an equally valid approach for analyzing comparables on the basis of the similarity between the economic activities performed.[207]

6. *Use of inexact comparables and periodic adjustments.* It is inappropriate to use inexact comparables to justify a related party transaction merely by analyzing similarities at the time of the initial transfer. For example, there may be valid inexact comparables that justify the establishment of a related party agreement with a fifteen percent royalty rate. These comparables may further justify fixing this rate for two years. Even if no adjustment were required during the first two years, in year three the taxpayer may not continue to rely upon the prior inexact comparables unless, after re-examination, use of these comparables remains appropriate.

Suppose a significant change occurs during the term of a license agreement. For example, suppose a taxpayer licenses a product design to a related party. At the time of the transfer, the taxpayer makes a good faith estimate that the product will be a routine one, and will attain 10–25 percent of its market. Based on this fact, the taxpayer gathers information on comparable transactions (none of which can meet the standards for an exact comparable). The information indicates that a royalty rate of 10 percent of sales is appropriate. The comparables contain varying duration and contingency clauses. In year three, the product design becomes uniquely popular and garners 95 percent of the market. Given this set of facts, the inexact comparables previously used may no longer be used in year three and succeeding years to justify the 10% related party royalty rate.[208]

Although unlikely, the taxpayer may find inexact comparables involving products with a 95 percent market share that demonstrate that the 10 percent royalty rate is still appropriate. More realistically, suppose that there are comparables that show that products in the taxpayer's industry with a 95 percent market share typically command a much higher royalty, or, as may be more likely, that there are no comparables for such a situation. In such case, the taxpayer must use the arm's length return method outlined in section C below either to justify the royalty rate previously set or to adjust the related party arrangement to bring it into compliance with the results of this new analysis.

C. An Arm's Length Return Method

The previous chapter discusses why a method that looks to arm's length returns, as distinct from arm's length prices, is appropriate. This section discusses how such a method should operate. Although some of the terminology in this section may be new, most of the techniques discussed in it are not. One of the main arguments for the development of an arm's length return method, in fact, is that taxpayers, the Service, and especially the courts have found it necessary to use ad hoc and incompletely developed versions of such a method in the past and will undoubtedly continue to do so in the future. Therefore, the goal of this discussion is to lay a foundation for this approach so that it may be used to achieve more consistent and satisfactory results.

1. *Basic arm's length return method—*
a. *General description.* Consider a U.S. company, Widgetco, that holds worldwide patent rights to the widget, a high-tech light gathering device that is expected to be a vital component in certain satellites and scientific instruments. Widgetco intends to exploit this patent in the following way. A foreign affiliate will manufacture the widgets, under license from Widgetco. Besides utilizing the license, Widgetco and the affiliate will engage in the following transactions. Widgetco will

[204] Treas. Reg. § 1.482–2(e)(2)(ii).

[205] *See infra* Appendix D for further discussion of unrelated party licenses.

[206] I.R.M. § 600 *et seq.*

[207] As Appendix D stresses, it is insufficient merely to replicate a royalty rate in order to achieve a comparable license. For example, the technological services provided by the licensor may have a large impact on the profitability of the license from the licensor's perspective.

[208] There may be other cases where the taxpayer can demonstrate an arm's length basis for continuing to use inexact comparables. *See* discussion *infra* Chapter 8 regarding periodic adjustments.

sell various types of microchips, seals and filters to the affiliate, which will also buy some of these products from unrelated suppliers. The affiliate will use these components to manufacture the widgets and sell them to Widgetco, which will market and distribute them. Widgetco maintains a research staff that developed the widget and will continue to try to improve it.

It would be very difficult to depend purely on comparable transactions, as traditionally defined, to establish the proper allocation of income in this sort of "round trip" transfer-pricing situation. There are three separate types of comparables that would have to be found. The first is a set of prices for the components the parent will sell to the affiliate. The second is the royalty that the affiliate should pay to the parent under the production license. The third is the transfer price for the finished widgets. Although it may be possible to find exact comparables for one of these types of transactions, such as the purchase price of some of the components, it will in general be impossible to find comparables for all three. Further, finding an answer to only one aspect of the problem provides little help in deciding the proper allocation of income between the related parties.

Another approach would be to try to find one or more comparable transactions in which a company contracts with an unrelated party to manufacture a product similar to the widget. It is likely that these transactions will not be good inexact comparables. In general, the form, risks, and extent of relationships in the related party case will at least appear to be quite different from those in a contract manufacturer transaction. Among other things, the foreign affiliate carries raw material, work-in process, and finished goods inventories and should receive a normal market return on its activities that reflects its investment in such assets and the moderate risk that manufacturers using routine manufacturing processes bear with respect to their investment in manufacturing facilities and inventories. Using the terminology of the previous section, a contract manufacturer transaction is likely to fail both the external and internal standards for inexact comparables, because both the types of transactions between the parties and the terms of their agreements will differ. While comparables of this type should not be discarded from all consideration (because this type of comparable may provide useful information), it would be improper to base a resolution of the transfer pricing issue solely on such information.

An arm's length return approach would start from a different perspective. It would seek to identify the assets and other factors of production that will be used by the related parties in the relevant line of business and would try to assign market returns to them.

The first step in this process is to perform a functional analysis—*i.e.*, to break down each line of business into its component activities or functions. It should then be possible to identify which of the functions utilize only factors of production that can be measured and assigned market returns and those which do not. In most cases, identifying functions with measurable factors will lead to distinguishing between those functions that make significant use of preexisting intangible assets and those that do not. In Widgetco's case, Widgetco owns several types of assets that are difficult to measure, including the widget patent and other manufacturing intangibles, the ongoing enterprise value of the research staff, and the marketing intangibles. On the other hand, the foreign affiliate utilized measurable factors of production, assuming that the manufacturing process is a routine one. Specifically, the affiliate employs labor, plant, equipment, working capital, and what might be called "routine" manufacturing intangibles—*i.e.*, know-how related to efficiency in routine manufacturing processes that most manufacturers develop through experience. Since it is easier to evaluate the factors of production to be used by the foreign affiliate, the market rate of return analysis will focus on the affiliate. As the theoretical analysis in the previous chapter demonstrates, focusing on the return of the affiliate in this manner is a valid extension of the arm's length principle.

Next, income should be assigned to each of the functions with measurable factors—here the functions performed by the affiliate. The reason for identifying measurable factors (and, therefore, focusing on the affiliate) is that the functions that employ measurable factors will probably be carried on by a wide range of unrelated parties for which information will probably be available regarding market returns earned by them. A market return consistent with the returns of unrelated parties can be assigned to each of the affiliate's functions since they all employ measurable factors. Once returns are identified for all of the affiliate's functions, the residual income from the line of business is then allocated to Widgetco.

Assume, as stated, that the only function to be performed by Widgetco s foreign affiliate is manufacturing and that this function does not involve the significant use of intangible property developed by the affiliate or purchased by it from unrelated parties. Under the rate of return method the assets of the foreign affiliate would be divided into liquid working capital and all other assets (*i.e.*, the production assets). The actual return on the liquid working capital will be identified and allocated to the foreign affiliate. Rates of return on production assets used in similar manufacturing activities of similar risk must be identified or estimated.[209] Income will then be allocated to the affiliate for its manufacturing activity in an amount equal to the identified or estimated rate of return as applied to its production assets. This rate of return would include, by definition, a return on routine manufacturing intangibles that manufacturers commonly possess as well as a return for assuming normal business risks that manufacturers bear with respect to their investment in manufacturing facilities and inventories.[210] The residual amount of income from the line of business is allocated to Widgetco.

The same allocation would be made to the foreign affiliate if it sold its output to a second affiliate and not back to Widgetco. In neither case would the foreign affiliate receive a return from marketing its product.

b. *Use of arm's length information.* There are two ways that arm's length information can be used to allocate income to the activities of the Widgetco manufacturing affiliate. The first method has been previously described—to identify the unrelated parties' rates of return on assets utilized in a particular function, taking into account only the non-liquid assets relevant to the function in the line of business being examined. If satisfactory measures of the unrelated parties' assets are available, it should be possible to calculate an appropriate rate of return for each function and apply it to the related party's assets utilized in that function.

The second way to use the arm's length information is to measure it against a yardstick other than rates of return on assets. A common alternative

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[209] Because manufacturing is a broad category, the function or activity would be defined more precisely. An example might be "medium instrumentation fabrication, assembly, and testing."

[210] *See* discussion of risk *infra* section F.

is the ratio of income to operating costs. For example, in the *DuPont* case,[211] and expert witness, Dr. Charles Berry, computed the ratio of gross income before reduction by operating costs and interest to operating costs for DISA, DuPont's Swiss affiliate, and for a number of unrelated parties performing similar functions. This analysis is useful to measure returns on service activities and in other situations where assets are difficult to measure consistently or, more generally, where there is reason to believe that the relationship between income and costs is more stable or easier to measure than the relationship between income and assets. As is true with assets, it is important to consider the types of costs and their relationships to income earned, not just the totals. For example, some analysts have used the ratio of gross income to "above the line" costs. This approach is suspect if the unrelated parties incur proportionately larger amounts of "below the line" costs, such as advertising, than the related affiliate incurs.

The use of both types of unrelated party information is consistent with the fundamental goal of the basic arm's length return method, which is to use information about unrelated parties to determine the returns that would have been earned had the related parties' activities been undertaken at arm's length. Therefore, both approaches are potentially applicable depending upon the availability of either type of information and the appropriateness of using either type of information in the particular circumstances.

c. *Applicability of basic arm's length return method.* The basic arm's length return method should have wide, but not universal, applicability in situations where exact or inexact comparable transactions are not available. It will not be sufficient alone, however, when both of the related parties own preexisting and significant intangible assets that are vital to the success of the project—for example, if Widgetco's foreign affiliate actively markets the products it manufactures in a manner that utilizes signifcant self-developed marketing intangibles. In such cases, it will be difficult to find a set of unrelated parties that possess the same type and amount of intangible assets as the affiliate and are thus able to perform the same activities. It will be difficult, therefore, to obtain the arm's length information needed to assign a return to either affiliate's activities.

This discussion is not meant to imply, however, that the basic arm's length return method is to be avoided whenever an affiliate possesses any amount of intangible assets. It is unlikely, for example, that any manufacturing operation is so simple that it does not involve the use of some intangibles. An affiliate engaged only in manufacturing may employ a skilled labor force, and the efforts expended in recruiting and training it may create at least some amount of going concern type of intangible. Further, the affiliate's experience in producing the parent's designs may lead to the development of some amount of know-how. These facts alone, however, should not prevent the application of the basic method. The reason is that unrelated parties performing similar activities, will, in general, possess these types of "routine" intangibles. Therefore, by measuring the return on assets that unrelated parties earn for performing similar activities and bearing similar risks, the basic method will automatically capture the returns earned by these "routine" intangibles and will properly attribute them to the affiliate. It is only when the affiliate owns some type of intangible that is of major importance to the enterprise, and which few unrelated parties possess, that the basic method is insufficent standing alone to resolve the issue.

The basic arm's length return method will probably be appropriate for most manufacturing affiliates. It should be possible to observe the rates of return on assets or ratios of income to costs that are earned by unrelated parties performing similar manufacturing activities involving similar risks and amounts of routine intangibles. It is possible to think of exceptions, however. Consider a corporation that has assembled a large and valuable team of engineers and skilled craftsmen within a European subsidiary in order to develop or perfect a complex manufacturing process. If no or few unrelated parties would be capable of performing this development activity, the basic arm's length return method will not be sufficient standing alone to resolve the case.

Similarly, the basic method will be applicable to many distribution and marketing affiliates. An affiliate that sets up and maintains a distribution network undoubtedly possesses a going concern intangible; an affiliate that markets products to industrial customers by participating in trade shows and maintaining a staff of salespersons undoubtedly possesses some amount of know-how. However, it seems likely that these sorts of activities are undertaken by unrelated parties that possess similar amounts of going concern value and know-how. Therefore, it should be possible to determine the arm's length returns on assets for these activities, which will include the appropriate returns to these "routine" intangibles. In other situations, however, the basic method alone will not suffice.

2. *Profit split addition to the basic arm's length return method.* Although the basic arm's length return method should be widely applicable, there are situations in which its use alone will clearly be inadequate. A large multinational corporation may have foreign subsidiaries that have research, marketing, planning, manufacturing, and other divisions that are as large and active as those of all but the biggest U.S. companies. Therefore, these affiliates may perform complex functions, take significant risks and own significant intangible assets equal to those of the typical parent corporation. If so, the basic arm's length return method would be impossible to apply because exact or inexact comparables, or rates of returns, for these complex functions are generally unavailable.

Consider Teachem, a U.S. company that is a world leader in designing and producing educational toys. It serves its major overseas market, Western Europe, through a French sales affiliate, Enseignerem. Teachem is planning to license a new set of designs to Enseignerem, who will modify them in minor ways, such as translating the instructions and markings, and who will hire local contract manufacturers to produce them. Enseignerem will utilize its own trademark and be responsible for all aspects of marketing and distribution in Europe. It will decide which of the toys to include in its line, set its own advertising budget, and design campaigns to promote the new line and its Enseignerem trademark. It also maintains a sales force and distribution network. Teachem maintains a research and testing staff to develop new products. The affiliate does not.

Assume further that Teachem has a business policy of not licensing its designs to unrelated parties. Exact comparables will therefore be absent, and inexact comparables may be difficult to find. How would an arm's length return approach be applied to determine the appropriate royalty rate to be paid by Enseignerem for the use of Teachem's designs? The first step is to identify the functions performed by the parent and the subsidiary in the line of business in which the licensed designs are used (the sale of new toy designs in

[211] *See* discussion *supra* Chapter 4.

the European market). The parent should be allocated the returns on the basic product designs, while the subsidiary is entitled to the returns to be earned by its trademarks, marketing efforts, and distribution network, plus any intangibles related to the modifications.

The next step is to identify the functions that employ measurable factors—*i.e.*, activities that do not involve the use of significant intangible assets. These activities should be analyzed using the basic arm's length return method. Enseignerem's distribution and manufacturing activities may be examples. It should be possible to find unrelated parties that perform these types of activities and incur similar business risks. Thus, it should be possible to determine an arm's length rates of return on assets (or income-to-costs ratio) for each activity and apply the arm's length rate or ratio to the appropriate related party factors. The resulting income should then be allocated to the party performing the activity. In this case, income attributable to distribution and manufacturing activities would be allocated to Enseignerem. If the parent corporation performs or is to perform routine activities involving the line of business, they too should be analyzed using the basic method.

These two steps will leave a quantity of income not yet allocated and a set of activities involving significant intangible assets not yet accounted for. The goal of the first two steps is to isolate the income that is attributable to the significant intangible assets owned by the corporate groups as a whole and used in the line of business in question—primarily the designs owned by Teachem and the marketing intangibles (including the trademark) owned by Enseignerem.

The goal of the remaining step is to identify the intangible income attributable to the relevant line of business and then split that income according to the relative value that the marketplace would put on each party's significant intangible assets had they been employed by unrelated parties operating at arm's length. The intangible income is equal to the combined net income from the line of business less the income allotted under the prior steps to functions with measurable factors—*i.e.*, the residual combined net income determined after applying the basic rate of return method to activities with measurable factors of the parties. In splitting the residual amount between the related parties, it is not necessary to place a specific value on each party's intangible assets, only a relative value. Of course, it is easier to state this principle than to describe in detail how it is to be applied in practice. In many cases, there will be little or no unrelated party information that will be useful in determining how the split would be determined in an arm's length setting. Furthermore, the costs of developing intangibles, even if known, may bear no relationship to value, especially in the case of legally protected intangibles, and generally should not be used to assign relative values to the parties' intangible assets. Splitting the intangible income in such cases will largely be a matter of judgment. There are two possible sources of arm's length information, however.

First, it may be possible to find unrelated parties that engage in similar activities and that use similar intangibles. The unrelated party transactions must be economically similar, of course, including the level of economic risks assumed. It would be inappropriate to use a profit split derived from a situation in which the unrelated parties' intangibles were much less (or more) profitable than those owned by the related parties. Further, it would be inappropriate to compare the split derived from a transaction in which an unrelated party conducted only wholesale level marketing, for example, with a related party situation in which an affiliate markets products to consumers. These requirements resemble the standards discussed above for inexact comparables. The analysis of unrelated party profit splits should explain the relationship between the observed profit splits and the overall profitability of the significant intangibles involved with a reasonable degree of accuracy. It is also necessary to analyze the functions that the unrelated licensors and licensees perform and the risks that they bear. Comments in this area should focus on how such an analysis can be implemented.

Second, in come circumstances, a taxpayer may have arm's length evidence of the value of its own or its affiliate's intangibles. For example, a taxpayer may have recently purchased its affiliate and may have some basis for determining the value of the intangible assets using the purchase price.

3. *Arm's length return method and periodic adjustments.* Issues involving periodic adjustments are easier to analyze for the arm's length return method than for the methods involving comparable transactions. Because the basic arm's length return method looks to the factors of production used by the parties, the income allocation should adjust as the factors change. Thus, as an affiliate's plant, equipment, and other measurable factors change from the projections in the initial analysis, the income allocated to them should change. Similarly, the profit split percentage is intended to reflect the relative values of significant intangible assets owned by the parties. When the value of intangibles belonging to one of the parties has changed, the percentage should be changed. For example, a dramatic increase in sales may be due to either a recent product improvement or an extensive marketing campaign, in which case proportionately more profit should be assigned to the developing or marketing affiliate, respectively.

These conclusions are not intended to imply, however, that there must be year-by-year equality between the related parties' incomes and the results of an ideal application of the method. The prior discussion of long-run versus year-by-year results is again relevant. For example, consider an independent firm that uses only plant and equipment. Although it should earn the market rate of return in the long run, it will, in general, experience lower returns or even losses in "lean" times and higher returns at the other end of the business cycle. Periodic adjustments will be required for significant changes in income. Therefore, changes (either negative or positive) that are less than significant may tend to even out in a long-term equilibrium. The absence of a requirement for an adjustment over time when insubstantial changes in income occur is a corollary of the rule that de minimis adjustments will not be made. Chapter 8 discusses this issue, including reasons why explicit inter-year set-offs would not be practicable, in more detail.

D. Priority and Coordination Among Methods

The previous sections of this chapter discussed two broad approaches for analyzing transfers of intangible property: an approach based on comparable transactions and one based on arm's length returns to factors employed. Which is to be used in a given situation? The answer is clear in one case. If an exact comparable is present, it and only it should be used to determine the allocation of income from the transfer. It follows from the definition of exactness that there can be no better evidence of what unrelated parties operating at arm's length would have done.

Finding an exact comparable, however, can be extremely difficult. In the majority of cases, particularly

contested ones, the allocation of income will come from either the inexact comparable method or the arm's length return method. The facts and circumstances of each case should determine which method—or methods—should be used.

There are four basic types of cases. In the first, the intangible for which a section 482 transfer price is being determined is comparable, to those used by unrelated taxpayers and each of the related parties is expected to employ significant and complex intangibles. The inexact comparables method should be chosen.

In the second case, the section 482 intangible is unique, and the affiliate utilizing the intangible will engage in functions that use only measurable factors of production and routine amounts of intangibles. The basic arm's length return method should be used.

In the third case, the section 482 intangible has many competitors and the affiliate using the intangible will engage in simpler kinds of functions. *Both* of the methods are potentially applicable. Under the theory on which they are based, they should yield similar results. This situation should, in practice, be the easiest for the taxpayer to analyze and should engender the least amount of controversy.

In the final case, the section 482 intangible is unique and both of the related parties own one or more significant intangibles that will be used in exploiting it. This is the hardest case. The profit-split version of the arm's length return method must be used.

E. Risk-Bearing in Related Party Situations

Economic environments are full of uncertainty, and this fact must be recognized in all methods of income allocation. In general, in a related party transaction, the market reward for taking risks must be allocated to the party truly at risk.

Companies take risks in all dealings in the marketplace, and are rewarded for doing so. Some of this risk disappears in related party transactions. The legislative history of the Tax Reform Act of 1986 noted:

> In addition, a parent corporation that transfers potentially valuable property to its subsidiary is not faced with the same risks as if it were dealing with an unrelated party. Its equity interest assures it of the ability ultimately to obtain the benefit of future anticipated or unanticipated profits, without regard to the price it sets.[212]

[212] 1985 House Rep., *supra* n. 47, at 424 (1985). A line of court cases not directly relevant to section 482 has reached a similar conclusion. In *Carnation* and succeeding cases, members of an affiliated group of corporations were denied deductions for "insurance premium" payments to another member of the group that insured predominantly risks of the group. The courts decided that no true insurance was present, because there was no true risk shifting between the parent and its affiliates. *Carnation Co. v. Comm'r*, 71 T.C. 400 (1979), *aff'd*, 640 F.2d 410 (9th Cir. 1980), *cert. denied*, 454 U.S. 965 (1981).

How should risk be accounted for in related party transactions? The riskiness of true economic activities gives rise to greater returns in the marketplace; therefore, if one part of an enterprise is inherently more risky than another, more income should be allocated to it. This allocation should be based on the risks arising out of the true economic activities undertaken by the parts of the enterprise, not on mechanisms that merely shift risks within the group.

This conclusion has implications for the proper application of both the comparables approach and the arm's length return approach. First, in searching for appropriate comparables, one should look for situations in which an unrelated party contracted to perform an economic activity that is about equal in riskiness to the activity done by the affiliate; it would be inappropriate to rely on comparables in which the unrelated party undertook a significant risk of some kind not undertaken by the related party. Likewise, in applying the arm's length rate of return method, unrelated party rates of return should be used only if they reflect similar levels of risk. But merely stating that unrelated party transactions must bear the same level of risk as the related party begs the question of what risks the related party should be allowed to assume. It's necessary to decide first what risks may be appropriately assumed by the related parties, depending on the functions that each performs. Only then is it possible to identify what unrelated party arrangements are comparable so that comparable rates of return (or inexact comparable transactions) can be determined.

Returning to the Widgetco example, the affiliate, as the manufacturer, is at risk both with respect to its investment in plant and equipment and with respect to inventories. The risk with respect to plant and equipment will be significant only if the facilities cannot be used for other purposes without incurring significant additional costs. If there is risk that the product will not be successful because there is uncertainty that the product will perform as anticipated or have the usages anticipated, then that risk should be borne by Widgetco as owner of the manufacturing intangible (the patent) and should not be reflected in the affiliate's rate of return. The affiliate's return should reflect only the moderate level of risk borne by manufacturers of products that are reasonably expected to achieve market acceptance. Likewise, if there is uncertainty that the product will be marketed successfully, then that marketing risk also should not be borne by the affiliate but should probably be shared in some fashion by the owner of the manufacturing intangible and the marketer, depending upon the extent to which anticipated profits from the enterprise are attributable to the manufacturing intangibles or the marketing activities.

On the other hand, assume that the risk does not relate to undue uncertainty regarding the anticipated performance or usage of the product or the market acceptability of the product. Assume, instead, that it is highly uncertain whether the product can be produced cheaply enough to make the enterprise viable, or that it is uncertain whether the manufacturing process will produce the product with the same quality as prototypes produced in the laboratory. These risks are risks inherent in the manufacturing function and should probably be shared in some fashion between the owner of the manufacturing intangible and the manufacturing affiliate. If the manufacturing affiliate is itself developing an efficient production process that attempts to achieve low production costs or to assure consistency in quality of output, then the affiliate should be allocated a return that reflects a substantial portion of that risk being borne by the manufacturing affiliate. (In such case, the manufacturing affiliate would bring to bear significant manufacturing process intangibles which would necessitate the application of the profit split addition to the basic arm's length return method.) If, instead, the owner of the intangible has also developed the production process without significant contribution by the manufacturing affiliate, then a separate manufacturing intangible related to the production process has been created, and the owner of such intangible is entitled to an arm's length return. The manufacturing affiliate's return should not bear more than the moderate level of risk borne by manufacturers of products that are reasonably expected to achieve market acceptance.

F. Coordination With Other Aspects of Transfer Pricing

The purpose of this chapter is to provide a framework for the development of new methods for allocating income from intangible

property. Therefore, methods for allocation of income in situations involving provision of services [213] or transfers of tangible property [214] may appear at first glance to be outside the scope of the present discussion. However, the rules for intangible property must be coordinated with the rules for other types of transactions between related parties for obvious reasons. Transfers of tangible property and provision of services frequently accompany a transfer of intangible property; all three are often bundled into a single economic transaction. Further, if the rules relating to one type of transaction become more or less favorable to taxpayers, then they will easily be able to find ways to structure their transactions to take advantage of the disparities.

It may be helpful to establish a priority for single economic transactions that involve more than one type of transfer. For example, licensing agreements often contain clauses that require the licensor to provide training or other services to the licensee. Further, transfers of tangible property often involve intangibles, since the goods transferred often depend for their value on embodied trademarks or patents. In these cases, the basic allocation of income issue should be settled under the rules to be developed for intangible property.

G. Conclusions and Recommendations

1. An approach incorporating two alternative methods for determining transfer prices for intangibles would achieve more appropriate allocations of income and greater consistency in result.

2. The first method uses exact or inexact comparables when they exist.

a. An exact comparable is the same intangible licensed to an unrelated parties, when the circumstances surrounding it and the related party transfer are similar. The price derived from this method has priority over all others.

b. An inexact comparable is an intangible very similar to the intangible transferred to a related party, but not identical. Differences must be definite and ascertainable. If the other intangible, the contractual arrangements, or the economic circumstances are too different, it may not be used as a comparable.

3. The second method uses an arm's length return analysis instead of looking for a comparable transaction and adopting that transfer price as the section 482 transfer price for the related party transfer.

a. The basic arm's length return approach applies when one party to the transaction performs economic functions using measurable assets or other factors, but not using significant intangibles of its own. The first step is to break down the relevant line of business into its component activities or functions and measure the factors (generally assets) utilized by the party performing the simpler set of functions. Income attributable to those functions is determined by identifying rates of return to assets or other factors of unrelated entities performing similar economic activities and assuming similar economic risks, and applying a comparable rate of return to the assets or other factors of the related party. Any residual income is thereby effectively assigned to the other party. The royalty rate or other transfer price for intangibles utilized by the related party must be set to achieve the allocation of residual income to the other party.

b. When both parties perform complex economic functions, bear significant economic risks, and use significant self-developed intangibles, a profit split analysis must be added to the basic rate of return method. Under the profit split analysis, the combined net income from the line of business must first be determined. The profit split analysis assigns the residual net income, determined after applying the basic rate of return method to the measurable assets of the parties, between the parties based upon the relative values of the parties' unique intangibles.

4. While the standards for exact or inexact comparables do not require year-by-year equality between results of the unrelated party arrangements and related party arrangements, unrelated party arrangements can lose their comparability over time as the facts and circumstances relevant to the standards for comparability change. In such case an adjustment to allocations of income may be necessary. Under the arm's length return method, income allocations reflect the functions performed by the parties and—*i.e.*, they reflect the measurable factors of production and the value of significant intangibles employed by the parties in performing those functions. Therefore, income allocated to the related parties under the arm's length return method will change as the functions performed or the factors of production or value of intangibles employed by the parties change.

5. Other than in the case of exact comparables, there should be no priority among these methods. However, each is designed to be utilized under a specific set of facts, so the underlying fact pattern should determine the method or methods to be used.

6. Risk should be accounted for under all methods described in this chapter, since the market rewards risk takers. However, the risk premium should be attributed to the affiliate undertaking the economic function in which the risk inheres.

IV. COST SHARING ARRANGEMENTS

Preceding parts of this study have analyzed the proper prices to be applied, or amount of income to be allocated, when an intangible is transferred between related parties. Cost sharing arrangements are an alternative method by which related parties can develop and exploit intangibles. The history of such arrangements, their acceptance for tax purposes, and an outline of rules that should be followed for post-1986 cost sharing arrangements are discussed in this part.

Chapter 12

History of Cost Sharing

A. Introduction

In general, a cost sharing arrangement is an agreement between two or more persons to share the costs and risks of research and development as they are incurred in exchange for a specified interest in any property that is developed. Because each participant "owns" specified rights to any intangibles developed under the arrangement, no royalties are paid by the participants for exploiting their rights to such intangibles. The Conference Report accompanying the 1986 Act indicates that Congress did not intend to preclude the use of bona fide research and development cost sharing arrangements. However, Congress expected the results produced under a bona fide cost sharing arrangement to be consistent with results under the commensurate with income standard.[215]

Cost sharing arrangements have long existed at arm's length between unrelated parties. Typically, unrelated parties pool their resources and expertise in a joint effort to develop a specified product in exchange for a share of potential profits. The Service has little experience with ordinary unrelated party cost sharing arrangements because they are at arm's

[213] Treas. Reg. § 1.482-2(b).

[214] Treas. Reg. § 1.482-2(e).

[215] 1986 Conf. Rep., *supra* n. 2, at II-6.

length and normally do not have unusual tax consequences.[216]

In view of the limited information currently available on both related and unrelated cost sharing agreements, the Service and Treasury would appreciate receiving information from taxpayers regarding their contractual arrangements and experience with cost sharing.

B. 1966 Proposed Section 482 Regulations

Proposed Treas. Reg. § 1.482–2(d)(4), published on August 2, 1966, provided extensive rules for cost sharing arrangements.[217] The proposed regulations permitted any affiliate (other than one in the trade or business of producing intangible property) to participate in the cost sharing arrangement, provided that the intangible property was intended for use in connection with the active conduct of the affiliate's business. The regulations specifically authorized cost sharing arrangements for single projects, but did not disqualify multiple projects or continuing arrangements. The sharing of costs and risks was required to be proportional to the anticipated benefits to be received by each member from the arrangement. Cost sharing was required to be based on sales, profits or other variable criteria.

The 1966 proposed regulations did not explicitly address the "buy-in" question—that is, the compensation to be paid to the developer or owner of intangibles that are made available at the time the arrangement commences. They did, however, require that an arm's length amount be paid to the affiliate that provides intangibles that substantially contribute to the arrangement. Any required section 482 allocation for services provided by other affiliates was also to be included as a cost of the arrangement.

The proposed cost sharing regulations were ultimately abandoned in favor of the simpler general requirements presently contained in § 1.482–2(d)(4).

C. Current Regulations

The current rules in § 1.482–2(d)(4) state that a cost sharing agreement must be in writing and provide for the sharing of costs and risks of developing intangible property in return for a specified interest in the property that may be produced. A bona fide cost sharing arrangement must reflect an effort in good faith by the participants to bear their respective shares of all costs and risks on an arm's length basis. The terms and conditions must be comparable to those that would have been adopted by unrelated parties in similar circumstances.[218]

D. Foreign Experience With Cost Sharing Agreements

The 1979 OECD Report on *Transfer Pricing and Multinational Enterprises* [219] stated that, although international cost sharing agreements for research and development costs were not common, some had recently been entered into by large multinational enterprises. The OECD report indicated that, with the exception of the United States, none of its members had laws or regulations pertaining specifically to cost sharing arrangements. A major concern expressed by the OECD report was that the participants to the arrangement be in a position to benefit from any intangibles developed under the arrangement before the cost sharing payments would be allowed as deductible expenses. The OECD report stated that the United States did not require a profit mark-up for research and development activities performed. The OECD report reflected a consensus, however, that a profit mark-up would be appropriate when research was performed at the specific request of a member of the cost sharing group. There was also a consensus that withholding taxes should not apply to cost sharing payments when paid.

A few countries have specifically addressed cost sharing arrangements since publication of the OECD report. Germany has developed guidelines [220] for the use of cost sharing agreements in cases in which expenses for research and development can only be valued in the aggregate. Division of the costs must be based on the extent that each party actually benefits or expects to benefit from the arrangement. When determining costs incurred, no profit element is recognized for tax purposes. Appropriate costs to be shared may include a contribution to general and administrative costs.

E. Deficit Reduction Act of 1984

Section 367(d), enacted in 1984, provides that a transfer of intangibles to foreign corporations in an exchange described in section 351 or 361 is to be treated as a sale, with the transferor being treated as receiving amounts that reasonably reflect the amounts that would have been received under an agreement providing for annual payments contingent on productivity, use, or disposition of the property. Such payments are treated as reductions of the foreign entity's earnings and profits and as U.S. source income to the U.S. receipient. The "Blue Book" discussion of section 367(d) indicates that it is to have no application to bona fide cost sharing arrangements.[221] The Blue Book further recognized that it may be appropriate for the Treasury Department to elaborate on the current cost sharing rules to address problems with cost sharing arrangements.[222]

F. Cost Sharing Under Section 936(h)

After 1982, the intangible income of a domestic corporation qualifying for the possessions tax credit must be included in the income of its U.S. shareholders, unless the possessions corporation either elects the cost sharing method or elects the 50% of combined taxable income method, both of which are contained in section 936(h). Under the section 936(h) cost sharing election, the possessions must pay its share of the affiliated group's total research and development costs based on the ratio of sales by the affiliated group of products produced in the possession to total sales by the affiliated group of all products. The cost sharing payment must be computed with respect to "product areas" rather than single projects. "Product areas" are defined, in general, by reference to the three-digit Standard Industrial Classification codes (SIC codes) promulgated by the Commerce Department. Cost sharing payments made by the possessions corporation

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[216] *See generally* Rev. Rul. 56–543, 1956–2 C.B. 327, revoked by Rev. Rul. 77–1, 1977–1 C.B. 161; *see also* Gen. Couns. Mem. 36,531 (December 29, 1975).

[217] 31 FR 10394 (1966).

[218] Whether a particular cost sharing agreement meets the requirements of section 482 is generally a factual question not appropriate for a private letter ruling. There have been private letter rulings regarding issues that are peripheral to the central question of whether a cost sharing agreement is bona fide. However, none of these rulings concerned the characteristics necessary for an agreement to be considered bona fide under the current regulations. See Priv. Ltr. Ruls. 8111103, 8002001, 8002014, and 7704079940A.

[219] OECD, *Transfer Pricing and Multinational Enterprises*, *supra* n. 158, at 55–62.

[220] The guidelines for cost sharing agreements are found in paragraph 7 of the German Transfer Pricing Guidelines. English and French translations of these guidelines are contained in Raedler-Jacob, *German Transfer Pricing/Prix de Transfert en Allegmagne* (Kluwer Law and Taxation Publishers, Devender, Netherlands, and Metzner, Frankfurt, Germany 1984). The guidelines are also available in International Bureau of Fiscal Documentation, *Tax Treatment of Transfer Pricing* (Amsterdam, Netherlands 1987).

[221] *General Explanation of the DRA of 1984*, *supra* n. 143, at 433.

[222] *Id.*

are not treated as income to the recipient but reduce otherwise allowable expenses.

A possessions corporation making the cost sharing election is treated as owning the manufacturing intangibles utilized in its business, and the income from such intangibles then becomes eligible for the possessions tax credit. Pricing of products between a possessions corporation electing the cost sharing method and its domestic U.S. affiliates must still meet the requirements of section 482, taking into account that the possessions corporation is treated as owning the manufacturing intangibles.

Pursuant to an amendment made by the 1986 Act, a possession corporation making the cost sharing election must pay the greater of 110% of the pre-1986 statutory cost sharing amount or the royalty required to be paid to the developer of the intangibles under the commensurate with income standard.[223] Given the special circumstances in which the section 936(h) cost sharing provisions apply and the 1986 Act changes, section 936(h) cost sharing arrangements do not provide much guidance with regard to the appropriate requirements for other cost sharing arrangements.

Chapter 13

Cost Sharing After the Tax Reform Act of 1986

A. Introduction

The Conference Report to the 1986 Act states that, while Congress intends to permit cost sharing agreements,[224] it expects cost sharing arrangements to produce results consistent with the purposes of the commensurate with income standard in section 482—*i.e.*, that "the income allocated among the parties reasonably reflect the actual economic activity undertaken by each." The Committee Report also emphasized three potential problems that should be addressed in any revision of § 1.428–2(d)(4).

The first problem is selective inclusion in the arrangement of high profit intangibles. The Report states:

> Under a bona fide cost sharing arrangement, the cost sharer would be expected to bear its portion of all research and development costs, on successful as well as unsuccessful products within an appropriate product area, and the cost of research and development at all relevant development stages would be included.[225]

The second issue concerns the basis on which contributions are to be measured. The Report states:

> In order for cost-sharing arrangements to produce results consistent with changes made by the Act to royalty arrangements, it is envisioned that the allocation of R&D cost-sharing arrangements generally be proportionate to profit as determined before research and development.[226]

The third specific Congressional concern relates to the "buy-in" issue. The Report states:

> In addition, to the extent, if any, that one party is actually contributing funds toward research and development at a significantly earlier point in time, or is otherwise effectively putting its funds at risk to a greater extent than the other, it would be expected that an appropriate return would be required to such party to effectively reflect its investment.[227]

This chapter examines these and other issues that have arisen with regard to the requirements for a bona fide cost sharing arrangement after the Tax Reform Act of 1986. It should be made clear at the outset that, if an arrangement is not bona fide, any payments made under the cost sharing agreement will be considered as offsets to the arm's length price that should have been paid for the intangibles. While § 1.482–2(d)(4) limits adjustments by the Service in the context of cost sharing arrangements to an adjustment of contributions paid, this regulation presupposes that the arrangement is bona fide. If the arrangement is not bona fide, normal arm's length standards would apply, including the commensurate with income standard.

B. Products Covered

In section 936(h), product area research is defined generally by reference to the three-digit Standard Industrial Classification (SIC) codes, meaning that the section 936(h) cost sharing arrangement covers research and development costs over a very broad product area.[228] As described above, the legislative history to the 1986 Act contemplates that a section 482 cost sharing arrangement should cover all research and development costs within an "appropriate product area." The approach in section 936 and in the 1986 Act legislative history contrasts to the proposed 1966 regulations. Cost sharing arrangements described in the 1966 proposed regulations could cover a single project, although multi-project or product area cost sharing agreements were not prohibited.

As discussed in section C below, broad product area cost sharing arrangements raise the issue of whether the potential benefits are proportionate to the participants' cost sharing payments. This issue is of particular concern in cost sharing arrangements of foreign-owned multinational groups if U.S. persons are participants, since cost sharing payments made by U.S. participants are deductible for U.S. tax purposes.[229]

On the other hand, single product arrangements present the potential that cost sharing may be employed solely for high profit potential intangibles, such that foreign affiliates of U.S. multinational groups acquire the rights to such intangibles without bearing the cost of research related to low profit potential intangibles and unsuccessful research. The incentive to include selectively only high profit potential intangibles in a cost sharing arrangement is most acute when tax haven entities are the primary or predominate participants in the arrangement.[230]

Three-digit SIC code product areas would seem to be the appropriate scope of most cost sharing arrangements. Both the Service or the taxpayer should be permitted to demonstrate, however, that a narrower or broader agreement is more appropriate. Taxpayers choosing a narrower agreement would need to show that the agreement is not merely an attempt to shift profits from successful research areas while leaving expenses of unsuccessful or less successful areas to be absorbed by the U.S. or higher tax affiliates. For example, some members of a multinational food and beverage group might be interested in research and development to develop a multipurpose artificial sweetener, yet their respective food and beverage product lines might be sufficiently diverse (or might be products for which research and development is not necessary) that a single product agreement would be appropriate. Taxpayers choosing a broader agreement would need to show that the agreement is not being used to charge U.S. affiliates or other participants for research and

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[223] Section 936(h)(5)(C)(i)(I), as amended by § 1231(a)(1)(A), Pub. L. No. 99–514, 100 Stat. 2085 (1986).

[224] 1986 Conf. Rep., *supra* n. 2, at II–638.

[225] Id.

[226] *Id.*

[227] *Id.*

[228] Section 936(h)(5)(C)(i)(I).

[229] Another potential abuse may arise in the context of a domestic affiliate that is a co-developer of the intangible, or otherwise participates in a *de facto* cost sharing arrangement. In such cases, the foreign entity may try to avoid the characterization of a cost sharing arrangement in order to extract royalties from the domestic affiliate, particularly where the withholding tax on the royalties is reduced by a tax treaty and the royalty income is not taxed or lightly taxed by the foreign jurisdiction.

[230] *See Lilly, supra*, n. 57, at 1150.

development without reasonable prospect of benefit. From the Service's perspective, a product area that is broader or narrower than three-digit SIC codes may be necessary to avoid these distortions.

C. Cost Shares and Benefits

Underlying all of the problems discussed in the legislative history of the 1986 Act in relation to cost sharing arrangements is the fundamental principle that the costs borne by each of the participants should be proportionate to the reasonably anticipated benefits to be received over time by each participant from exploiting intangibles developed under the cost sharing arrangement. This cost share/benefit principle has several facets, including the appropriate product area to be covered (discussed in section B above), definition of costs to be covered (discussed in section D below), and the measurement of anticipated benefits and several other issues discussed below.

1. *Assignment of exclusive geographic rights.* In general, the computation of cost shares should reflect a good faith effort to measure reasonably anticipated benefits to be derived from the arrangement. While it is difficult under the best of circumstances to predict what benefits each of the participants will derive, it is virtually impossible to do so unless the participants are assigned specific exclusive geographic rights to intangibles developed under the arrangement. Specific assignment of rights could take the form of assigning the rights to manufacturing intangibles relating to products to be sold in the United States to a U.S. affiliate, rights related to European markets to an Irish affiliate, rights related to Middle Eastern and Pacific rim markets to a Singapore affiliate, etc. In such case, the U.S. affiliate would derive the income attributable to the manufacturing intangibles developed under the arrangement with respect to any sales in U.S. markets regardless of whether ultimately the U.S. affiliate is manufacturing the products sold in U.S. markets. (As discussed below, however, the participants must be those expected to exploit the intangibles by performing the manufacturing function themselves.)

Alternatively, exclusive worldwide rights to different types of intangibles developed under the arrangement could be assigned to particular participants. This latter type of arrangement would warrant special scrutiny to assure that the cost shares reflect reasonably anticipated benefits.[231] Moreover, if research activities are not common to the various types of intangibles produced under the arrangement, then the research related to each type of intangible should be charged to the specific affiliate that will receive the rights to that type of intangible. This is particularly true of arrangements where one of the parties produces components. The Service and Treasury would welcome comments on this topic. In short, such research activities are not the proper subject of a cost sharing arrangement.

For various reasons, including consistency with longstanding section 367(a) policy, U.S. geographic rights should never be permitted to be assigned under a cost sharing arrangement to a foreign person if either: (1) The participants are part of a U.S. owned multinational group; (2) a significant portion of the research is performed in the United States; or (3) any U.S. person participates in the arrangement. Accordingly, U.S. rights could be acquired by a foreign person only in the case of a foreign-owned multinational group that conducts the research overseas and does not include any U.S. affiliates as a participant in the arrangement.

2. *Overly broad agreements.* The principle that cost shares be proportionate over time to the reasonably anticipated benefits may affect the issue of whether cost sharing arrangements are overly broad in terms of the products covered or the affiliates participating in the agreement. For instance, a manufacturing conglomerate makes widgets and gadgets. An overall cost sharing agreement for research and development may be inappropriate if a particular affiliate does not make both widgets and gadgets. If a disproportionate amount of research and development relates to widgets but affiliate A manufactures only gadgets, affiliate A would be subsidizing the research for the widget manufacturers. Although every participant in a cost sharing agreement should not be required to benefit from every intangible that may be produced, cost shares should be proportionate to the reasonably anticipated benefits. It may be necessary, therefore, either to have separate cost sharing agreements for widget and gadget research, to adjust affiliate A's cost share to reflect the costs related to gadget research, or to exclude affiliate A from the cost sharing arrangement.[232]

3. *Direct exploitation of intangibles by participants.* The cost share/benefit principle may otherwise affect who may participate in a cost sharing arrangement. In general, the benefit to be derived under a cost sharing arrangement is the right to use a developed intangible in the manufacture of a product. Therefore, the participant must be in a position to exploit the intangible in the manufacture of products.[233] It is not necessary that all participants be capable of manufacture at the time costs are being incurred, so long as it is reasonably anticipated that the participants will be capable of manufacture once the intangibles are developed and will use intangibles developed under the arrangement in the manufacture of products.[234]

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[231] As discussed in the next paragraph, rights to exploit an intangible in the U.S. must belong to a U.S. affiliate.

[232] The exclusion of affiliate A from the cost sharing arrangement raises the question of which of the other participants should pay for research related to intangibles that may be used by affiliate A. For various reasons, not all affiliates that anticipate using the intangibles developed under the cost sharing agreement may actually participate in the arrangement. For example, there may be reason to exclude a particular affiliate that manufactures only certain types of products and therefore will use only certain types of intangibles developed under the arrangement. Alternatively, the arrangement may not be recognized under foreign law for tax purposes, such that a deduction for cost sharing payments would be denied. In such cases, some affiliate must fund research for intangible rights to be used in manufacturing by the nonparticipants. While there is no clear answer, it seems appropriate that the affiliate that performs the research should fund and receive the residual rights.

[233] As a roughly analogous requirement, the 1966 regulations required that participants use the intangibles developed under the cost sharing arrangement in the active conduct of their trade or business. Prop. Treas. Reg. § 1.482-2(d)(4)(ii)(b), 31 FR 10,394 (1966). The 1966 regulations would also have excluded as participants companies in the trade or business of performing research for others. This latter exclusion seems unnecessary so long as the affiliate that performs the research and development funds an appropriate portion of the research and development costs and is capable of using the intangible rights that it acquires under the agreement in the manufacture of products.

[234] Expectations will not always prove true, and in some situations the participant that acquires certain rights to intangibles developed under the cost sharing agreement will not ultimately directly exploit those rights. For example, assume that a Dutch affiliate acquires the European rights to intangibles developed under the arrangement with the anticipation of manufacturing products for European markets in Ireland. It later appears that it will be necessary for various reasons to have a locally incorporated entity manufacture in Germany products to be sold in the German market. Unless the German rights to the intangible are transferred in a contribution to capital or other tax free transaction, the German rights would have to be licensed or sold to the German affiliate. In either case the intangible would be subject to section 482 and, generally, the subpart F provisions would treat the resulting royalty or sales income as foreign personal holding company income includible in subpart F income.

4. *Measurement of anticipated benefits.* In order to determine whether cost shares are proportionate to reasonably anticipated benefits, it is necessary to measure the anticipated benefits. Obviously there has to be some prediction, rough though it may be, of the kinds of intangibles likely to be produced and the relative proportion of units that will be produced and sold under the rights of each participant. In many cases, estimated units of production may be an appropriate measure of benefit assuming that there is a uniform unit of production that can be used as a measuring device. If there is no uniform unit of production, then sales value may be an appropriate measure, if measured at the same level of production or distribution for all participants. As stated in section A above, however, the Conference Report anticipated that cost shares be proportionate to profit as determined before research and development. Given the legislative history, therefore, neither units of production nor sales would be an appropriate measure if it were apparent (or became apparent during the course of the agreement) that profitability differed substantially with respect to various participants' rights. This would be true, for example, in situations in which geographic markets differ significantly in terms of production costs, market barriers, or other factors that bear significantly on profitability. In such cases, estimated gross profit or net profit may have to be used, or some adjustments may have to be made to cost shares determined on the basis of units of production or sales.

It is not realistic, however, to expect taxpayers in most instances to be able to estimate gross or net profit margins from estimated sales. Even estimates of units produced or sales value probably would be imprecise. It may be that a cost sharing agreement should not be recognized if units of production or sales are not appropriate measures and gross or net margins are extremely difficult to estimate. In such cases, the relationship between cost shares and anticipated benefits may simply be too tenuous.

5. *Periodic adjustments.* The language in the legislative history that the results of cost sharing arrangements be consistent with changes made by the 1986 Act to royalty arrangements has one other obvious implication. The cost shares should be adjusted periodically, on a prospective basis, to reflect changes in the estimates of relative benefits, including a change in the measurement standard if that becomes appropriate. In any event there is always a risk that the cost sharing agreement could subsequently be rejected as a bona fide arrangement if the estimates of benefits derived under the arrangement proved to be so substantially disproportionate to the cost shares that the estimates of benefits cannot be considered to have been made in good faith. Periodic adjustments to the cost sharing arrangement would reduce that risk.

D. Costs To Be Shared

In general, the costs to be shared should include all direct and indirect costs of the research and development undertaken as part of the arrangement. Direct costs would include expenses for salaries, research materials, and facilities. However, there should be a limitation on the annual inclusion of costs for depreciable assets that is consistent with U.S. tax accounting principles. Otherwise, deductions for outbound payments may be overstated. Indirect costs should include a portion of overall corporate management expense and overall interest expense that is allocated and apportioned to research and development activities in a manner consistent with U.S. expense allocation principles. The costs to be reimbursed should be net of any charges for research undertaken on specific request or for any government subsidies granted.[235]

E. Buy-in Requirements

As previously stated, the legislative history to the 1986 Act states that a party to a cost sharing arrangement that has contributed funds or incurred risks for development of intangibles at an earlier stage must be appropriately compensated by the other participants—hence the requirement for a buy-in payment. One of the primary reasons for adopting cost sharing provisions is to avoid the necessity of valuing intangibles. Yet, if there are intangibles that are not fully developed that relate to the research to be conducted under the cost sharing arrangement, it is necessary to value them in order to determine an appropriate buy-in payment.

There are three basic types of intangibles subject to the buy-in requirement. A participant may own preexisting intangibles at various stages of development that will become subject to the arrangement. A company may also conduct basic research not associated with any product. Finally, there may be a going concern value associated with a participant's research facilities and capabilities that will be utilized.

Fully developed intangibles command a royalty to the extent used by other participants and are generally not appropriately incorporated into a cost sharing arrangement. Thus, royalties for preexisting developed intangibles may not be included in the buy-in payment, but instead are subject to the general rules of the commensurate with income standard. Because a subsequent substantial deviation in the income stream from the intangible might require an adjustment, it is important to identify separately the income stream and royalties related to preexisting developed intangibles. In many situations, research is performed with respect to preexisting intangibles in order to improve the preexisting intangibles (improved software, for example) or to develop the next generation of intangibles. The requirement for an adjustment to the royalty paid for the intangible would not apply if the intangible is enhanced in value solely as a result of research undertaken after inception of the cost sharing arrangement.

The buy-in payment should reflect the full fair market value of all intangibles utilized in the arrangement and not merely costs incurred to date. To permit a buy-in based on cost would be inconsistent with the provisions of section 367(d) which effectively precluded the tax-free transfer of intangibles and, by implication, the transfer of intangibles at cost.[236] The buy-in payment could take the form of lump sum or periodic payments spread over the average life expectancy of contributed intangibles—perhaps on a declining basis since intangibles generally have greater value in the earlier stages of their life cycle. Obviously, periodic payments should reflect the time value benefit of not making a lump sum payment at the inception of the agreement.

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[235] It is generally expected that there will not be a profit element in cost sharing agreements. A profit should be required, however, for research performed at the specific request of a group member or for a person outside the arrangement group. OECD, *Transfer Pricing and Multinational Enterprises, supra* n. 158, at p. 119. In either case, the amount received should reduce the costs to be shared. One item that should not be included in the costs to be shared among the participants is the buy-in cost of transferring intangibles from the party by whom they were developed to the other participants. This general subject is discussed in section E below.

[236] The legislative history of the 1984 Act states that the provisions of section 367(d) can be avoided by selling intangibles subject to the application of section 482 to the sale. S. Rep. No. 169, 98th Cong., 2nd Sess., vol. 1 at 368 (1984). The legislative history did not contemplate that a transfer at cost would avoid the application of section 367(d).

A "buy-out" occurs when a participant withdraws from a cost sharing arrangement. Having funded a portion of research and development prior to withdrawal, that person owns a share of whatever the agreement has borne to date and must be compensated by the other participants for the value of what the arrangement has produced to date and not merely reimbursed for costs incurred to date.

A "secondary buy-in" is required when new members are admitted after a cost sharing agreement is in place. If a new member is acquiring a portion of the geographic rights of one of the original participants, any buy-in amount should be paid to the affiliate whose geographic rights are being reduced. Once again, in order for the buy-in to be arm's length, any new member must compensate the original participants in a manner similar to the original buy-in computation, but based upon current values and not merely costs incurred to date.

F. Marketing Intangibles

The 1986 amendment to section 482 provides that the term "intangible property" shall have the same meaning as in section 936(h)(3)(B). The section 936 definition of intangible property includes marketing intangibles. This does not mean, however, that marketing intangibles are necessarily the proper subject of cost sharing rules developed with manufacturing intangibles in mind.

In general, marketing costs yield a present benefit (even if also a future benefit) and, therefore, are currently deductible expenses for which a charge must be made under the services provisions of the section 482 regulations if the benefit therefrom accrues to a related person.[237] (Research expenses related to manufacturing intangibles generally do not yield present benefits but, nevertheless, are currently deductible pursuant to the special provisions of section 174.) In the context of marketing expenses, the services regulations under section 482 presently serve the same function as would rules governing cost sharing arrangements in identifying the potential beneficiaries of a marketing expense and requiring an appropriate charge (albeit with a profit element in certain cases). There seems to be no need for an additional regime to deal with the tax treatment of cost sharing arrangements related to marketing expenses. Comment is requested, however, concerning any situations which are believed not to be covered by the section 482 services regulations or any perceived problems which arise under those regulations as they affect marketing expenses.

G. Character of Cost Sharing Payments

Under section 936(h), the amount of any required cost sharing payment is not treated as income of the recipient, but instead reduces the amount of deductions otherwise allowable.[238] More generally, when expenditures are made with the expectation of reimbursement, they are treated as loans, and therefore the reimbursement does not constitute gross income to the recipient.[239] Accordingly, cost sharing payments are not income to the recipient but, instead, reduce costs which are otherwise deductible in computing taxable income and earnings and profits. Since cost sharing payments are not gross income to the recipient, no U.S. withholding tax would be imposed on outbound cost sharing payments made by a U.S. person to a foreign person.

Characterizing cost sharing payments in this manner also reduces the amount of research and development expenses of the entity performing the research that are subject to allocation under the rules of § 1.861–8 and increases the amount subject to allocation by the participants making the cost sharing payments.[240] Furthermore, since the payments received by the entity performing the research will not constitute income, payments received by a U.S. entity from foreign affiliates are not foreign source income to the U.S. entity.

For purposes of calculating the credit allowable under section 41 for research expenditures, members of a commonly controlled group of corporations may disregard intercompany reimbursements for research expenditures.[241] This rule treats a U.S. company that actually performs U.S. situs research as incurring 100 percent of the research expenses for purposes of calculating the research credit, even if the U.S. company is reimbursed for a portion of those expenses pursuant to a section 482 cost sharing arrangement.

One group of taxpayers has suggested that the regulations should allow a cost sharer to denominate its rights under a cost sharing arrangement as a geographically exclusive, no-royalty, perpetual license if a license is required to obtain local country tax benefits or if the parent would be in a better position to protect against infringement than the subsidiary. If under U.S. law, the participant is clearly the beneficial owner of intangibles developed under the cost sharing arrangement, then labeling its interest as a "license" will not change the characterization for U.S. tax purposes, even if legal title to the rights are held by its parent serving as nominee owners of such rights. Therefore, whatever label is applied to the arrangement for foreign law purposes generally would not affect its U.S. tax treatment unless the label affects substantive legal rights relating to the intangible.

H. Possessions Corporations

The cost sharing payment made by a possessions corporation pursuant to the special cost sharing election under section 936(h)(5)(I) must be determined under those rules and not under a contractual cost sharing arrangement that would otherwise govern the charges incurred by the participants. Indeed, the statute and regulations explicitly provide that the section 936(h) cost sharing payment shall not be reduced by a contractual cost sharing payment.[242] Under section 936(h), the cost sharing payment by the possessions corporation must equal the greater of the amount required under the new commensurate with income standard or 110 percent of the pre-1986 Act statutory cost sharing amount. Under the commensurate with income standard, the cost sharing amount must at least equal the fair market royalty which would have to be paid to the developer if the manufacturing intangibles had been licensed (even in cases in which the intangible had previously been transferred in a section 351 exchange).

The amount paid under section 936(h) entitles the possessions corporation to

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[237] Treas. Reg. § 1.482–2(b)(2).

[238] Section 936(h)(5)(C)(i)(IV)(a); Treas. Reg. § 1.936–6(a)(5).

[239] *Boccardo v. U.S.*, 12 Cl. Ct. 184 (1987).

[240] Section 1.861–8 sets out rules for allocating and apportioning deductions between U.S. and foreign source gross income. A special allocation rule gives companies the right to allocate fewer U.S. research and development expenses to foreign source income, even though the income generated by the expenses is foreign source. Treas. Reg. § 1.861–8(e)(3)(B)(ii). Under the 1986 Act, 50 percent of all amounts allowable as a deduction for qualified domestic research and experimental expenditures is apportioned to income from sources within the United States, with only the remaining 50 percent apportioned on the basis of gross sales or gross income of companies benefitting from the research and development. This special provision applies only to expenses incurred in tax years after August 1, 1986, and on or before August 1, 1987. § 1216, Pub. L. 99–514, 100 Stat. 2085 (1986). Provisions similar in concept are currently under consideration in Congress.

[241] Tres. Reg. § 1.44F–6(e); Priv. Ltr. Rul. 8643006 (July 23, 1986).

[242] Section 936(h)(5)(c)(i)(I); Treas. Reg. § 1.936–6(a)(3).

be treated as the owner of manufacturing intangibles previously developed by its U.S. affiliates. The fact that a possessions corporation has entered into a cost sharing arrangement for the development of future intangibles and is paying a lesser amount under that arrangement does not affect the amount required under the section 936(h) cost sharing election. Indeed, since the section 936(h) cost sharing payment is compensation for intangibles previously developed and the section 482 cost sharing payment made pursuant to the contractual cost sharing agreement is for the cost of developing new intangibles, both amounts appropriately must be paid initially—one by statutory election and the second pursuant to the contractual arrangement. It might be argued that, once intangibles are developed under the section 482 cost sharing arrangement, the possessions corporation's section 936 cost sharing payment should be reduced so that the possessions corporation does not pay a second time for that intangible. The statute, however, precludes that result.

I. Administrative Requirements

Taxpayers seeking to enter into cost sharing arrangements should be required to make a formal election and to document the specifics of the agreement contemporaneously. Any U.S. participant should be required to include a copy of the agreement with its first return filed subsequent to the agreement's effective date. Taxpayers making the election would agree to produce, in English and in the United States, the records of foreign participants necessary to verify the computation and appropriateness of the respective cost shares within 60 days of a request by the Service. These records would include identification of the SIC code or other basis used to determine products covered by the agreement, and summary information concerning sales, gross margins, and net income derived with respect to such products. The House Report accompanying the 1986 Act suggests that the Service should require similar records to be kept and produced under the authority of section 6001 for section 936(h) cost sharing agreements.[243]

J. Transitional Issues for Existing Cost Sharing Agreements

It is unlikely that there will be preexisting cost sharing agreements that will meet all of the standards described above. If such agreements are not recognized, the Service and taxpayers will encounter significant problems in determining ownership of preexisting intangibles and the treatment of the payments that have been made pursuant to the preexisting agreements. Some type of grandfather treatment would therefore appear to be appropriate. One possibility would be to permit any cost sharing agreement that conforms to the requirements of the existing regulations, and that has been in existence for more than 5 years prior to 1987, to be recognized fully if conformed within a certain period after the promulgation of the new rules with respect to matters other than the buy-ins that occurred prior to June 6, 1984 (the effective date of section 367(d)). If the cost sharing agreement has been in effect for less than 5 years and the agreement does not conform substantially to the new rules, then the old agreement would not be recognized. If a new agreement that conforms to the new rules is adopted, then all payments pursuant to the old agreement would be taken into account as an adjustment to any required buy-in payments relating to the new agreement.[244]

K. Conclusions and Recommendations

1. Congress intended to permit cost sharing arrangements if they produce results consistent with the commensurate with income standard in section 482.

2. Three-digit SIC code product areas seem to be the appropriate scope for most cost sharing arrangements. Both the Service and the taxpayer should be permitted to demonstrate, however, that a narrower or broader agreement is more appropriate.

3. The fundamental principle underlying the concerns identified in the legislative history of the 1986 Act with respect to cost sharing is that costs borne by each of the participants must be proportionate to the reasonably anticipated benefits to be received over time by the participants from exploiting intangibles developed under a cost sharing arrangement. This principle has several implications.

a. In order for taxpayers to make a good faith effort to predict anticipated benefits, it is essential that the participants be assigned specific and exclusive geographic rights to intangibles developed under the arrangement. U.S. geographic rights generally should not be permitted to be assigned to a foreign person.

b. Cost sharing arrangements may be overly broad in terms of products covered or affiliates participating in the agreement if some participants would utilize only a narrow range of intangibles developed under the agreement.

c. Since the benefit to be derived under a cost sharing arrangement is the right to use developed intangibles in the manufacture of a product, participants must generally be capable of manufacturing and using developed intangibles in the manufacture of products.

d. In estimating anticipated benefits, units of production or sales value generally would be an acceptable unit of measure unless profitability would reasonably be expected to differ significantly with respect to various participants' rights. In the latter instance, some adjustments must be made, or some other standard of measurement utilized, to reflect more accurately the reasonably anticipated benefits to be derived by the participants.

e. Cost shares should be adjusted periodically, on a prospective basis, to reflect changes in the estimates of relative benefits, including a change in the measurement standard if that becomes necessary.

4. The costs to be shared should include all direct and indirect costs determined in a manner consistent with U.S. tax accounting and expense allocation principles.

5. A party that contributes funds or incurs risks for development of intangibles at an earlier stage must be appropriately compensated by the other participants in the form of a buy-in for the value of preexisting intangibles (including basic research and the going concern value of research capability).

a. Fully developed intangible command a royalty and should not be incorporated into a cost sharing agreement, with the result that the buy-in may not reflect compensation for fully developed intangibles.

b. A secondary buy-in is required whenever a participant withdraws from a cost sharing arrangement or a new participant enters the arrangement.

6. Expenses relating to marketing intangibles are presently governed by the services provisions of the section 482 regulations. There seems to be no need for marketing expenses to be subject to a cost sharing regime developed for manufacturing intangibles.

7. Cost sharing payments are not income to the recipient but, instead, reduce costs that are otherwise deductible for purposes of computing

[243] 1985 House Rep., *supra* n. 47, at 418–419.

[244] This approach is generally consistent with the cost sharing regulations published in 1968, which permitted pre-existing cost sharing agreements to be modified within 90 days of publication of the section 482 regulations. Treas. Reg. § 1.482–2(d)(4).

taxable income and earnings and profits. Consequently, outbound cost sharing payments are not subject to U.S. withholding tax, and inbound payments are not foreign source income.

8. Since a section 936(h) cost sharing payment is compensation for intangibles previously developed and a section 482 cost sharing payment is for the cost of developing new intangibles, both amounts appropriately must be paid initially if a possessions corporation making the section 936(h) cost sharing election enters into a section 482 cost sharing arrangement. Under the statute, the section 936(h) payment may in no event be reduced to reflect amounts paid under a section 482 cost sharing agreement.

9. Taxpayers should be required to make a formal election if they enter into a cost sharing arrangement, to file a copy of the agreement with their return, and produce records necessary to verify the computation and appropriateness of the respective cost shares.

10. Cost sharing agreements in existence for more than five years prior to 1987 should be grandfathered if they conform in certain respects with new rules to be promulgated. Other agreements will not be bona fide unless and until they substantially conform to the new rules.

Appendix A—Analysis of Questionnaire Responses

A. IRS Access To Pricing Information

- Significant section 482 issues were identified by IEs over 70 percent of the time and by the domestic agent about 10 percent of the time.
- Significant section 482 issues were initially identified using the following sources:

Source:	Percentage of responses
Form 5471	50.36
Form 5472	23.74
Financial data	13.67
Prior exam	7.19
Industry experience	2.88
Customs data	2.16

- Time alloted to develop the 482 issue was determined by:

	Percentage of responses
Case manager	51.32
Domestic group manager	7.78
I.E. manager	35.53
Branch chief	5.26

- About 66 percent of the IEs reported that the decision on time allotment was made after receiving adequate opportunity to analyze the section 482 issue.
- Almost 90 percent of respondents stated the time alloted to examine the section 482 issue was flexible.
- Factors affecting time allotment were:

	Percentage of responses
Potential yield	32.84
Assurance of yield	4.48
Both of the above	28.35
Neither of the above	34.33

- Annual Reports to shareholders were used to identify or develop section 482 issues in 34 percent of the cases.
- The portions of the Annual Report specifically considered for identification or development of section 482 issues were:

	Percentage of responses
Income tax notes	19
Segment information note for product line	31
Segment information for geographic area	36
Other	14

- Sixty-five percent of respondents thought that information on Forms 5471 and 5472 was helpful in planning exams.
- In 29 percent of the reported cases, section 482 issues were identified and not pursued. In 20 percent of the reported cases, section 482 issues were identified and not changed.
- The taxpayer had no readily available basis to support its section 482 transaction in almost 75 percent of the cases.
- In over 50 percent of the reported cases, taxpayers failed to make timely and complete responses to questions asked in developing section 482 issues.
- More than 66 percent of the responses indicate that there was no reasonable explanation for any delay in responding to questions aimed at developing section 482 issues.
- Reasons given for delays in responding to IDRs:

—Tax department staffing.
—Records located overseas.
—Foreign parent refused to produce records.
—Extremely detailed requests for information from the foreign subsidiaries.
—Lack of cooperation existed between the parent and subsidiary.

- Unreasonable delays in responding to requests for information concerned:

—Control of affiliates—34.4 percent of responses.
—Existence of comparable transactions with third parties—48.5 percent of responses.
—Terms of comparable transactions with third parties—48.5 percent of responses.

- The average length of delay to responses was 12.2 months. The portion of the delay deemed as reasonable by the responding IEs averaged 2.2 months.
- Using a summons to obtain information was considered as follows:

	Percentage of responses
Considered	41
Discussed with taxpayer	34
Employed	5

- IE descriptions of circumstances in which issuance of a summons was considered:

—Formal summons discussed—not used because case manager felt that the action would close the door to future cooperation in domestic audits.
—It was felt that the issuance of a summons for records would only delay the overall development and completion of the case.
—Summons considered due to delay in response to agent and economist. Not issued as taxpayer eventually did respond, although the responses were generally inadequate.
—Used as a threat to speed-up IDR response time. Generally not useful.
—Taxpayer complained that our request was overly broad. After discussion with Branch Chief, including the use of section 982 and summons, Taxpayer offered an alternative to books and records, under which most of the information requested was eventually received.

- Section 982 procedures arose to the following extent:

	Percentage of responses
Considered	26.6
Discussed	17.6
Employed	4.0

- IE descriptions of the circumstances in which section 982 was considered:

—The section 982 procedures were mentioned in opening conference.
—Taxpayer's practice was to furnish as little information as possible with approximately a 90-day turn around time. When subsequent IDRs needed to be issued, the same practice was followed.
—Taxpayer is well aware of our open year policy and planned closing dates. IE was of the opinion that taxpayer feels if they use delaying tactics the case will become "old" and will be closed out undeveloped. Taxpayer's delaying tactics prevented the issuance of follow up IDRs. Taxpayer refused to furnish its parent's cost data for the products that were at issue.
—Taxpayer was late in providing data after initial adjustments were prepared. Taxpayer's attorney's tactic was to continue indefinite discussion of the issue, including appeals to the National Office.
—Taxpayer's responses to IDRs took from 6 months to a year. The audit was stretched out to the point that the planned audit closing date became a problem.
—Section 482 issues were raised on the previous audit. The prior examiner

received virtually no information from the taxpayer. Detailed information was submitted by the taxpayer in the Appeals protest. This information was used by the IE and the economist in subsequent years.
—Taxpayer clearly not responsive to IDRs that could hurt him. In three cycles, the key IDRs were not answered.
—District allows taxpayers excessive amount of time to respond to IDRs. A two year audit cycle takes five years to complete.

• According to responding IEs, the following adversely affected the development of section 482 issues:

	Number of responses	
	Yes	No
(a) 3.0, 5 open years policies	21	44
(b) Planned audit closing dates	28	39
(c) Taxpayer tactics	31	30

• Competent Authority considerations affected the resolutions of 10% of the reported cases.

• Only 3% of respondents claimed that competent authority considerations affected their decision to pursue any section 482 issue.

• Appeals settled 28% of the section 482 issues in the reported cases.

• 69% of respondents disagreed with the terms of the Appeals settlement.

• Counsel was involved in 26% of cases settled by Appeals.

• 76% of respondents did not receive a copy of the Appeals settlement.

• The section 482 issues were resolved at the examination level 43.4% of the time in the reported cases.

• The IE was appropriately consulted in 90% of the reported cases resolved by Examination.

• The section of the 482 regulations providing the basis for Examination's resolution was:

	Percentage of responses
Comparable uncontrolled price	32
Resale price method	8
Cost plus method	24
Other	36

• The IE agreed with the resolution by Examination 85.7% of the time.

B. Application of Pricing Methods

• IEs stated that the taxpayer used comparables as follows with regard to section 482 transactions:

	Percentage of responses
Planning transactions	9
Defending transactions	33
Did not rely on comparables	58

• 71% of IEs who responded stated that the comparables used were not made available to them at or near the beginning of the examination.

• Description of comparable(s) relied on by taxpayer in planning or defending its section 482 transaction:
—In performance of services, taxpayer tried to establish comparables based on charges to third parties.
—The taxpayer presented pricing data with an unrelated distributor of similar property in a different country.
—Sales invoices to third parties.
—Contracts between unrelated third parties.
—Taxpayer claimed it was charging the same royalties to all of its foreign subsidiaries.
—Taxpayer secured quote from third party in small quantity transaction.
—Weighted average of Canadian CFC's third party sales. Method required by Revenue Canada.
—Sales to 50% owned subsidiaries.
—Industry norms.

• Only 19% of those responding accepted the taxpayer's comparables.

• Examples of explanations why taxpayer's comparables were not accepted:
—The taxpayer was looking only at the services and not looking at the overall transaction, i.e. providing services, the transfer of technology and other intangibles.
—The comparables did not reflect true arm's length pricing because they ignored the fact that the parent performed substantial marketing, distribution, and trademarking functions, or the circumstances were otherwise different.
—The taxpayer's method generated approximately 185% of the combined profit to the low tax entity and a loss to the U.S. parent.
—The taxpayer's comparables included very small volumes.

• The taxpayer relied on comparables based on "industry norms" in 41% of the cases reported.

• Description of industry average "comparables" submitted by the taxpayer to support its assertions:
—Robert Morris Associates—Annual Statistics by SIC Code of Gross Profit Margins for Wholesale Automotive Equipment Dealers.
—Taxpayer relied on published AFRA demurrage rates.
—Taxpayer used the average resale mark-ups for the industry.

• Comparables were used as a basis for adjustment in about 75% of the cases reported.

• Representative sources for finding comparables relied upon by IEs:
—The IRS Economist used industry (construction) comparables. The services that the offshore company performed were that of a construction manager. The economist determined that, based on comparables, the offshore company should receive a comparable profit. The remaining profit was allocated back to the taxpayer for services and intangibles.
—Economist used industry statistics from docketed cases and SEC reports of unrelated taxpayers.
—Taxpayer was requested and did provide comparable transactions of its manufacturer parent with its unrelated distributors.
—Information from third parties with respect to comparable transactions (a similar product under similar circumstances in a similar market).
—License agreement with related and unrelated parties.
—Analysis of industry, consulting with ISP, contacting other IEs examining similar companies.
—Third party agreements for similar services or intangibles with same taxpayer in same circumstances.
—Obtained Form 10K information from serveral U.S. entities and used to establish the arm's length price on a cost plus basis.
—Third party sales of taxpayer and compiled statistics from "Robert Morris & Associates—Annual Statement Studies."

• The following are descriptions of significant problems encountered by IEs in developing a comparable:
—The information sought from third parties was old—5 to 6 years. In one instance the third party relocated and finding records was difficult. Records were not organized when obtained.
—Difficulty in acquiring information from third parties and obtaining permission to use data from the third party.
—Adjusting for differences in geographic markets.
—There are no comparables at this level of distribution. All manufacturing/sales companies in this industry are related.
—The products manufactured and sold by the Puerto Rican affiliates were the high volume, profitable products. The functions performed by the subsidiaries did not correspond to any third party situation. Consequently, the comparables identified were useless.

• Methods used in proposing tangible property adjustments by percentage of response:

	Percent
Comparable uncontrolled price	31
Resale price method	18
Cost plus method	37
Other method	14

• A majority of IEs who responded claim that the priority of methods was useful in development or analysis of the tangible price issue.

• Market penetration was not considered as a factor when determining section 482 adjustment in about 75% of the cases reported.

• The taxpayer's documentation considered the priority of pricing methods in 50% of the cases reported where documentation existed.

• Excerpts of descriptions of "other methods used by the taxpayer to justify its pricing policies.
—Taxpayer claimed intercompany price was arm's length because it was negotiated between the lower tier sub and its foreign parent.

—Taxpayer contended all income attributable to intangibles belonged to the Puerto Rican affiliate.
—Prior appellate settlements.
—Taxpayer attempted to identify other charges made by the parent to its subsidiaries that were equivalent to the royalty adjustment that was proposed.
—Taxpayer explained its method as being required by Revenue Canada.
—"Old fashioned business know-how".

• In over 75% of the cases reported, the taxpayer relied on a profit split to determine its transfer price.

• Descriptions of taxpayer's methods of computing profit split:

—Market penetration accounted for any difference in price.
—Resale price.
—Taxpayer computes revenues of products made in Puerto Rico then reduced them by: cost of sales P.R., an R&D cost sharing amount based on section 936(h), selling and administrative expenses based on a fractional calculation and other income or expenses using section 936(h)—this gave CTI of which they considered the P.R. entity to possess half.
—Taxpayer used prior Appeals settlement profit split.
—Taxpayer allowed its domestic subsidiaries a profit of 6% on the cost incurred by such subsidiaries.
—Taxpayer used profit earned by the parent on other transactions with related parties. Taxpayer's contention is that the subsidiary's high profit is irrelevant as long as the parent made an adequate profit on the transaction.
—Taxpayer claimed that the marketing company should recover all of its marketing costs (11% of sales) plus derive a profit (4% of sales).

C. Services

• The IEs proposed an adjustment for services in 32.8% of the reported cases.

• In 43% of the reported cases, difficulty in applying the services regulations was the primary reasons for not making an adjustment.

• Difficulties reported by IEs in applying the service regulations included:

—Determining for whose benefit services were provided.
—Undue burden on the IE to: (1) Isolate costs, (2) determine whether the service was an integral part of the business, and, (3) develop comparables to determine proper adjustment.
—Determining what services were rendered, by whom, the amount of time spent rendering the service, and the cost of the service.
—The service regulations do not allow a profit in the allocation.

• Example of difficulties in deciding whether to propose an adjustment for services rendered or intangibles transferred included:

—Taxpayer only wanted to charge for services at the same rate they generally charged third parties. IE used a functional analysis to show that know-how was also transferred to related parties but not to third parties.
—Taxpayer does purchasing for a subsidiary and picks up a 5% profit. IE had no idea if the profit mark-up was appropriate.
—Taxpayer allocated a portion of cost based on time spent by officers. Because of the 25 percent rule, the IE was prevented from making an adjustment.

D. Intangibles

• 50% of the cases reported involved a significant transfer of intangibles.

• Adjustments were made under Treas. Reg. § 1.482–2(d) in about 50% of the reported cases.

• Factors reported by IEs as affecting the decision to proceed under services or sales of tangible property regulations rather than under the intangibles section:

	Percent
(a) Inability to separately identify the intangible	39.2
(b) Inability to document the transfer	17.4
(c) Inability to value the intangible	43.4

• IE recommend changes in the regulations that would have made an adjustment for intangibles more feasible:

—Spell out that T/P's reputation is an intangible.
—Clarify that a CFC should not get a marketing profit if they don't do marketing.

• In reported cases involving the transfer of intangibles to a related party, the taxpayer acknowledged the transfer at the outset of the examination 48.6% of the time.

• Documentation produced by taxpayers with respect to the transfers of intangibles:

—Unrelated professional appraisal
—Corporate minutes and legal documents
—Licensing agreements
  a. With related entities
  b. With unrelated entities
—Section 351 transfer documents
—Section 367 ruling

• Marketing intangibles were involved in 25% of the intangible cases.

• Data relied upon or method of intangible valuation:

—Advertising and marketing expenses
—Trade name and trademark defense costs
—Distribution costs
—Market dominance—3rd party brokerage statements—market studies—royalties textbooks—profit and loss comparisons—patent infringement cases—prevailing rates in the industry.
—Compared rates charged by taxpayer to unrelated parties.
—Used functional analysis to show that CFCs were not active in crude oil trading. Only administrative and communication services were performed. Economist determined an arm's length service fee due the CFC for services performed, then used the residual method to value the income to be allocated to the domestic subsidiary.

• Taxpayers used a cost sharing agreement with a related party in 17½% of the cases reported.

• Description of cost sharing agreements:

—Parent billed Puerto Rican subsidiary for their share of R&D.
—R&D costs shared based on percentage of sales. Director costs charged to entity deriving benefit.
—Reimbursed for R&D, marketing, and administration.
—Share in R&D and reimbursed marketing costs.

E. Use of Specialists and Counsel

• The following specialists were involved with reported cases:

	Percentage of responses
Engineer	18
Economist	59
Appraiser	2

• IE descriptions of issues considered by specialist and how the specialist was brought into the case:

—Economist performed a functional analysis of activities of CFCs and identified comparables. The economist was requested after the taxpayer prepared a section 482 study to refute the proposed adjustment. In order to be successful in Appeals or court, an economist was considered essential.
—An economist was requested to assist in developing the third party comparables found by the IE and to assist in assessing taxpayer's arguments.
—An economist was involved in the prior year and, accordingly, was requested for the current cycle. An engineer was needed to assess the electrical engineering function of the related companies.
—An economist was requested for a valuation of risk capital.
—An engineer was used to compare the CFC shop to unrelated shops. An economist found comparable mark-ups.
—An economist was used on an informal basis as to procedure and appropriate percentage of profit.
—An economist was used on the royalty expense issue and to evaluate a trademark transfer; engineer was used to evaluate a fee structure.
—The economist was requested to review our position with respect to imputation of royalty and technical service income. Looking beyond this, the economist suggested that a potential pricing issue existed. The economist was assigned late in the examination and was not granted the time needed to develop the pricing issues.
—The economist added support in the development of the transfer of intangibles issue. The economist was brought into the case after we recognized and began developing the issue.
—An economist was requested by IE—used to establish arm's length pricing of foreign autos.
—An appraiser was brought in by the IE and the Case Manager to evaluate the sale of U.S. entity's stock at book value and to establish control elements.
—The economist performed a functional analysis on Puerto Rican operations. It was difficult to attack taxpayer's pricing as long as we accepted the function of the Puerto

Rican subsidiary as a full-fledged manufacturer.
—IE received informal advice on a stewardship issue.

• According to the IEs, specialists were brought in at appropriate times in 91% of the reported cases.
• Specialists raised additional issues in 9% of the reported cases.
• 79% of respondents thought that specialists' reports were particularly useful in proposing issues.
• Brief descriptions of specialists' reports which were helpful:

—The economist report was very useful since it discussed, in depth, the functional analysis and comparables used in determining the arm's length rates for intangibles and services.
—Economist report supported the IE's conclusion that market penetration was not prevalent in the years under examination, which was the thrust of the taxpayer's argument.
—Economist report gave a basis for reasonable profit factor in pricing computation.
—The economist's report was useful in establishing the service fee for CFC and the function of taxpayer's worldwide trading activity.
—The report made a good case for treating the subsidiary as a contract manufacturer. Prior to that, taxpayer was maintaining its position that the resale method applied.
—The economist developed a method of joining data secured by means of a private survey with data from a public source. The economist revealed to the agent a number of other sources that are available for statistical analysis and comparisons.

• Specialist's reports were used:

	Percentage of responses
To support an adjustment	87.5
Not used	10.0

• Responses indicate that specialists did not cause an undue delay in 90% of the cases.
• 14% of respondents stated that restrictions were placed on their use of a specialist.
• The taxpayer employed a specialist in 27% of the reported cases.
• The taxpayer's use of a specialist was as follows:

	Percentage of responses
Planning section 482 transaction	25
Involved in audit	80

• IRS Counsel was involved in 39% of the reported cases.
• 14% of respondents claimed that had counsel been involved, their cases would have been better developed.
• Counsel was involved at a timely stage of case development in 76% of reported cases.
• Persons who determined that counsel should become involved were:

	Percentage of responses
Case manager	22
Domestic group manager	3
IE manager	38
IE	32
Industry specialist	5

• The types of legal assistance rendered:

	Percentage of responses
Activity:	
District Counsel technical assistance	61
National Office technical advice	11
Summons review	20
Section 982 Proceedings review	7

• The assistance rendered by counsel was considered useful in development of section 482 issues in 68% of responses.

Appendix B—Section 482 Questionnaire—International Examiners

CASE NAME———————————Years———————————

PLEASE ATTACH A COPY OF YOUR EXAMINATION REPORT ON THIS CASE TO YOUR RESPONSE TO THIS QUESTIONNAIRE.

Please check the appropriate column(s). Check:

(A) if the listed section 482 issue was present in this case;
(B) if the taxpayer agreed to the proposed adjustment; and
(C) if the taxpayer did not agree to the proposed adjustment.

Please enter the dollar amount of the proposed adjustment in column (D).

	(A)	(B)	(C)	(D)
Transfer pricing	[36]	[17]	[20]	$5.9 billion.
Income allocation (other than transfer pricing)	[22]	[2]	[19]	$1.1 billion.
Expense allocation (not including cost sharing agreements)	[19]	[12]	[19]	$105 million.
Cost sharing agreements	[1]	[0]	[0]	$————
Intangibles	[16]	[5]	[10]	$460 million.
Services	[10]	[3]	[8]	$34 million.
Interest	[17]	[10]	[10]	$175 million.
Rental expense	[1]	[1]	[0]	$————
Gain allocation	[2]	[1]	[1]	$27 million.
Miscellaneous	[5]	[2]	[2]	$58 million.

(Please briefly identify. Do not futher identify or discuss in this questionnaire any routine adjustments to the general and administrative or overhead expenses of related parties.)

☐ Please check here if this case involved section 936.
☐ Please check here if you have answered question 100 on this questionnaire.

1. Who initially identified the significant 482 issues in this case? (Please check the appropriate box or boxes and briefly identify the issues raised by each.)

Domestic agent	[9]	Yourself	[57]	Other	[10]
Case manager	[0]	I.E. group manager	[1]		
Domestic group manager	[0]	Economist	[3]		

If other, please identify.————————————

2. Please list each of the significant 482 issues in this case in the spaces provided below. (Use an additional sheet to identify other significant 482 issues, if any.) Please also indicate how each of these issues was initially identified (whether by you or by someone else) by filling in the number corresponding to the method used to identify the issue in the space below.

(1) Form 5471
(2) Form 5472
(3) Financial data
(4) Prior exam
(5) Experience with the industry
(6) Customs data
(7) Other (please briefly explain in the appropriate space)
(8) Do not know how issue was identified by another person

	Issue	How identified?
A.	(1) 70	
B.	(2) 33	
C.	(3) 19	
D.	(4) 10	
E.	(5) 4	
F.	(6) 3	
	(7)	

3. Who principally determined the amount of time allotted to developing the 482 issues in this case?

A. Case manager	[39]
B. Domestic group manager	[6]
C. I.E. manager	[27]
D. Branch chief	[4]
E. Exam chief	[0]

4. Was the decision on time allotment made after you had an adequate opportunity to analyze the 482 issues?

Yes [41] No [22]

5. Was the time allotment flexible?

Yes [51] No [6]

6. Was the amount of time allotted to the development of the 482 issues in this case affected either by the potential yield or the likelihood that there would be a yield? (Check one.)

A. Potential yield affected allotment	[22]
B. Assurance of yield affected allotment	[3]
C. Both affected the allotment	[19]
D. Neither affected the allotment	[23]

7. Did you use one or more annual reports to shareholders to identify or develop a 482 issue?

Yes [24] Please continue.
No [46] Skip to question 10.

8. Which of the following portions of the annual report, if any, were specifically considered? (Check if considered.)

A. The income tax note to the financial statement	[8]
B. The segmental information note for product line data	[13]
C. The segmental information note for geographic area data	[15]
D. Other	[6]

(please identify) ———

3 identified

9. Who initiated the use of annual reports in your consideration of the 482 issues in this case?

A. Yourself	[22]
B. Domestic group manager	[0]
C. Case manager	[0]
D. I.E. group manager	[0]
E. Domestic agent	[2]
F. Other	[3]

(please identify) ———

10. Was the information required to be reported on Form 5471 or 5472 (or predecessor forms) helpful or inadequate in planning the exam?

Generally helpful	[36]
Generally inadequate	[19]

11. Please briefly describe any specific information required to be reported on these forms that you found helpful in planning your examination in this case.

46 ———

12. Please briefly describe any specific respects in which the information now required to be reported on Forms 5471 anbd 5472 was (or would have been) inadequate in this case. What specific additional information reporting requirements would have been useful in the planning and conduct of your examination in this case? (For example, would your case development have been improved if taxpayers were affirmatively required to disclose the transfer pricing method relied upon by the taxpayer?)

36 ———

13. Were there any identified 482 issues that were not pursued or that were no-changed?

A. Not pursued?
Yes [19] No [47]

B. No-changed?
Yes [10] No [40]

If you answered yes to either question, please briefly identify the issue(s) and explain.

23 ———

14. Did the taxpayer have readily available the basis and support for its section 482 transactions?

Yes [19] No [51]

15. Did the taxpayer generally make timely and compete response to the questions in your IDRs that were asked to develop the 482 issues in this case?

Yes [31] Please skip to question 20.
No [40] Continue.

16. Were there reasonable explantations for any delays by the taxpayer in responding to the questions you asked in IDRs that were aimed at developing the 482 issues in this case?

Yes [13] Please continue.
No [27] Skip to question 18.

17. Please briefly describe any reasonable bases for the delays.

16 ———

18. Please indicate whether the taxpayer unreasonably delayed responding to any questions in your IDRs that dealt with the following:

	Yes	No
A. Control of affiliates	[11]	[21]
B. The existence of its comparable transactions with third parties	[19]	[16]
C. The terms of its comparable transactions with third parties	[16]	[17]

19. In the spaces below, please estimate the length of any delay and the portion of the delay, if any, that was reasonable.

	Mos.
Total time delayed	12.2
Reasonable portion of delay	2.2

20. Did IRS management become involved in attempting to secure information from the taxpayer? If so, indicate each management

level involved and whether the information sought was obtained as a result of that involvement.

	Level	Was the requested information obtained?	
		Yes	No
A. No involvement	[26]		
B. Group chief	[35]	[22]	[19]
C. Branch chief	[15]	[11]	[9]
D. Exam chief	[4]	[2]	[10]
E. District director	[3]	[1]	[10]

21. Was the use of summonses considered, discussed with the taxpayer, and/or employed?

	Yes	No
Considered?	[28]	[41]
Discussed?	[21]	[40]
Employed?	[3]	[54]

If you answered yes to any of the above, please briefly describe the circumstances and the results obtained.
24 _____

22. Was the use of section 982 considered, discussed with the taxpayer, and/or employed?

	Yes	No
Considered?	[17]	[47]
Discussed?	[9]	[42]
Employed?	[2]	[49]

If you answered yes to any of the above, please briefly describe the circumstances and the results obtained.
13 _____

23. Did you work with an economist, engineer, appraiser or other specialist on the case?

	Yes	No
A. Engineer?	[10]	[46]
B. Economist?	[40]	[28]
C. Appraiser?	[1]	[49]
D. Other [1]?	[9]	[40]

[1] If other, please briefly describe.

If you have answered yes to any of the above, please continue.
If you answered no to all of the above, please skip to question 34.
24. Please briefly describe the issue(s) considered by any specialist(s) and how the specialist(s) was (were) brought into the case.
43 _____

25. Was (were) the specialist(s) involved in the case at an appropriate time?
[40] Yes, all specialists were brought into the case at appropriate times.
[4] No, not all specialists were brought into the case at appropriate times.
If no, please briefly explain. _____

26. Did the specialist(s) raise new 482 issues?
Yes [4] Please continue.
No [40] Skip to question 28.
27. Please briefly identify the 482 issues initially raised by the specialist(s) in the case.
9 _____

28. Were any of the specialists' reports useful to you?
Yes [33] Please continue.
No [9] Skip to question 30.
29. Please briefly identify which report(s) was (were) useful, and why.
34 _____

30. Please briefly indicate which report(s) was (were) not useful, and why.
12 _____

31. How were specialists' reports used in connection with your proposed adjustment? (If more than one specialists' report was prepared in this case, please fill in the appropriate number of reports in the spaces provided.)

A. Report recommended against the adjustment	[1]	.....
B. Used to support adjustment	[35]	.....
C. Not used to support adjustment	[4]	.....

32. Did the involvement of any specialist unduly delay the case?
Yes [4] No [40]
33. Did anyone place a restriction on your use of a specialist?
Yes [6] No [38]
If yes, who? (Please identify.) _____

34. Did the taxpayer employ a specialist?
Yes [18] Please continue.
No [48] Skip to question 36.

35. Was the taxpayer's specialist utilized in planning the transaction, in refuting a proposed adjustment, or both?

	Yes	No
Involved in planning?	[4]	[12]
Involved in audit?	[16]	[4]

36. Did Counsel become involved in the case?
Yes [27] Please skip to question 38.
No [42] Continue.
37. Would the case have been better developed if Counsel had become involved?

Better developed	[6]
No difference	[37]

Please skip to question 43.
38. Was Counsel involved at a timely stage?
Yes [22] Please skip to question 40.
No [7] Continue.
39. Would the case have been better developed if Counsel had become involved at an earlier time?
Better developed [6] No difference [4]
40. Who determined that Counsel should become involved?

A. Case manager	[8]
B. Domestic group manager	[1]
C. LE. manager	[14]
D. Exam Chief	[0]
E. Yourself	[12]
F. Industry Specialist	[2]

41. Please check the appropriate box to indicate the type of assistance rendered by Counsel in this case.

	Oral	Written
A. District Counsel technical assistance	[18]	[9]
B. National Office technical advice	[0]	[5]
C. Summons review	[4]	[5]
D. Section 982 proceeding review	[1]	[2]

42. Was the assistance rendered by Counsel useful in your development of the 482 issues in this case?
Yes [19] No [9]
43. Did any of the following adversely affect your development of 482 issues in this case?

	Yes	No
A. 3.0, 5 open years policies	[21]	[44]
B. Planned audit closing dates	[28]	[39]
C. Taxpayer tactics	[31]	[30]
D. Other	[7]	[27]

If you checked yes for C. or D.,

Please briefly explain.

44. Were any of the 482 issues resolved in Examination?

Yes [30] Please continue.
No [39] Skip to question 50.

45. Did Examination's resolution involve only the 482 issues in the case alone or was it part of a broader resolution?

482 issues resolution only ..... [23]
Part of over-all resolution ..... [7]

46. Were you appropriately consulted regarding the resolution of the 482 issue(s) in the case that were resolved in Examination?

Yes [27] No [3]

47. Which provisions of the 482 regulations provided the basis for Examination's resolution of 482 transfer pricing issues in this case?

A. Comparable uncontrolled price..... [8]
B. Resale price method ..... [2]
C. Cost plus ..... [6]
D. Any "other" reasonable method ..... [9]

48. Did you agree with the resolution?

Yes [24] No [4]

If no,
Please briefly explain.

49. Did Competent Authority considerations affect Examination's resolution of any section 482 issue in this case?

Yes [3] No [28]

If yes, please briefly describe the transaction that gave rise to this concern.

50. Did Competent Authority considerations affect your decision to pursue or not pursue any section 482 issue in this case?

Yes [2] No [67]

If yes,
please briefly explain.

51. Did Appeals settle any section 482 issue in this case?

Yes [17] Please continue.
No [44] Skip to question 54.

52. Did you agree with the terms of Appeals' settlement of the 482 issue(s) in this case?

Yes [5] No [11]

If no,
please briefly explain.

53. Was Counsel involved in the Appeal settlement?

Yes [5] No [14]

54. Did you receive a copy of Appeals' final report on this case?

Yes [9] No [29]

55. In this case, were there difficulties establishing "control" for purposes of section 482?

Yes [5] No [64]

56. Was control established by means other than direct or indirect ownership of a majority of the stock of a controlled corporation?

Yes [7] No [61]

If yes, please briefly explain how control was established.

57. Did the taxpayer rely on comparables either in planning or defending its 482 transactions?

[7] Relied on comparables in planning transactions.
[24] Relied on comparables in defending transactions.
[42] Did not rely on comparables in either planning or defending transactions. Please skip to question 62.

58. Were those comparables made available to you at or near the beginning of the examination?

Yes [9] No [22]

59. Please briefly describe the comparable(s) relied upon by the taxpayer in planning or defending its 482 transactions.

27

60. Did you accept the taxpayer's comparables?

Yes [5] No [22]

If no, please briefly explain why.

61. Did the taxpayer rely upon comparables based on "industry norms" in planning or defending its transfer pricing?

Yes [11] No [16]

If yes, please briefly describe the data provided by the taxpayer to support its assertions.

62. Did you seek to use a comparable as a basis for making any 482 adjustments in this case?

Yes [42] Please continue.
No [25] If either you or the taxpayer sought to rely or relied on comparables, skip to question 67. Otherwise, skip to question 68.

63. Did you actually use a comparable as the basis for making the 482 adjustments in the case?

Yes [34] No [12]

64. How did you identify the comparable you used or sought to use?

40

65. Were you able to properly develop information regarding the comparable you used or sought to use?

Yes [32] No [11]

66. Please briefly describe any significant problems you encountered in attempting to develop the comparable you used or sought to use.

23

67. What kind of adjustments, if any, were needed for both the taxpayer and Service comparables to achieve arm's length? (Please check all that apply.)

Government comparable		Taxpayer comparable
[9]	Warranties and rebates	[2]
[12]	Level of market	[7]
[8]	Geographic market	[4]
[9]	Volume of transactions	[8]
[6]	Length of agreement	[4]
[12]	Product differences	[5]
[9]	Terms of sale	[5]
[4]	Currency translation	[1]
[12]	Other	[6]

If other, please explain briefly.

12

68. In your opinion, did this case involve any significant transfer or permissive use of any of the following: a patent, invention, formula, process, trade secret, design, brand name, pattern, know-how, marketing expertise, or show-how?

Yes [34] Please continue.
No [33] Skip to question 79.

69. Please briefly describe the patent, etc.

35

70. Did you specifically make an adjustment in this case for intangibles under Treas Reg. 1.482-2(d)?

Yes [19] Please skip to question 73.
No [20] Continue.

71. In making an adjustment for (1) related party services, or (2) the transfer pricing of tangible property, did you take the transfer or use of intangibles into account?

Yes [11] Please continue.
No. [15] Skip to question 73.

72. What factors dictated the decision to proceed under the services or sales of tangible property regulations rather than make an adjustment under the intangibles regulations?

A. Inability to separately identify the transferred intangibles ..... [9]
B. Inability to document the transfer or use ..... [4]
C. Inability to value the intangibles ..... [10]
D. Other ..... [1]

If other, please explain. _____

73. Which of the following factors were most important to you and to the taxpayer in determining the arm's length pricing for the most significant transferred intangible in this case? Please select up to five factors that were most important to you and to the taxpayer and number them in decreasing order of importance (*i.e.*, five is most important, one is least) in the appropriate spaces.

	Government		Taxpayer	
	Responses	Weight	Responses	Weight
A. Prevailing rates in the same industry for similar property	14	3.6	6	4.7
B. Offers of competing transferors	4	4.0	4	3.0
C. Bids of competing transferees		3	1.7	
D. Limitations on geographic area covered	4	2.0	4	2.3
E. Nonexclusivity of grant	3	2.0	6	3.8
F. Uniqueness of the transferred property	17	3.4	10	2.7
G. Likelihood of continuing uniqueness	10	1.9	6	2.3
H. Patent or other legal protections	9	1.4	7	1.1
I. Services rendered in connection with the transfer of property	14	3.1	8	3.5
J. Prospective profits to be realized by the transferee from the property	19	3.5	10	3.5
K. Costs to be save by the transferee as the result of the transfer of the property	12	2.4	10	3.2
L. Capital investment and start-up expenses of the transferee	8	2.1	2	3
M. Availability of substitutes for the transferred property	5	3.0	2	4
N. Prices paid by third parties where the property is resold or sublicensed to them	5	2.4	3	3.3
O. Transferor's costs of development	12	2.6	8	2.4
P. Other facts or circumstances (please explain)	4	2.0	4	3.0

74. Did the taxpayer acknowledge at the outset the existence of a transfer of intangibles to a related party in this case?

Yes [18] Please continue.
No [11] Skip to question 76.

75. What documentation for the intangible transfer did the taxpayer produce? Please briefly describe.

14 _____

76. What changes, if any; in the intangibles regulations would have made an adjustment for intangibles more feasible in this case?

19 _____

77. If there were marketing intangibles involved in the case, did you attempt to value such marketing intangibles separate and apart from the manufacturing or other intangibles involved in the case?

Yes [9] Please continue.
No [27] Skip to question 79.

78. Please briefly describe the method utilized to value the marketing intangibles in this case and the type of data you relied upon.

14 _____

79. Did the 482 issues in this case involve the pricing of tangible property?

Yes [40] Please continue.
No [28] Skip to question 82.

80. Which method did you use in proposing your adjustment?

A. Comparable uncontrolled price?

Yes [15] Please continue.
No [26] Skip to part G. of this question.

Please check the appropriate box if you relied on:

(1) transactions between the same taxpayer (or a related taxpayer) and third parties; or

(2) transactions between two parties both of which were not related to your taxpayer.

[4] Relied only on related party transactions. Please skip to part G. of this question.
[13] Relied on one or more unrelated party transactions. Continue.

B. Please briefly describe the unrelated party transaction(s) you relied upon to develop your comparable(s).

C. Were you able to disclose to the taxpayer the terms of the comparable(s) you documented through unrelated party transactions?

No [5] Please continue.
Yes [6] Skip to part G. of this question.

D. Please briefly describe the reasons (promises of confidentiality, etc.) that you were unable to discuss the terms of the comparable with the taxpayer.

6 _____

E. If it became necessary, would you have been able to disclose the terms of the comparable(s) you documented through unrelated party transactions as evidence in court?

No [2] Please continue.
Yes [5] Skip to part G. of this question.

F. Please briefly describe any impediments to your introduction of the terms of the comparable(s) in court that were different than those described in part D. of this question. (If no difference, please write "same.")

G. Resale price method?
Yes [9] No [21]
H. Cost-plus method?
Yes [18] No [13]
I. "Other" method?
Yes [7] No [17]

If other, please describe briefly the "other method" used by you. _____

81. Was the priority of methods required under Treas. Reg. sec. 1.482–2(e) useful or detrimental in your development or analysis of the tangible transfer price issue?

Useful [19] Detrimental [17]

If detrimental, please briefly explain. _____

82. In considering any proposed adjustments under section 482, did you consider whether the taxpayer's interest in "penetrating" a new market needed to be taken into account?

Yes [17] No [47]

83. In its responses to your proposed adjustments, did the taxpayer argue that your proposed pricing adjustments needed to be modified to take into account its market penetration goals?

Yes [5] Please continue.
No [62] Skip to question 87.

84. For how many years had the taxpayer sold in that market?

9 responses 17.88 years (average)

85. Did you accept the taxpayer's contentions?

Yes [2] Skip to question 87.
No [6] Please continue.

86. If you rejected all or part the taxpayer's contentions with respect to market penetration, please briefly explain.

5 _____

87. Did the taxpayer provide you with contemporaneous documentation regarding the methods it used to set its transfer prices?

Yes [16] Please continue.
No [48] Skip to question 89.

88. Did the taxpayer's documentation expressly consider the priority of pricing methods set out in Treas. Reg. sec. 1.482–2(e)?

Yes [10] No [10]

89. Please describe briefly any "other method" used by the taxpayer to justify its pricing policies.

32 _____

90. Did the taxpayer contend in Examination that its "other reasonable method" of transfer pricing resulted in an appropriate profit split, or did it rely on a profit split to determine its transfer prices?

Yes [14] Please continue.
No [49] Skip to question 92.

91. Please briefly describe the taxpayer's means of computing the profit split it utilized or defended as appropriate.

11 _____

92. Did this taxpayer utilize a cost sharing agreement with a related party?

Yes [12] Please continue.
No [58] Skip to question 95.

93. Please briefly describe the cost sharing agreement. _____

11 _____

94. Please briefly describe any adjustments you proposed to make to the expense allocations required by this agreement.

4 _____

95. In this case, did you have difficulty deciding whether to propose making a 482 adjustment based on—

(1) services performed by one related party on behalf of another;

or—

(2) transfers of intangibles between the related parties?

(Example: Did you have to decide between proposing an adjustment based on (1) a parent corporation's "training" its new subsidiary's employees, or (2) the parent's transfer of "know-how" to the new subsidiary?)

Yes [19] Please continue.
No [43] Skip to question 97.

96. Please briefly describe the issue. _____

18 _____

97. In this case, did you consider proposing an adjustment based on the provision of services by one related party to another?

Yes [22] Please continue.
No [45] Skip to question 100.

98. If your proposed adjustments did not include an adjustment with respect to related party services, was your decision based on difficulties in applying the services regulations under section 482?

Yes [13] Please continue.
No [17] Skip to question 100.

99. Please briefly describe any specific difficulties you had applying the services regulations.

8 _____

100. If we have overlooked asking about any significant 482 issues that you believe could be better addressed in regulations, please take the time to identify the issue, the regulation, and any thoughts you have about how that regulation might better address the issue. Please do not confine yourself to the issues raised in this case. Please attach additional sheets if necessary.

Appendix C—Transfer Pricing Law and Practices of Selected U.S. Treaty Partners

Canada

The statutory basis for transfer pricing allocations is section 69(2) of the Income Tax Act [1] that provides as follows:

Where a taxpayer has paid or agreed to pay to a non-resident person with whom he was not dealing at arm's length as to price, rental, royalty or other payment for or for the use or reproduction of any property or as consideration for the carriage of goods or passengers, or other services, an amount greater than the amount (in this subsection referred to as the "reasonable amount") which would have been reasonable in the circumstances if the non-resident and the taxpayer had been dealing at arm's length, the reasonable amount shall, for the purpose of computing the taxpayer's income under this Part, be deemed to have been the amount that was paid or payable therefor.

Section 69(3) of the Income Tax Act provides as follows:

Where a non-resident person has neither paid nor agreed to pay to a taxpayer with whom he was not dealing at arm's length as to price, rental, royalty or other payment for or for the use or reproduction of any property, or as consideration for the carriage of goods or passengers or for other services, the amount that would have been reasonable in the circumstances if the non-resident person and taxpayer had been dealing at arm's length, that amount shall, for the purposes of computing the taxpayer's income under this Part, be deemed to have been received or receivable by the taxpayer therefor.

Sections 69 (2) and (3) apply to all taxpayers including individuals, unincorporated businesses, trusts, and corporations. However, section 69(2) applies only when the Canadian taxpayer has paid more than a reasonable amount and does not apply when the Canadian taxpayer has paid less than a reasonable amount. Similarly, section 69(3) applies only when the Canadian taxpayer has received less than a reasonable amount and does not apply when the Canadian taxpayer has received more than a reasonable amount.

Interpretation of this statute by the Canadian government has been provided in an Information Circular issued by the Department of National Revenue in 1987.[2] In this Circular, Revenue Canada interprets the phrase "reasonable in the circumstances" to mean the price that would have prevailed if the parties to the transaction had been dealing at arm's length. In applying this arm's length standard, Revenue Canada has endorsed the methods enumerated in the 1979 OECD report on Transfer Pricing and Multinational Enterprises. Although the methods are not prioritized as to the order that they must be used, Revenue Canada has expressed a preference for the comparable uncontrolled price method and the following sequence of tests:

1. Sales by taxpayer to unrelated parties;
2. Comparable transactions between unrelated third parties;
3. Resale price method;
4. Cost plus method; and

[1] Income Tax Act, S.C. 1970–71–72.

[2] Department of National Revenue Information Circular No. 87–2, *International Transfer Pricing and Other International Transactions* (Feb. 27, 1987).

5. Any other method in support of the other methods or where the other methods are inappropriate.[3]

These methods apply to the sale of goods as well as to the acquisition or disposition of intangible property. With respect to royalty rates on the disposition of intangibles, Revenue Canada's Information Circular states that, in determining an arm's length rate, the focus will be on:

(a) Prevailing rates in the industry;

(b) Terms of the license, including geographic limitations and exclusivity of rights;

(c) Singularity of the invention and the period for which it is likely to remain unique;

(d) Technical assistance, trade-marks, and "know-how" provided along with access to the patent;

(e) Profits anticipated by the licensee; and,

(f) Benefits to the licensor arising from sharing information on the experience of the licensee.[4]

In addition, when only use of the intangible is transferred, it must be determined whether the transferee's payment is "in fact for the use of the intangible for the year—as opposed to a payment for its outright acquisition or other capital outlay." [5]

France

The statutory basis for transfer pricing allocations is Articles 57 of the French General Tax Code which is as follows:

In assessing income tax due by enterprises which are subordinated to or controlled by enterprises established outside France, the income to which is indirectly transferred to the latter, either by increasing or decreasing purchase or sale prices, or any other means, shall be restored to the trading results shown in the account. The same procedure is followed with respect to undertakings which are controlled by an enterprise or a group of enterprises also controlling enterprises located outside France.

* * * * *

Should specific data not be available for making the adjustments provided for the preceding paragraph, the taxable profits are determined by comparison with those of similar undertakings run normally.[6]

The tax administration has endorsed the 1979 OECD Report on Transfer Pricing and Multilateral Enterprises, although the OECD guidelines are not binding on the French authorities.[7] In enforcing Article 57, the authorities generally compare profit margins of similar entities to identify any abnormalities.[8]

A similar approach is apparently taken with respect to the payment of royalties by a French taxpayer in that a deduction will be allowed for the payment only to the extent that the net income of the payee or subsidiary is at least equal to that realized by a French enterprise engaged in a similar activity. Furthermore, under the French exchange control law, all royalty agreements with and payments to nonresidents must be reported, prior to payment, to the National Institute of Industrial Property.[9]

The experience of the Office of Assistant Commissioner (International) is that French companies filing consolidated returns that include foreign subsidiaries must agree to allow French tax authorities on-site inspection of the subsidiaries' books and records; that, as indicated above, profit experience is a very important factor in examinations; and that no guidelines have been developed for evaluation of royalty cases involving transfer of intangibles. When intangibles are transferred to a tax haven, payments received on account of the transfer are deemed to be unreasonable, and the burden is on the taxpayer to establish that the payments are reasonable.

Although cost sharing arrangements are permitted,[10] the French authorities do not have specific rules applicable to such arrangements.

Germany

The statutory basis for intercompany pricing adjustments includes Article 8(3) of the Corporation Tax Law, which states that hidden distributions of income do not reduce taxable income.[11] Section 31 of the Corporation Tax Regulations interprets "hidden distributions" to include a benefit granted by a company to a related person, outside the normal statutory profit distributions, which an orderly and conscientious manager would not have granted to an unrelated party under comparable circumstances.[12]

Similarly, Article 1(1) of the Foreign Tax Affairs Law states that where the income of a taxpayer resulting from his business relationship with a related person is reduced because the taxpayer, within his business relationship extending to a foreign country, has agreed on terms and conditions which deviate from those unrelated third parties would have agreed upon under the same or similar circumstances, then his income shall, notwithstanding other provisions, be determined as if the income had been earned under terms and conditions agreed upon between unrelated third parties.[13] Article 1(1) applies to all related or affiliated taxpayers, including individuals, partnerships, and corporations.

Paragraph 2.1.1 of the Transfer Pricing Guidelines of 1983 [14] (hereinafter referred to as Guidelines) requires that business dealings between related parties be evaluated on the principle of arm's length dealings between independent parties acting in a situation of free competition.

Paragraphs 2.2.2 through 2.2.4 of the Guidelines list the following as the standard methods for evaluating transfer prices: comparable uncontrolled price method, resale price method, and cost plus method. In contrast to § 1.482–2(e)(2)(ii), which requires that these methods be used in the order prescribed if the circumstances of the case permit, paragraph 2.4.1 of the Guidelines states that; "[t]here is no single correct sequence of standard methods for the examination of transfer prices which applies to all groups of cases." Also, paragraph 2.4.2 of the Guidelines, similar to the "fourth method" provision of § 1.482–2(e)(1)(iii), allows use of a combination of the three standard methods or of other methods.

In cases involving transfers of intangibles to offshore manufacturing affiliates, paragraph 5.1.1 of the Guidelines recognizes that a determination must be made whether the transferor has received an adequate consideration for the transfer of the intangible. Paragraph 5.2.2 of the Guidelines states that an arm's length price for transfer of an intangible is to be determined under "an appropriate method." Paragraph 5.2.3 of the Guidelines indicates that the preferable method is the comparable uncontrolled price method but, if the facts of a case will not support application of this method:

then the starting point for the examination is the consideration that a sound business manager of the licensee enterprise would only pay a royalty up to an amount which leaves the enterprise *with an acceptable commercial profit* from the licensed product. [Emphasis added.]

According to paragraph 5.2.4 of the Guidelines, the cost plus method may be used "in exceptional cases." One such exceptional case is described in paragraph 3.1.3 (Example 3) of the Transfer Pricing Guidelines of 1983, as follows:

An enterprise transfers particular manufacturing functions to a foreign subsidiary corporation. Production and marketing by the foreign corporation are closely tied in with the business of the domestic enterprise.

The articles produced are purchased by the parent corporation under a long-term arrangement. The subsidiary corporation with its limited range of production could not in the long run survive as an independent corporation. Between unrelated parties the production would have been carried out on a subcontract basis. * * * The transfer price can accordingly be determined using the cost plus method.

This approach is essentially the same as that of the IRS in the *Lilly* case, discussed *supra*, Chapters 4 and 5.

One commentator, Mr. Friedhelm Jacob, Counselor for Tax Affairs at the West German Embassy in Washington, DC, has noted that, in contrast to the 1986 Tax Reform Act amendments to section 482, which require adjustments over time for substantial changes in circumstances, the German

[3] *Id.* at paras. 13–19.

[4] *Id.* at para. 46.

[5] *Id.* at para. 42.

[6] Code General des Impots, art. 57.

[7] *See* Instruction Administrative (May 4, 1973), *published in* Bulletin Official de la Direction Generale des Impots 4A–2–73.

[8] BNA, No. 364–9253, France: Transfer Pricing Within Multinational Enterprises and Article 56 of the French General Tax Code 11 (1980).

[9] *Id.* at 11.

[10] *Id.* at 11.

[11] Koerperschaftsteuergesetz art. Section 8(3).

[12] Koerperschaftsteuerrichtlinien Section 31.

[13] Koerperschaftsteuergesetz art. Section 1(1).

[14] *See* Intl. Bureau of Fiscal Documentation, *The Tax Treatment of Transfer Pricing* (1987) (English translation).

approach has been that the determination of fair market consideration for an intangible is made at the time of the transfer.[15]

Paragraph 2.4.3 of the Guidelines recognizes that related entities may enter into bona fide cost sharing arrangements and that such arrangements can affect transfer prices. Under paragraph 7.1.1 of the Guidelines, cost sharing arrangements are to be taken into consideration in making transfer price income allocations between the entities involved in the arrangement. However, full costs, direct and indirect, must be calculated and included under a recognized accounting method. If the cost sharing arrangement is to be recongnized, the services must be distinguishable and the aggregate of the costs must be separable as to the services. No profit is permitted in such an arrangement. Furthermore, a taxpayer seeking a deduction for a cost sharing payment must have "a specific right, definite both in nature and scope, to benefit from the activites of the central organization."

The experience of the Office of the Assistant Commissioner (International) has been that, if the comparable uncontrolled price method cannot be utilized, the German tax authority generally allows a price or royalty that leaves the enterprise with an acceptable commercial profit from the sale of license, although there are no published industrial safe harbor profit norms. With respect to the transfer of intangibles, the tax authority does not consider that the intangible property itself was used when a person acquires the goods or merchandise produced with the intangible.

Japan

Article 66–5 of Japan's Special Taxation Measures Law is effective for taxable years beginning on or after April 1, 1986.[16] This law applies only to corporations (and certain other legal entites recognized under Japanese law), but does not apply to individuals, unincorporated joint ventures, and similar entities. Furthermore, Art. 66–5 applies only to transactions between a foreign corporation and a corporation that is subject to Japanese tax and only when the two entites are related by at least a 50 percent direct or indirect ownership.

Article 66–5 is as follows:

(1) In the event that, during a business year commencing on or after April 1, 1986, a corporation ("Corporation A") has conducted sale or purchase of assets, provision of services or other transactions with a foreign affiliated corporation ("Corporation B") which has a relationship with Corporation A in which one of the corporations in question, directly or indirectly, owns a number of shares comprising 50 percent or more of the total number of issued shares of the other one or has any other special relationship with Corporation A ("Special Relationship") and, in connection with such above mentioned transaction ("Transaction"), if the amount of consideration of which payment was received by Corporation A from Corporation B was less than an arm's length price, or if the amount of consideration which Corporation A paid to Corporation B was greater than an arm's length price, then, for purposes of corporate income taxation of corporation A for the said business year, the Transaction will be deemed to have been carried out at an arm's length price.

Paragraph (2) of Article 66–5 lists the methods by which the arm's length price is to be determined, although in contrast to § 1.482–2(e)(1)(ii) the methods are not prioritized as to the order in which they must be employed. In the case of sale or purchase of invenetory assets, the permissible methods are comparable uncontrolled price, resale price, cost plus, and, if none of the first three methods may be applied, a method "similar to" the first three methods or "other methods prescribed by cabinet order." In the case of other transactions (*i.e.*, that do not involve the sale or purchase of inventory assets), the arm's length price is determined by "a method which is equivalent to" the comparable uncontrolled price method, the resale price method, the cost plus method, and, if none of the first three methods may be applied, a method "equivalent to" or a method which is "similar to" one of the first three methods.[17]

The comparable uncontrolled price method is described generally as the price that would have been paid between a buyer and a seller who are unrelated, where the sale or purchase of inventory is the same type of inventory as the inventory involved in the subject transaction, and the circumstances, including commercial level and transaction volume, are similar. It is permissible to use this method where the transactions are not precisely comparable, but it is possible to adjust for differences.[18]

The resale price mothod is described as the price computed by deducting a normal amount of profit (meaning an amount computed by multiplying the resale price by a normal profit percentage) from the amount of consideration when a buyer of inventory assets involved in the subject transaction resells inventory assets to a person with which it has no special relationship.[19]

The cost plus method is described as the price computed by adding a normal amount of profit (meaning an amount computed by multiplying the amount of costs by a normal profit percentage), to the amount of the costs of the seller to acquire, by purchase, manufacture, or other acts, the inventory assets involved in the subject transaction.[20]

The guidance given by the Japanese legislation for determinating an arm's length price for the transfer of an intangible asset is that methods similar to comparable uncontrolled price, resale, and cost plus methods can be used, and that, if none of these methods is applicable, a fourth method may be used.

A unique aspect of Japan's transfer pricing law is a preconfirmation system whereby a Japanese parent or subsidiary may request pre-approval of a sale or purchase price from a foreign related entity from the tax administration. The purpose for this procedure is to reduce the number of transfer pricing cases and to eliminate uncertainties in international transactions. No such procedure is available under U.S. law, and the IRS would not grant such a ruling because of the factual nature of the issue. The Japanese experience to date is that taxpayers are taking a "wait and see" attitude towards the pre-confirmation procedures.[21]

United Kingdom

The statutory basis under U.K. law for adjustments to transfer prices is section 770 of the Income and Corporation Taxes Acts of 1988 [ICTA]. This section provides that where any property is sold and:

(a) The buyer is a body of persons over whom the seller has control, or the seller is a body of persons over whom the buyer has control, or both the buyer and the seller are bodies of persons over whom the same person or persons has or have control; and

(b) the property is sold at a price ("the actual price") which is either—

(i) Less than the price which it might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length ("the arm's length price"), or

(ii) Greater than the arm's length price,

then, in computing for tax purposes the income, profits or losses of the seller where the actual price was less than the arm's length price, and of the buyer where the actual price was greater than the arm's length price, the like consequences shall ensue as would have ensued if the property had been sold for the arm's length price.[22]

This section applies to rentals, grants and transfers of rights, interests or licenses, loan interest, patent royalties, management fees, payments for services, and payments for goods.

Guidance with respect to application of section 770 of the ICTA is provided in Notes published by Inland Revenue.[23]

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[15] Jacob, *The New "Super-Royalty" Provisions of Internal Revenue code 1986: A German Perspective*, 27 European Taxation 320 (1987).

[16] Japan Special Taxation Measures Law, art. 66–5 (March 31, 1986), an outline of which is contained in Appendix I. to the Speech of Toshiro Kiribuchi, Deputy Commissioner (International Affairs), National Tax Administration, at the International Tax Institute Seminar, New York, NY (June 2, 1986).

[17] Special Taxation Measures Law, art. 66–5 section 2(i) and (ii).

[18] Special Taxation Measures Law, art. 66–5 section 2(i)(a).

[19] Special Taxation Measures Law, art. 66–5 section 2(i)(b).

[20] Special Taxation Measures Law, art. 66–5 section 2(i)(c).

[21] Go, Kawada, Director, Office of International Operations, National Tax Administration, Remarks at the International Tax Institute Seminar, New York, NY (June 27, 1988).

[22] Income Tax Acts of 1988, section 770.

[23] Thomas, Richard, Deputy to Assistant of Taxes, Board of Inland Revenue, Remarks at the International Tax Institute Seminar, New York, NY (June 27, 1988).

An Inland Revenue Note defines "arm's length price" as the price which might have been expected if the parties to the transaction has been independent persons dealing at arm's length, i.e. dealing with each other in a normal commercial manner unaffected by any special relationship between them.[24]

The Note dealing with methods of arriving at arm's length prices is as follows:

In ascertaining an arm's length price the Inland Revenue will often look for evidence of prices in similar transactions between parties who are in fact operating at arm's length. They may however find it more useful in some circumstances to start with the resale price of the goods or services etc. and arrive at the relevant arm's length purchase price by deducting an appropriate mark-up. They may find it more convenient on the other hand to start with the cost of the goods or services and arrive at the arm's length price by adding an appropriate mark-up. But they will in practice use any method which seems likely to produce a satisfactory result. They will be guided in their search for an arm's length price by the considerations set out in the OECD Report on Multinationals and Transfer Pricing. (This Report examines the considerations which need to be taken into account in arriving at arm's length prices in general and also in particular in the context of sales of goods, the provision of intra-group services, the transfer of technology and rights to use trade marks within a group and the provision of intra-group loans).[25]

Appendix D—An Empirical Analysis of the Marketplace for Intangibles

A. Introduction

One question that has been raised during the preparation of the paper is whether the requirement for periodic adjustments in certain situations is consistent with the manner in which unrelated parties structure arrangements involving transfers of intangibles. Additionally, the Congressional concern about related party use of inappropriate comparables raises questions about which characteristics of unrelated party arrangements should be included in related party arrangements. This appendix draws upon academic work that examines actual licensing experience by unrelated parties in an effort to address this issue.[1] Although each of the papers examined had a different goal, the underlying data collected through surveys or interviews with licensees and licensors provides relevant information about what unrelated parties do.

In addition to synthesizing other authors' work on technology transfers, the Service and Treasury have collected a sample of license agreements drawn from the records of the Securities and Exchange Commission ("SEC"). The SEC requires that companies disclose license agreements that are "material" to the operation of the company.[2] The disclosures to the SEC provide a potential data base of over five hundred agreements. Only sixty of these agreements have been analyzed for this report. The choice of agreements in the sample was largely dictated by the ease of discovery and the availability of documents within the SEC's files. The sample consists of forty agreements for the manufacturing industry, most of which are clustered in the Standard Industrial Classifications (SIC) for pharmaceutical preparations, toilet preparations, electronic computing equipment, semiconductors, surgical and medical equipment, and ophthalmic goods. The other twenty agreements are for the services industry, mostly within the SICs for computer programming, computer software, and research and development laboratories.

In this study, the SEC documents have been used primarily for further illustration of the points raised by other authors. Further examination of the SEC agreements will be conducted after publication of this study, with a view toward relating them to financial accounting and tax data of the firms involved, and publishing the results. An analysis of available data might give a more complete picture of the incomes realized by the two parties to the transaction and suggest criteria for determining a profit split in comparable cases.

B. Goal of Licensing Agreements

Parties contemplating entering into a license agreement are ultimately concerned with the income they can expect to receive from the arrangement. The existence of proprietary knowledge suggests that production and sale of the product will result in profits that are greater than those necessary to provide a normal rate of return to the inputs provided by both parties. The actual division of these profits will depend on each party's forecast of the total profits, and on the relative bargaining strength of the two parties.

Some authors have formally diagrammed and discussed the negotiating range of unrelated parties.[3] The basic premise is that the parties are concerned with the split of the net income from the product. Baranson reports that Bendix officials "indicated that, if a broad cross-section of American industry were polled, one would find that the average goal is a return to the licensor equal to about one-third of the profit of a well-run, well-established licensee with a broad market."[4] Caves *et al.* find that the licensor will capture an average of forty per cent of the expected profits that remain after the deduction of a normal return on capital. According to their sample, the range of the split leaves one-third to one-half of the profits to the licensor.[5] Contractor's overview of the literature suggests that licensors "should settle for a 25 to 30 percent share of the licensee's incremental profit."[6]

These averages can not necessarily be used to replicate an individual arm's length deal because they do not, for example, control for the specific economic activities undertaken by the parties. They do show that unrelated parties enter negotiations for a license agreement with expectations about the total profits that they think will be earned from the exploitation of the intangible, and about the share of the profit that they can expect to receive.

C. Payment Terms for a License

Although the goal is to capture a portion of the profits, the provisions in license agreements rarely specify that a percentage of the profits will be paid as compensation for the right to exploit the intangible. This may be because the licensor fears that the accounting for profits can be manipulated too easily by a licensee, who may be able to choose what costs are included. Instead, a royalty that is a percentage of the net selling price is typically chosen.[7] Fifty-eight percent of the agreements in the SEC sample used a royalty based on the net selling price.[8] This means of achieving the split of profits from the intangible leads to a more easily verifiable number for the licensor.

Of the SEC agreements that have royalties based on the net selling price, 40 percent have a constant royalty rate. Because costs vary over time, a flat royalty rate will lead to a different profit split on a year-by-year basis. Therefore, an examination of the returns over the lifetime of the agreement is necessary to determine the true division of the profits.

Some agreements apparently attempt to even out the returns earned by varying the royalty rate. A number of different structures are possible. Some agreements have a royalty rate that declines over time; others are structured so that the rate rises and then falls. Thirty percent of the SEC agreements that have royalties based on the net selling price vary the royalty rate over the years of the agreement.

The remaining 30 percent of agreements with royalties based on the net selling price vary the royalty rate based on total sales of

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[24] *The Transfer Pricing of Multinational Enterprises, Notes by the UK Inland Revenue* (Jan. 26, 1981), at 1, *reprinted in* Int'l Bureau of Fiscal Documentation, *Tax Treatment of Transfer Pricing* (1987).

[25] *Id.* at 3.

[1] Authors who rely on statistics that include related party transactions are quick to point out that the numbers are biased due to potentially tax motivated manipulations. *See, e.g.*, Katz and Shapiro, *How to License Intangible Property*, 101 Quarterly Journal of Economics 567–589 (1986).

[2] "Material" is an accounting concept that describes items about which a prudent investor ought reasonably to be informed. For an explanation of a "material contract," *see* Item 10 of the Instructions to the Exhibit Table for Form 10–K, 17 CFR 229.601.

[3] *See, e.g.*, F. Contractor, *International Technology Licensing*, at Chapter 3 (1981).

[4] J. Baranson, *Technology and the Multinational* 64 (1978).

[5] Caves, Crookell, and Killinger, *The Imperfect Market for Technology Licenses*, 45 Oxford Bull. of Economics and Statistics 249, 258 (1983).

[6] Contractor, *supra* n. 3, at 125.

[7] The net selling price is typically the price charged by the licensee to unrelated parties on an f.o.b. factory basis after deduction for state and local sales taxes and, sometimes, after deduction for quantity discounts.

[8] Recall that the sample size is small and was not chosen randomly. All percentages provided are purely illustrative and should not be accorded the weight one would give to a larger, randomly selected sample.

the product. This structure may be most clearly tied to the returns that the licensor requires. It may also provide incentives to the licensee; this aspect will be discussed below.

Not all compensation packages are based on a percentage of the net selling price. Eighteen percent of the agreements in the SEC sample require a royalty per unit. Once again, the royalty per unit may be constant or it may change as more units are sold. In the SEC sample, 60 percent of the royalties per unit were constant, and 40 percent declined per unit as the number of units increased. The licensor may prefer to base the royalty on units sold instead of on net selling price if the licensee is contemplating discounts or if the intangible may be sold as part of a larger package, such as when software is distributed free of charge to the buyer of a computer. In the SEC sample, 80 percent of the royalty per unit agreements occurred in licenses for computer software. Computer software would seem to be the type of product for which "free" samples may be provided or which may be part of a package deal. Indeed, 67 percent of the sample agreements in the SIC code for "Computer Programming and Software" contain royalties per unit.[9]

Some agreements combine advance or lump sum fees with a royalty based on sales or units. Different factors might explain these payments in different settings. If the licensee's country of incorporation limits the allowable royalty rate, an initial lump-sum fee might be used to ensure that the licensor earns the required return.[10] Alternatively, the goal of a front-end fee may be to lower the licensor's risk by ensuring a minimum return. In the SEC sample, 16 percent of the agreements with per unit or net selling price royalties also have initial lump sum fees.

Another means of lowering the licensor's risk is for the licensee to prepay a nonrefundable amount of money against which future royalty obligations are credited. In addition, a minimum payment may be due each year. If the total royalties paid are less than this amount, the licensee must pay the difference to the licensor. Forty-seven percent of the agreements with per unit or net selling price royalties contain this type of arrangement.

Finally, a lump sum fee may provide the sole compensation for the use of an intangible for a certain number of years. Twenty percent of the SEC agreements used a one time, lump sum payment or annual lump sum payments. Such an arrangement fixes the return that the licensor will receive. This payment scheme leaves the licensee to absorb all the variance in the amount earned. Just as in the minimum payment scheme, if the product is much less popular than expected, the licensee will absorb the loss. However, unlike the minimum payment scheme, if the product is much more popular than expected, the licensee will reap all of the unexpected rewards. This type of arrangement could provide a strong incentive to the licensee to concentrate resources on selling the product.

Forcing the licensee to absorb the risk may not be the only reason that lump sum fees are chosen. The licensor may have patented a new technique or instrument that the licensee wishes to use to attempt to create another product. In this case there is no readily apparent unit to be produced, nor is anything being sold initially. Therefore, a lump sum fee may be the only practical means of compensating the licensor for the use of the patent. Lump sum fees may also be used to settle disputes over patent infringement claims.

D. Provisions Which May Affect Returns

Other clauses in the agreement, which do not explicitly affect payment, may affect the returns earned by the licensor and the licensee. For example, the licensor may require the licensee to perform a certain amount of marketing. This clause can be very specific, and may require that a certain amount be spent or that a certain percentage of the licensee's marketing expenditures be devoted to the licensor's product.[11] Alternatively, the marketing or advertising clause may be open-ended, requiring that the licensee use its "best efforts."[12] Although such a clause does not readily translate into a dollar figure, it potentially gives the licensor the ability to terminate the agreement or to file suit if unsatisfied with the results.

One might expect to find these clauses in licenses for products in which advertising plays a pivotal role in determining the success of the product. Indeed, in the SEC sample, these marketing or advertising clauses seem to be particularly prevalent in the SIC code for toilet preparations. Seventy-three percent of the agreements in the SEC sample that contain advertising clauses are for licenses with respect to clothing articles or toilet preparations. Once again, certain features of agreements seem to be product specific. This suggests that a comprehensive analysis of the marketplace for intangibles should ideally focus on individual product groups.

In addition to lowering the licensor's risk, these marketing clauses imply that the licensee is engaging in a significant economic activity beyond the manufacture and distribution of the good that embodies the intangible. One would expect that the performance of this additional activity would affect the returns that each party anticipated

A major factor affecting the licensor's return from licensing the intangible is the amount of technical support required as a condition of the license. The total expense of transferring a technology to a licensee will depend on the technology and on the licensee's level of expertise. Transfer costs include the physical transfer costs of plans, specifications, and designs, as well as the cost of training the licensee to make use of them. Since the licensor has typically already created the product being licensed, the cost of transferring the technology may be the biggest resource cost to the licensor. Indeed, Contractor finds that the most important factor in determining the licensor's return on an agreement is the amount of technical services provided.[13] By carefully limiting the amount of service automatically provided, the licensor can minimize uncertainty of return from the transfer.

Additional technical support is sometimes provided on a time and expense basis.[14] The split between "free" technical support and additional support for which the license is charged varies depending on the circumstances. Additional detail would be necessary to test hypotheses concerning how expectations about technical support affect technical assitance provisions and how these provisions affect the whole licensing package. The SEC data reveal a variety of solutions to the technical assistance question. Some set a specific time period for "free" technical support.[15] Others require that techncial assistance be reimbursed at cost,[16] at a fixed rate,[17] or at the lowest rate

[9] This product specific use of a certain type of royalty base is the type of information that one would hope to find in more situations after a thorough examination of the SEC data.

[10] If the licensee's country of incorporation intends to limit the compensation flowing out of the country, attempts to provide a lump sum payment may only serve to shift the analysis. In addition to limiting the royalty rate, the country may also challenge the lump sum payment.

[11] One agreement states that: [I]n each License Year during the term of this Agreement, Licensee shall expend a sum equal to 2% of the Net Sales of Licensed Products * * * for trade and consumer advertising of Licensed Products under the Licensed Trademarks. All such advertising shall be in accordance with the provisions of this Agreement. Licensee shall furnish Licensor with copies of each such advertisement and with proof of such advertising expenditure.

The agreement goes on to define advertising and to require that "such advertising shall have been submitted to Licensor and received its prior written approval."

[12] One such clause reads: "[Licensee] shall use its best efforts to document, package, market, distribute, advertise and promote the Use of the Software. All advertising and promotion * * * shall be undertaken at [the licensee's] expenses. * * *"

[13] Contractor, *supra* n. 3, at 123, n. 6.

[14] Baranson, *supra* n. 4, atg 65, n. 4.

[15] A license for the design, use, and sale of laser accessories with a per unit royalty provides: Upon [licensee's] request, [licensor] shall give or shall cause to be given to [licensee] such technical assistance and shall give or shall cause to be given to [licensee's] employees such training for 6 months after the date hereof as [licensee] may reasonably require in connection with the transfer of technology provided in the preceding paragraph * * *.

[16] A license to manufacture and sell clothing using the licensor's trademark with a royalty based on net sales notes: Licensor agrees to furnish technical aid to the licensee (including information concerning advertising, packaging and customer lists) if requested in writing, provided that the licensee pays all of the expenses for such aid. * * *

[17] A 1985 license agreement to modify and sell software where the license makes regular, fixed royalty payments says: [Licensor] agrees to provide technical assistance concerning the Software to licensee, upon request by Licensee, in the development of the Modified Software; provided, however, that in addition to all other sums payable under this agreement, Licensee agrees to pay [licensor] the sum of $100.00 per hour for all labor provided by [licensor], plus reimbursement for all expenses incurred by [licensor] in providing such technical assistance to Licensee.

charged by the licensor to third parties.[18] As is true of the marketing clauses in a licensing agreement, a licensor may need to balance the desire to push all of the technical costs onto the licensee with the need to ensure that the licensed intangible is used productively.

E. Preparing for Surprises

An arm's length license agreement is shaped by each party's expectations about costs, sales, and the overall profit potential from the use of the intangible. The parties' expectations may differ, and they may differ markedly from the actual profit experience with the product. Therefore, even if both parties are pleased with the royalty rate to be paid, the level of technical services to be provided, and any marketing clauses or clauses on market restrictions, it is possible that future events will leave one or both of the parties dissatisfied with the arrangement.

There are two types of surprises from which the parties may desire protection. One surprise occurs if further development of the intangible significantly improves the product's profitability. The other occurs if several years of actual profit experience lead to a change in expectations about future profitability.

The first surprise is of particular concern to the licensor. In order to insure against this risk, many license agreements contain "grant back" or "technology flowback" clauses. These clauses specify that the licensor receives, free of charge, any enhancements to the technology that are developed by the licensee. These clauses serve to discourage the licensee from doing its own R&D and potentially competing with the licensor. They further protect the licensor from losing out on serendipitous discoveries by the licensee. Caves *et al.* found grant back clauses in 43 percent of the 257 agreements they studied. However, the clauses appeared 76 percent of the time in agreements involving "dominant product" licensors.[19]

The second type of surprise, changes in the parties' expectations about future profitability, can create problems from which both licensors and licensees may want relief. Termination clauses provide one kind of protection in these circumstances. In one agreement, a license for the use of a trade name, the licensee was required to meet certain sales targets. This type of arrangement allows the licensor to exist from the deal or renegotiate if the volume is insufficient to realize the expected returns from the intangible.

In other cases, termination clauses allowed the parties to end the contract, without cause, after giving notice. This safety valve may not lead to actual termination but instead may offer an opportunity for renegotiation if one of the parties thinks that its returns are inadequate. The structure of termination clauses varies. Clauses may allow immediate termination, or they may require several years notice. Manufacturers' distributors can typically be dropped by the manufacturer to whom they are under contract on 30 days' notice.[20] At the other end of the spectrum, some terminations without cause are tied to the length of a patent. However, not all agreements involving patent life specify such a long period before renegotiation is considered. Thirty-four percent of the SEC agreements provide for termination without cause for the licensee, while 21 percent allow the licensor to terminate without cause after a given period of time.

Some agreements have no termination clause except for cause. There are several situations in which a license might be likely to lack a termination clause. If the licensee was required to make a substantial initial investment in order to make use of the intangible, one can hypothesize that the licensee would not enter into the agreement if the licensor could easily pull out of the deal. Another type of agreement without a termination clause might be one involving the license of products, such as computer software, that have a very short lifespan. In this case the relevant life is so short that termination is not a useful option; both parties must choose correctly the first time. Related to this group are agreements that are scheduled to end after a specific, and relatively short, length of time. These agreements will automatically be renegotiated if the parties wish to extend the license.

Fifty-five percent of the SEC sample agreements allow no termination except for cause. However, of this subset, 22 percent are agreements that have a specified length of less than three years, and another six percent are agreements of five or six years in duration. These agreements seem to fall into the category of licenses with relatively short lengths.

Twenty-eight percent of the SEC sample agreements without a termination clause (16 percent of the total sample) were agreements with a duration of ten years or more. More information on these licenses would need to be gathered in order to test the hypothesis that extended licenses tend to exist when the licensee is required to make a substantial initial investment.[21]

Of the remaining agreements with no termination clause, 22 percent were for agreements with lump sum payments and 22 percent were for agreements of indeterminate length. The latter group typically specified that the agreement lasted until the patent expired; these patent expiration dates were not readily available.[22]

The existence of termination clauses shows that companies are concerned about their ability to predict the total profits from the exploitation of an intangible. Regardless of the existence of termination clauses, agreements do get renegotiated. The frequency of renegotiation would give information about the "surprises" that occurred and the companies' ability to predict the outcome of a license agreement. Although it is not possible to make general statements about the overall frequency of renegotiations or terminations based on the sample of agreements we examined, some examples of renegotiations were found. A license to manufacture and sell clothing under a trademark was renegotiated in the second year of a six year term. The amended agreement provided the licensor with a royalty rate, based on net selling price, one percentage point higher than the original rate. However, the new agreement also lowered the percentage of the net selling price to be spent by the licensee on advertising by one-half a percentage point.

Other agreements provide clear evidence that the parties contemplated the possibility that renegotiation might be necessary. One agreement, with no termination clause, provides for renegotiation of the royalty rate after three years. At that time, "[B]oth the royalty rate and the scope of the Patented Portions will be renegotiated * * * [to] aggregate to not less than 1.5 percent and not more than 2.5 percent of the Royalty Portion selling price of such Licensed Products." Another agreement provides for renegotiation after certain events occur, instead of after a certain time period. This is a 15 year agreement which the licensee can terminate on six months' notice. It says: "Licensor or Licensee are unable at the Effective Date of this Agreement to value on a proportionate basis the future worth to Licensee of the rights presently owned by Licensor in the Technological Field * * *." The agreement goes on to provide for current royalty payments and for additional payments, depending on the outcome of certain events.

This discussion of terminations and renegotiations shows that there is no single way of dealing with uncertainty. Ultimately, much more detailed analysis would have to be undertaken to determine what circumstances lead unrelated parties to renegotiate or terminate contracts.

F. Conclusions and Recommendations

The agreements filed with the SEC and those analyzed in the academic work provide a body of information concerning arm's length transactions involving intangible property. This body of information points out key factors that should be considered when determining the proper allocation of income in related party situations. The SEC data and other sources will be further analyzed in greater detail following publication of this

[18] A license for the use of a new type of laser where the licensee provides fixed annual royalty payments requires: [Licensor] shall make available such technical assistance as [licensee] may reasonably request for understanding or exploiting the Proprietary Technology at [licensor's] standard rates, and under terms that are no less favorable than those extended to any of its other customers.

[19] Caves, *supra* n. 5, at 261, n. 5. A dominant product is one that accounts for more than 60% of a firm's sales. This classification relates only to the level of the firm's diversification. It does not make any distinction with regard to the overall profitability of the product. *Id.* at 252.

[20] Galante, *Quickie Divorce Curbs Sought By Manufacturer's Distributors*, Wall Street Journal, July 13, 1987, at 25.

[21] In addition, representative information on all licenses, regardless of term, that require the licensee to make a substantial investment would be necessary in order to test the hypothesis that a large initial investment by the licensee leads to a license of long duration.

[22] These agreements could be of short duration; several of the other license agreements in the sample were for patents with only two three years left before expiration.

paper. For example, patterns might be disclosed between royalty rates and specific levels of technical assistance, or marketing expenditures, either in general or by specific industry groups. Moreover, a study of the prevalence of, and circumstances that trigger, termination or renegotiation clauses (as well as the results following exercise of the clause) might be helpful in determining when unrelated parties exercise these rights.

Appendix E—Examples of Methods for Valuing Transfers of Intangibles

Preamble to Examples

The examples that follow illustrate the principles and methods described in Chapter 11. They are intended to set forth what the Service and Treasury believe is an ideal application of these principles and methods to specific factual situations. They are intended to serve as guidance for taxpayers in planning their pricing transactions as well as for both taxpayers and the Service on audit. In large part, the types of information set forth are based upon information used by IEs and economists on audit and used by taxpayers or outside economists for planning purposes.

In general, it is expected that the amount of information about comparable transactions, rates of returns, and costs for a taxpayer's industry and claimed comparable transactions will be the greatest following a full examination of the taxpayer's return. But, as Chapter 3 makes clear, taxpayers have a burden to document contemporaneously, and to justify, their transfer pricing policies and their return positions. The Service and Treasury recognize the practicalities involved in locating and analyzing the type of information set forth in certain of these examples when transactions are planned or returns filed. In general, the taxpayer making a relatively minor investment would not be expected to have gathered and analyzed data outside of its own knowledge or its business affairs and those of its competitors. As Chapter 3 indicates, however, a taxpayer engaging in a transaction involving high profit intangibles should arguably be expected to gather and analyze the type of information set forth in certain of the examples, to the extent that it is available, contemporaneously with the transaction.

Example 1: Exact Comparable

Hydrangea, Inc. is a U.S. developer, producer, and marketer of business software for personal computers. It has developed a new line of specialized accounting software that it expects to sell mainly in foreign markets.

Hydrangea expects that this product will have a life cycle similar to most other products in its line. Thus, it expects that this software will have a peak productive life of three to five years. If it is moderately successful, there will be a small, declining market after that, as obsolescence sets in. If the product is very successful, Hydrangea may decide to develop an enhanced, substantially modified version after the peak period, which it would treat as a new product.

Hydrangea has decided to serve the market in country F for this software by licensing it to an unrelated country F corporation, Fleur, with which it has had satisfactory dealings in the past. Specifically, Hydrangea and Fleur have negotiated a licensing agreement with the following terms. Fleur receives an exclusive license to market Hydrangea's product in country F and agrees to pay Hydrangea 20 percent of the net selling price for each copy it sells. Fleur agrees not to market competing products while the license is in effect. Fleur will market the product under its brand name and will perform the necessary work to modify the product to integrate it into its own line of accounting software. Hydrangea agrees to provide Fleur, for free, with any corrected, revised, and enhanced versions of the software that it releases publicly during the first four years. (Fleur and Hydrangea understand that, after that period, the latter is permitted to develop an enhanced, substantially modified product and to call for new negotiations with Fleur, find another licensee, or market the new product itself.) The agreement grants Fleur a perpetual license to the current product. During the first four years, neither party can terminate without cause; after that period, Fleur can terminate with six months' notice.

Hydrangea will serve the market in country B through its wholly owned local subsidiary, Royal Hydrangea. The markets in countries F and B are substantially similar in size, sophistication, and ability to use business software intended for personal computers. Royal Hydrangea performs the same functions as Fleur relating to marketing and distribution of accounting software. Thus, it will modify the product as necessary for local requirements; it has been and will continue to be responsible for marketing its products and developing its trademark; and, it maintains a distribution network, including a sales staff. For these reasons, Hydrangea concludes the external standards for using the Fleur agreement as an exact comparable are satisfied.

Hydrangea satisfies the internal standards by including all important features of the Fleur agreement in its agreement with Royal Hydrangea. Thus, the royalty is set at 20 percent of net selling price. The provisions concerning corrections and revisions are also, therefore, included, as are the provisions concerning duration and termination.

Each year, Hydrangea reexamines its related party arrangement to determine if the exact comparable approach is still valid. Specifically, it determines whether the two markets are still similar, and whether Fleur and Royal Hydrangea still perform similar functions. If these aspects of the external standards have substantially changed, or if Fleur terminates its agreement, Hydrangea must reestablish the appropriateness of its related party transaction, which may require adjusting the royalty rate.

Example 2: Unavailability of Comparables

A U.S. company has developed a unique good that it believes will capture 80 percent of the relevant market. The U.S. company plans to produce the good in the United States and to license the rights to production and sale for the rest of the world to its foreign subsidiary. The U.S. company can find no examples of situations in which an unrelated party licensed the rights to production for a product that captured such a large share of the market. Therefore, the company should use the arm's length return method in order to set the appropriate royalty rate with its foreign subsidiary.

Example 3: Inexact Comparable

Shampoo Inc., a well known hair-care products corporation in the United States, plans to set up a subsidiary in country Z in order to introduce its line of products in country Z. The subsidiary will manufacture, distribute, and market the products using the Shampoo trademark. When planning the appropriate transfer price for the lincense, Shampoo officials started with the knowledge that one of their competitors, Condition Corp., licensed a line of hair-care products to an unrelated party in country Z, Lotions, Inc.

The Condition license covers the formulas for all of Condition's hair-care products as well as the Condition trademark. The license gives Lotions the right to manufacture, distribute, and market the licensed products. Terms include an exclusive license in country Z for a term of four years paying a royalty of four percent of the net selling price. The licensor agrees to provide the licensee with product formulations, scientific data, manufacturing know-how, marketing, public relations, and related assistance. The licensee must adhere to strict quality control standards in manufacturing, distribution, and marketing. The licensor has the right to inspect operations of the licensee to verify such quality. The licensee is prohibited from manufacturing, importing, or marketing competing products in country Z.

From the terms of the agreement it is clear that Lotions performs the same functions that Shampoo's subsidiary in country Z will perform. It is also clear that Condition provides the same type of services and quality control for Lotion's operations that Shampoo will provide for its subsidiary in country Z. It is anticipated that Shampoo's subsidiary will have a volume of sales similar to Lotion's once its operations are fully developed. Finally, Shampoo knows that the gross margin, (net sales−cost of sales)/net sales, on sales of Shampoo's products in the United States is similar to the gross margin achieved by Condition in the United States, which indicates that their manufacturing processes and sales activities have comparable efficiencies. Therefore, it is appropriate for Shampoo to set a royalty rate of four percent of the net selling price for a four year term.

Example 4: Likely Use of Inexact Comparables

Computers Inc., a U.S. software company that specializes in games, plans to acquire the rights to manufacture, market, and distribute a new computer game, Gizmo, created by its European subsidiary. Gizmo will be an addition to Computers' existing line of games. Computers Inc. projects that the total number of Gizmo copies distributed will be close to the industry average. Numerous third party licenses for computer software are available. Computers examines these licenses for appropriate inexact comparables and should be able to determine the appropriate royalty amount and other terms for its agreement with its affiliate from the third party agreements.

Example 5: Basic Arm's Length Return Method: U.S. Importer and Distributor

TravelFun is a large publicly traded foreign corporation with a U.S. subsidiary, TravelUS. TravelFun produces a unique recreational product using sophisticated and highly sought-after production technology. TravelUS imports the assembled product and distributes it under the Travel name. TravelUS has the exclusive right to develop the Travel name in the United States. Because of the importance of the intangibles, TravelUS must apply the rules governing the transfer of intangible property.

TravelFun does not license the Travel name to unrelated parties, nor does it allow unrelated parties to distribute the product. Therefore, no exact comparables are available. Similar products exist that could potentially serve as inexact comparables; however, none of them are sold to unrelated distributors. Therefore, when TravelFun sets up its policy for transfer prices of units sold into the United States for 1989 it uses the rate of return method. In order to apply the method properly, the following information is necessary: (1) A general description of the functions that TravelUS performs, (2) financial information on companies performing similar functions, and (3) analyses of appropriate rates of return.

(1) *Functions of TravelUS.* TravelUS imports the product from TravelFun and distributes it to retailers. TravelUS is responsible for developing the marketing strategy in the United States.

(2) *Companies performing similar functions.* Initially, TravelFun seeks data about publicly traded independent operators of wholesale distribution businesses. A search of the appropriate SIC categories yields a number of companies that differ in the following ways: (1) Some are importers, while others acquire their products in the United States; (2) some are distributors of final products, while others distribute parts; and, (3) some apply intensive marketing, while others do not. Examination of these firms' published financial information indicates that the sample should be narrowed to 16 firms in order to reflect more clearly the functions performed by TravelUS. TravelUS is an importer that distributes final products and performs an important marketing function. Each firm in the final sample has some combination of these characteristics. Balance sheet and income data are then collected for the sample of 16 companies.

(3) *Analysis of appropriate rates of return.* The company evaluates the available information in order to determine the appropriate ratios on which to base its comparisons. Comparable asset data are not available for all firms in the sample. Therefore, an attempt must be made to determine a rate of return for TravelUS based on available cost data for the sample of firms. A number of ratios can be considered as a means of determining an appropriate return on costs. Possibilities include the ratio of gross profit to operating expenses (the Berry ratio), the ratio of operating income to the cost of sales and operating expenses, and the ratio of net pre-tax income to total expenses. The choice of the appropriate ratio will depend on the composition of the sample and the stability of the ratios over time.

For the sample of 16 companies, all of the ratios lead to similar results. TravelUS retains the information that supports this claim, but upon examination presents only the analysis using the Berry ratio. As defined above, the Berry ratio is the ratio of gross profit to operating expense:

$$\frac{\text{Net Sales} - \text{Cost of Sales}}{\text{Operating Expenses}}$$

Net sales are total revenue from sales less cash discounts to customers for payment within a specified time. Cost of sales is also referred to as cost of goods sold, including freight charges. Operating expenses include selling expenses such as sales salaries and commissions, advertising and marketing expenses, depreciation expenses, supplies, office salaries, and payroll taxes. The major expense not included in either cost of goods sold or operating expenses is interest expense.

For the 16 firms in the sample the average Berry Ratio is 1.40 with a standard deviation of .15. (The minimum ratio was 1.17 and the maximum was 1.61.) TravelUS uses the average ratio, 1.40, in order to determine the payment that should be made to the parent. Additional information that will be necessary includes net sales, operating expenses, and cost of sales that are not included in the payment to the parent for the product.

TravelUS projects sales of 20,000 units, net sales revenue for 1989 of $100 million, and operating expenses of $30 million. Cost of Sales are projected to be $2 million plus transfer payments to TravelFun. Plugging this information into the equation for the Berry ratio yields:

$$1.40 = \frac{\$100 \text{ mil.} - [\$2 \text{ mil} + 20{,}000 \times]}{\$30 \text{ mil}}$$

Therefore, x, the transfer price paid for each unit, is $2800. TravelUS will pay TravelFun $2800 per unit of import and projects that it will pay TravelFun a total of $56 million in 1989.

Example 6: Basic Arm's Length Return Method: Foreign Subsidiary Serving Local Market

Counter Inc., a U.S. corporation that specializes in over-the-counter drugs, plans to set up a subsidiary in country X. The subsidiary will manufacture, distribute, and market Counter's products in country Z. The manufacturing process is not particularly complex. The subsidiary will set up its own distribution network, which will be of average size for the industry. Further, it will perform its own marketing; however, because the subsidiary will, in general, sell "generic" products that will sell under its customers' brand names and trademarks, its marketing activities will involve contacting drug stores and other selling concerns, and not the development of a unique, consumer-level marketing intangible.

Counter's search for unrelated party licenses for comparable products proves fruitless. The search does yield a number of licenses in which the functions performed by each party are similar. The products are not similar enough to over-the-counter drugs to be classified as inexact comparables; however, the level of manufacturing, the type of distribution network, and the type of marketing performed in each case are similar. Therefore, Counter searches for information about the returns earned by each of these companies. Analysis of the income statements and balance sheets of the firms in the sample yields an average rate of return earned. This average can be used by Counter to determine the royalty rate to be paid by its subsidiary in country Z.

Example 7: Basic Arm's Length Return Method: Foreign Subsidiary Producing for U.S. Market

A U.S. corporation has developed and patented the formula for a new heart drug that has fewer potential side effects than any drug in existence. The U.S. corporation plans to manufacture the drug in a foreign subsidiary to be located in country Y, which has very low labor costs. The completed product will be returned to the parent for sale in the United States. In addition, some of the manufactured drug will be shipped from the manufacturing subsidiary to a marketing subsidiary in country X for sale in Europe. The parent wishes to fashion the transaction so that a royalty will be paid by the subsidiary to the parent for the right to manufacture and sell the drug. The parent and the subsidiary in X will then pay the

manufacturing subsidiary for the finished product.

The following information is known or projected:

1. The drug will sell for $2.00 per pill.

2. The volume of sales in the United States in 1989 will be approximately 900 million pills.

3. The volume of sales in Europe in 1989 will be approximately 600 million pills.

4. Marketing and distribution costs in the United States are estimated to be $14.4 million.

5. Marketing and distribution costs incurred by the country X subsidiary are estimated to be $9.6 million.

6. The manufacturing subsidiary's costs will be as follows:

Cost of Chemicals	$110 million
Operating Expenses	$75 million
License Payments	To be determined
All Other Expenses	$5 million

7. The manufacturing subsidiary will have the following assets:

Cash	$12 million
Factory	$360 million

8. The manufacturing subsidiary will have the following income:

Interest Income	$1 million
Revenue from Sale of Drug	To be determined

There are no transfers by unrelated parties that would provide an inexact comparable for either the license the parent grants to the manufacturing subsidiary or for the pill that is sold to the parent and to the marketing subsidiary. There are other companies that perform similar marketing and manufacturing functions. The difficult piece to measure is the value of the patent which is held by the parent. Therefore, the parent turns to the arm's length return method as the appropriate method. The parent will find proper rates of return for the manufacturing and marketing segments of production and allocate to itself the residual profits.

A sample of manufacturers in locations with low labor costs shows that manufacturers earn an average rate of return on their manufacturing assets of 12 percent. The subsidiary's total manufacturing assets, the factory, cost $360 million. Prices should be structured so that the manufacturing subsidiary earns profits of $44.2 million ($43.2 million return on the factory asset plus the known $1 million return on cash).

If all of the drug were resold to the parent, the split between the cost of the final pill and the license payment would be unimportant as long as the correct amount of income remained allocated to the subsidiary. However, in this case the final product is also being sold to the subsidiary in country X, so the correct split is important.

Information on marketers and distributors of drugs shows that they earn approximately cost plus 25 percent, both in the United States and in country X. Based on the costs outlined above, the parent should earn net income of $3.6 million on its distribution and marketing activities, the Country X subsidiary should earn net income of $2.4 million. Revenue from the sale of the heart drug will be approximately $1800 million in the United States and $1200 million in Europe. Therefore, the manufacturing subsidiary should charge $1.98 per pill.

Total revenue received by the manufacturing subsidiary will be $2971 million ($2970 million from sales and $1 million from interest income.) The royalty to be paid to the parent will be a percentage of the net sale price of $1.98. The correct royalty rate, r, can be determined by the following equation, which shows the manufacturing subsidiaries revenues and costs:

Net Income ($44.2 mil.) = Total Revenue ($2971 mil.) − Cost of Chemicals ($110 mil.)
− Operating Expenses ($75 mil.)
− Other Expenses ($5 mil.)
− Royalties Paid [(1500 mil.) ($1.98)r]

Solving for r shows that r equals .921.

Therefore, the appropriate royalty rate is 92.1 percent of the net selling price of $1.98.

Example 8: Likely Use of Basic Arm's Length Return Method

A U.S. company manufactures electronic equipment for sale in the United States. The U.S. company designs the equipment and licenses the designs to its foreign subsidiary. The subsidiary assembles the circuit boards and other components for the products and sells them to the parent. For transfer pricing purposes, the parent searches for the rate of return earned by independent computer assembly operations in order to determine the amount of income that should be attributed to its foreign subsidiary.

Example 9: Likely Use of Either Inexact Comparables or Basic Arm's Length Return Method

A U.S. company manufactures and markets a line of sportswear. The company plans to introduce the same line of clothing to Europe through its European subsidiary. The subsidiary will manufacture, market, and distribute the casual wear using the parent's trademark. The clothing is marketed toward middle income consumers and is projected to sell at prices and earn a market share similar to several other brands which are marketed to this group. The parent has two options when setting its transfer pricing policy. If unrelated party licenses of trademarks for clothing can be located, then these inexact comparables can be used to establish appropriate terms for the license agreement. If information is available on the returns earned by unrelated parties that perform functions similar to the European subsidiary, then the rate of return method can be employed.

Example 10: Profit Split Method Using Split Observed in Arm's Length Transaction

ABC is a U.S. corporation that produces advanced machine tools. It maintains a large artificial intelligence research lab, which has made significant advances in computer vision. Recently, this work has begun to yield marketable products. Specifically, ABC has developed a "sighted" numerically controlled machine tool (NCMT) that can be programmed to recognize the pieces on which it should perform its fabrication tasks. ABC expects this new device to be a significant advance over competing NCMTs because the pieces will not have to be precisely aligned before the fabrication operations can be performed; therefore, the "sighted NCMT" should be much easier to operate and integrate into an assembly line. The key element in this advance is the software that allows the NCMT to determine the precise position and orientation of a piece placed on its operating deck. ABC has obtained worldwide patent protection for this software. As is true of most of ABC's products, the device must be substantially modified for each customer's specific application, and ABC maintains a large and expert engineering staff to accomplish this.

ABC projects that devices based on the new technology will eventually become an important source of revenues and profits for the company. During the first three to five years, ABC expects to have no significant competitors, and plans to market the devices to the high price, high mark-up, low volume, most technologically advanced segment of the NCMT market. After that period, as the technology becomes more common, ABC expects that sighted NCMTS will, in general, replace other types of NCMTs and that its lead will enable it to capture a significant share, perhaps 50 percent or more, of the overall NCMT market.

ABC-Europe is a wholly owned subsidiary of ABC incorporated in country X. All of ABC's products currently sold in Europe are produced and marketed by this company. ABC-Europe maintains its own research and engineering staffs and manufactures all of the devices it sells. A majority of the products in its line involve technology licensed from ABC, but a significant fraction depend on technology developed through its own research efforts. ABC-Europe performs all of the marketing for Europe, and its engineering staff performs the necessary development work of the devices for each customer.

ABC plans to transfer the European rights to exploit the software and associated technology for sighted NCMTs to ABC-Europe. ABC has no plans to license the technology to an unrelated party; therefore, no exact comparable is available. ABC has conducted a search for inexact comparables; although the search does turn up unrelated party transactions involving licenses of machine tool devices and patents, ABC has concluded that none of them can meet the standards for the inexact comparable method. Specifically, none of the potential comparables are for devices which involve profit margins as high as the sighted NCMTs will have in the short run, nor market shares as large as ABC anticipates having in the long run.

ABC next considers the basic arm's length return method. It concludes that ABC-Europe's activities in exploiting the sighted NCMT technology can be split into four functions: (a) Conducting research to search for uses in the European market, (b) marketing the devices, including participating in trade shows, conducting demonstrations, and providing technical assistance (mass-market retail-level advertising is not necessary in this industry), (c) designing the specific devices to meet the requirements of each customer's application, and (d) manufacturing and distributing the devices.

ABC concludes that some but not all of these functions can be analyzed under the basic arm's length return method. Once each customer's design has been set, manufacture of the devices will not be much more complicated than current NCMTs, and ABC is familiar with firms that manufacture current-generation NCMTs according to others' designs. Therefore, ABC concludes that function (d) can be analyzed in this way; specifically, it concludes that a rate of return to operating assets of 16 percent is the average for firms that perform this function. Marketing is not a major activity in this industry, because the customers are extremely knowledgeable. ABC deals with firms that perform marketing functions for it; based on its knowledge of these firms, ABC concludes that a 20-percent ratio of income to costs is a reasonable way to value the contribution of function (b).

Functions (a) and (c), however, cannot be analyzed in this way. ABC-Europe's staff of scientists and engineers, while smaller than ABC's, is still one of the largest and most expert in Europe. ABC knows of no independent firm in the machine tool industry, in the United States or Europe, that would be able to conduct research, development, or design work as satisfactorily as or on a scale comparable to ABC-Europe. Therefore, ABC concludes that it would be inappropriate to value the contributions that ABC-Europe's performance of these functions will make toward selling sighted NCMTs in Europe by multiplying the assets employed by a rate of return, or multiplying the costs incurred by an income-to-costs ratio. In short, a profit-split approach is necessary.

Although ABC's search for comparables did not turn up appropriate licenses in the machine tool industry, other transactions between unrelated parties were found. For example, ABC obtained information about the following transaction: a group of professors, in partnership with their university, established a consortium to patent and exploit a process through which a new product can be produced by a genetic engineering technique. The consortium bargained at arm's length with several large chemical companies, and negotiated a licensing agreement with one of them. The licensee manufactures the product, tailors it to meet the specific needs of various groups of farmers, and markets it. The product has no significant competitors and has achieved widespread use in certain important agricultural applications. The licensee pays the university consortium a royalty of $7 per pound.

ABC next gathers information about the chemical company and the industry in which it operates. It is able to determine that the chemical company maintains a large staff of scientists and engineers which performs functions concerning the new product that are comparable to the research and development activities that ABC-Europe will perform. The chemical company undertakes significantly more marketing activities than will ABC-Europe, and the manufacturing process for the product is not comparable. Further, ABC is able to determine the following information: (a) The product sells for $27 per pound; (b) production costs are ten dollars per pound; (c) independent firms that produce chemicals using similar production techniques earn profits equal to 20 percent of cost; (d) marketing and distribution expenses are three dollars per pound, and (e) independent firms that perform similar marketing and distribution activities earn 33 percent of expenses.

This information allows ABC to determine the profit split between the basic technology contributed by the university consortium, on the one hand, and the research, development, and application activities and know-how contributed by the chemical company, on the other. Specifically, the latter's profit per pound, net of royalty and expenses, is seven dollars ($7=$27–$7–$10–$3). Of this amount, two dollars should be attributed to the manufacturing activity and one dollar to the marketing and distribution ($2=$10×0.20, and $1=$3×0.33). This leaves four dollars per unit as the return to the chemical company's know-how and skills as to R&D and application of technology to its customers' needs. The university's income is the seven dollars royalty. Therefore, the profit split is 64 percent (64 percent=7/(7+4)) for the licensor's basic technology and 36 percent (36 percent=4/(7+4)) for the intangibles employed by the licensee. (Note that the licensor and licensee each earn 50 percent of the total profits, since they each earn seven dollars per pound; however, 50 percent vs. 50 percent is not the relevant profit split for this situation, because it does not distinguish between the profits for the manufacturing and marketing functions.)

Finally, ABC is able to determine the proper arrangement for its license to ABC-Europe. There are many ways ABC could structure the arrangement. One would simply be to specify that ABC-Europe (a) determine gross profits from sales of sighted NCMTs (with gross profits defined as sales receipts minus manufacturing and marketing costs), (b) subtract 16 percent of the value of assets used in manufacturing the devices, (c) subtract 20 percent of the marketing costs, (d) subtract 36 percent of the remainder, and, finally, (e) remit the remaining amount to ABC as a royalty.

Alternatively, ABC could use additional information about ABC-Europe's future activities to set a more traditional licensing arrangement. ABC's projections for sales of sighted NCMTs in Europe during the first three years of operations include the following figures. The devices will sell, on average, for $100,000 each. Cost of production will be $56,000 and will require $50,000 of production assets per device. Marketing costs will be $5,000 per device. These projections imply that gross profits, defined as sales receipts minus manufacturing and marketing costs, equal $39,000 per machine. Of this amount, ABC-Europe should be allocated $8,000 for the manufacturing function and $1,000 for marketing ($8,000=$50,000×0.16 and $1,000=$5,000×0.20). Remaining profits are thus $30,000 per device. This amount should be split 64 percent to ABC and 36 percent to ABC-Europe; thus ABC should be allocated $19,200 per device and ABC-Europe the remaining $10,800. A more traditional licensing arrangement, therefore, would require that ABC-Europe pay ABC a royalty equal to 19.2 percent of sales (19.2 percent=$19,200/$100,000).

If ABC chooses the former type of arrangement, periodic adjustments to it are less likely to be necessary, because the allocation of income between ABC and its affiliate will automatically adjust to a large extent. ABC should reconsider periodically, however, whether the manufacturing rate of return to assets, the marketing income to cost ratio, and the profit split percentages are still appropriate. If ABC chooses the latter type of licensing arrangement, many more periodic adjustments to it will likely be necessary. Specifically, in addition to considering the preceding factors, ABC must determine if actual experiences depart from the projections enough to imply significant changes in the appropriate allocation of income. If so, ABC will have to recalculate the sales based royalty rate by substituting the relevant actual figures for the projections in the preceding paragraph.

Example 11: Profit Split Method Using Information About Relative Values of Preexisting Intangibles

Teachem is a U.S. corporation that designs, produces, and markets educational toys in the U.S. It maintains a staff of educational psychologists and engineers to develop and design the toys, which are perceived as uniquely high quality and sell at a premium. Enseignerem is a wholly owned affiliate of Teachem and is incorporated in country F. It is one of the largest toy companies in Europe. It was, and still is, the largest toy company in country F when it was acquired by Teachem a number of years ago. Enseignerem incurs large advertising and other marketing costs to develop its trademark and reputation as a producer of high quality educational toys. It is responsible for its own marketing strategies, which are different in important respects from Teachem's marketing efforts in the United States. For example, Enseignerem maintains a large sales force that calls on schools and other institutions, and institutional sales account for a much larger proportion of its revenues.

Teachem has recently developed a new line of electronic toys and intends to license the European rights to the designs to Enseignerem. Teachem does not plan to license them to any unrelated parties; therefore, an exact comparable is not available. Further, Teachem expects that Enseignerem will be able to capture its usual high market share, especially in the institutional market, and will be able to sell the toys for its usual significant premiums over its competitors. For these reasons, Teachem decides that suitable inexact comparables will probably not be available.

Teachem next considers the basic arm's length return method. Enseignerem will perform three functions with respect to the new line of toys. It will be responsible for manufacturing them; specifically, it will negotiate contracts and supervise independent contract manufacturers who will actually produce the toys. Second, it will distribute them. Third, Enseignerem will be responsible for all aspects of marketing them.

The first two functions can be analyzed

under the basic arm's length return method. Teachem projects that the new toys will sell for $100 each in Europe. Payments to the contract manufacturers will be approximately $40 per toy. Enseignerem has found that distribution costs, including transportation and costs of holding inventories, are usually one-half of production costs, and expects that the new line will be typical in this regard. Therefore, Teachem projects that distribution costs will be $20 per toy. Finally, Enseignerem expects to incur costs of four dollars per toy relating to the supervision of the contract manufacturers. These costs include the salaries of engineers who will be assigned to visit and test the contractors, and premiums for liability insurance.

In some of its product lines, Enseignerem employs contract manufacturers who are willing to distribute, as well as produce, the items. By comparing these contracts with those calling for manufacturing only, Teachem concludes that the independent firms that perform distribution earn a return for it equal to 25 percent of the distribution costs. Teachem therefore allocates five dollars per toy to Enseignerem for the distribution function ($5=$20x0.25). Teachem also decides that a 25 percent income-to-costs ratio is appropriate for the first function, responsibility for manufacturing. Thus, Teachem allocates one dollar per toy to the affiliate as the return for performing it ($1=$4x0.25).

Teachem decides that the affiliate's final function, marketing, cannot be analyzed by the basic method. Enseignerem is not planning to incur any significant costs attributable solely to the new toys. In general, it focuses its advertising on promoting the Enseignerem reputation rather than displaying a single item, and does not plan to issue a separate catalog or set up a separate sales force for the new line. Therefore, Teachem decides that it is not possible to identify or measure the costs or assets that Enseignerem will devote to the new product line. However, it would clearly be wrong to conclude that Enseignerem deserves no return for the marketing function, because its preexisting reputation, sales force, and knowledge of its market are crucial to the success of the new product line in Europe. Therefore, a profit split is necessary.

To summarize the analysis to this point, the toys are projected to earn a gross profit of $36 each ($36=$100−$40−$20−$4). Of this amount, six dollars should be allocated to Enseignerem for the functions analyzed with the basic method. Thus, $30 per toy is left as the combined return to Teachem's product designs and Enseignerem's trademark, sales force, and other marketing intangibles. The next step is to split these profits in a way that reflects the relative economic values of these sets of intangibles.

Teachem concludes that the new line of toys is similar to other lines that the corporate group has introduced in the past few years in terms of the importance of the underlying design relative to marketing intangibles. Specifically, the designs involved a typical amount of research and development effort and the toys will be marketed in ways similar to, and with similar intensity as, other products. Teachem analyzes its own performance record and educational toy industry information on the relative importance of design and marketing intangibles therein. Based on a good faith analysis of this data, Teachem concludes that it is reasonable to assign a relative value of the design intangibles equal to one-half the value of marketing intangibles. Accordingly, it allocates ten dollars of the $30 to be split to itself and the remaining $20 to Enseignerem.

Teachem can structure the arrangement in any form that achieves the appropriate allocation of income, ten dollars per toy to the parent and $20 to Enseignerem. Specifically, it could establish an agreement in which Enseignerem pays Teachem a royalty for the European rights to the product designs at a rate of ten percent of sales. In future years, Teachem must reexamine its arrangement and, if any key element in the analysis described above changes significantly, must adjust the royalty rate accordingly.

Example 12: Likely Use Of Profit Split Method

The research staff of a European company that manufactures and markets food products has just created a chemical compound that will alter the way that the human digestive system reacts to sugar. The company believes that by adding the compound to its products, the products will pass through the human digestive system without being absorbed. The compound is unique because it leaves the taste of the product unchanged. No information is known about the possible side effects of this compound. The company wants to use this discovery to offer a whole line of diet products. The European company has a U.S. subsidiary that presently manufactures and markets existing products in the United States. The U.S. subsidiary also has a research staff. Because the prime market for this new product is the weight-conscious United States, the parent licenses the compound to the U.S. subsidiary for development and for the extensive and expensive testing that will be necessary in order to obtain approval from the Food and Drug Administration. Because the product is unique and because the subsidiary performs such complex functions, the profit split arm's length return method is probably most appropriate.

Example 13: Periodic Adjustments To Reflect Changes in Functions

A U.S. corporation produces and markets widgets in the United States and it has a subsidiary in country X that produces and markets widgets in Europe. The U.S. parent is in the early stages of developing a new super-widget. In 1988 it is clear that this could be a major breakthrough in widget technology; however, the manufacturing process is still cumbersome. It is unclear whether the process can be developed to the point that it would be possible to mass-produce the super-widget. The U.S. parent believes that the team of employees at its subsidiary in country X is best suited for the time-consuming and expensive job of developing the process to produce the super-widget.

In determining an appropriate transfer price for the license of the technology, the parent can find no inexact comparable for the super-widget. Similarly, the basic arm's length return method is not feasible because neither party is performing standardized functions. Therefore, the U.S. parent attempts a profit split analysis.

Based on the best information available in 1988, the U.S. corporation predicts that the development process should be completed by 1994. An increasing number of super-widgets will be produced between 1988 and 1994; however, only in 1994 will true assembly-line style production be feasible. Based on an analysis of the relative costs incurred by the parent and by the subsidiary, and on an analysis of the relative returns earned by unrelated parties when risky products are jointly developed, a 50–50 profit split on the returns of the design of the super-widget is adopted by the parent.

By the end of 1989, as the parent is filing its 1989 tax returns and is rechecking its transfer price policy for 1990, super-widgets are being successfully mass-produced at close to the volume predicted for 1994. Instead of requiring the extended development process predicted two years earlier, establishing production was more similar to the effort necessary when adjusting production lines for improved versions of products. Accordingly, the parent adjusts its transfer price policy to a basic arm's length return analysis for its subsidiary in country X. Specifically, the parent determines the average rate of return earned by independent companies that manufacture a product similar in complexity to super-widgets. Because the parent is particularly cautious and feels it would be difficult to sustain its profit split for 1989, it also modifies the 1989 policy to a rate of return analysis. While at the outset of this transaction it appeared that the subsidiary in country X would be required to use significant intangibles of its own to establish the production process, the actual experience of the parties was that no unique intangibles were contributed by the subsidiary. The decrease of five years in the time expected to develop production to the 1994 level constitutes a significant change that requires an adjustment.

Example 14: Periodic Adjustments to Reflect Changes in Indicators of Profitability

A U.S. pharmaceutical company has patented the formula for a new anti-arthritic drug with fewer side effects that those in existence. The U.S. parent's subsidiary in country Y will manufacture the drug and market it worldwide. There are numerous third party licenses for the existing anti-arthritic drugs. The parent decides that these products are comparable because it feels that its product will be a close competitor to them, and will sell for a similar price and capture a similar market share. Specifically, it believes that its drug will capture approximately 15 percent of the market, as do several of the existing products. The parent uses the eight percent royalty on net selling price that is found in those licenses and adopts other significant features of such licenses as well. For example, the length of the agreement is for the length of the patent.

The U.S. parent reviews its license with the subsidiary at the start of year two and finds

that its drug has only an eight percent market share. However, the market share seems to be continuing to grow. Indeed, at the beginning of year three its market share is 16 percent and at the beginning of year four its market share is 21 percent. In each of these years the U.S. parent decides that the inexact comparable is still appropriate.

By the end of year four the popularity of this drug has skyrocketed and it captures 50 percent of the market. Since this share of the market is far beyond that captured by any of the third party licenses, it can no longer be assumed that the level of overall profitability for the product licensed to the related party is similar to that for the products licensed to unrelated parties. Specifically, to the extent that market share is an indication of the mark-up that can be charged on a product, the related party product, which captures 50 percent of the market, is probably much more profitable than products that capture only 15 percent of the market. Therefore, the present inexact comparables are not longer valid. A search for other inexact comparables fails to produce a license involving a similar market share. Therefore, the parent turns to a basic arm's length return analysis to determine what its subsidiary should earn.

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Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 780, 784, 816 and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Performance Standards; Permanent and Temporary Impoundments; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 780, 784, 816 and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Performance Standards; Permanent and Temporary Impoundments

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) is amending certain portions of its permanent program regulations governing permanent and temporary impoundments at surface and underground coal mining operations. Most of the revisions respond to a court decision; others respond to a 1986 amendment to the Surface Mining Control and Reclamation Act of 1977.

The rule, which includes design, construction and inspection requirements for impoundments: (1) Requires a minimum static safety factor for small impoundments; (2) requires stable foundations and abutments during all phases of construction for small impoundments; (3) establishes new spillway requirements for impoundments; (4) establishes a distinction between impoundments based on size and potential adverse effects resulting from impoundment failure; and (5) authorizes qualified registered professional land surveyors to inspect small impoundments and to certify the construction of siltation structures.

EFFECTIVE DATE: November 28, 1988.

FOR FURTHER INFORMATION CONTACT: Robert A. Wiles, P.E., or Stephen M. Sheffield, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202–343–1502 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. Background

The Surface Mining Control and Reclamation Act of 1977 ("the Act" or SMCRA), 30 U.S.C. 1201 *et seq.*, sets forth general regulatory requirements governing surface coal mining and the surface impacts of underground coal mining. Environmental protection performance standards for permanent water impoundments constructed during surface mining activities appear in section 515(b)(8) of the Act, 30 U.S.C. 1265(b)(8), and provisions governing the construction of siltation structures appear in section 515(b)(10)(B), 30 U.S.C. 1265(b)(10)(B). Sections 516(b)(9) and (10) of the Act, 30 U.S.C. 1266(b)(9) and (10), authorize similar regulation of water impoundments and siltation structures for underground mining activities. Section 516(b)(10) further provides that the Secretary shall make such modifications in these requirements as are necessary to accommodate the distinct differences between surface mining and underground mining.

The permanent regulatory program for surface coal mining and reclamation operations was promulgated on March 13, 1979 (44 FR 15312). Requirements for sedimentation ponds at surface mining activities were established at 30 CFR 816.46 (44 FR 15400), while those for underground mining activities were established at 30 CFR 817.46 (44 FR 15426). OSMRE implemented the provisions of section 515(b)(10)(B) of the Act for siltation structures by establishing requirements for sedimentation ponds. At that time, OSMRE considered sedimentation ponds to be the "best technology currently available" for controlling sediment movement from surface coal mining operations.

Requirements for permanent and temporary impoundments at surface and underground mining activities were established in the 1979 rules at 30 CFR 816.49 (44 FR 15401) and 30 CFR 817.49 (44 FR 15428), respectively.

Permitting requirements for reclamation and operation plans for impoundments at surface activities and underground mining activities were established in the 1979 rules at 30 CFR 780.25 (44 FR 15360) and 30 CFR 784.16 (44 FR 15368), respectively.

Section 816.49 regulates all types of impoundments whether they are temporary or permanent. The terms "impoundment," "impoundment structure," "permanent impoundment" and "temporary impoundment" are defined at 30 CFR 701.5. In addition to the regulations governing all impoundments, there are special regulations covering specific types of impoundments. At § 816.46 are regulations covering siltation structures. Requirements for coal mine waste impounding structures are provided at § 816.84. These special provisions supplement the guidance provided at § 816.49 for these special categories of impounding structures.

In promulgating the 1979 rules, and again in the 1983 rules, OSMRE did not identify any differences between impoundments for surface and underground mines that necessitated different regulatory provisions. The permitting rules applicable to impoundments for surface mining activities at 30 CFR 780.25 and those for underground mining activities at 30 CFR 784.16 were identical. Similarly, the performance standards for surface mining activities at 30 CFR 816.46, 816.49, and 816.84 were identical to the rules for underground mining activities at 30 CFR 817.46, 817.49, and 817.84, respectively.

During revision of the permanent regulatory program in 1983, OSMRE replaced most of the specific design criteria in § 816.46 (48 FR 44051) and § 816.49 (48 FR 44004) with performance standards, thereby providing regulatory authorities greater flexibility in the administration of impoundment design. Section 816.46 was renamed "Hydrologic balance: Siltation Structures," to be consistent with the wording of section 515(b)(10)(B)(ii) of the Act and to reflect rule changes which allowed the use of siltation structures other than sedimentation ponds, such as chemical treatment facilities or mechanical structures. The 1983 rules at §§ 816.46 and 816.49 and related coal mine waste impounding structure provisions in § 816.84(b), were challenged in the U.S. District Court for the District of Columbia in *In re Permanent Surface Mining Regulation Litigation*, (*In re Permanent II (Round III)*) 620 F. Supp. 1519 (D.D.C. July 15, 1985).

The District Court remanded: (1) Sections 816.49(a)(3) and (a)(5)(i) because they included requirements for a static safety factor and for foundation investigation and laboratory testing of small sedimentation ponds without having included such requirements when the rule was proposed on June 21, 1982 (47 FR 26754), as required by the Administrative Procedure Act (620 F. Supp. at 1568–1570); and (2) §§ 816.49 and 816.84(b) to the extent they deferred to the Mine Safety and Health Administration (MSHA) impoundment classification standards when OSMRE had not separately justified reliance on such standards (*Id.* at 1536–1537). In addition, in response to plaintiff's challenge of the combination spillway requirement of §§ 816.49(a)(8) and 816.84(b)(1), the Secretary of the Interior agreed to propose a rule specifying that one spillway that can safely pass the design precipitation event may serve as

a combination principal and emergency spillway. (*Id.* at 1538 and 1571–1572.)

On October 21, 1987 (52 FR 39364), OSMRE proposed to amend its permanent program regulations governing permanent and temporary impoundments at surface and underground mining operations. In addition to soliciting public comments and providing an opportunity for public hearings upon request, OSMRE provided a 70-day public comment period. OSMRE received comments from seventeen organizations, including State regulatory authorities, environmental groups and representatives of the coal industry. No public meeting was requested and none was held.

The remainder of this section of the preamble is organized by issues as follows: (1) Impoundment Size; (2) spillways; (3) stability; (4) foundations; (5) certification of Siltation Structures; and (6) inspection of Impoundments. Changes to the proposed rule and OSMRE's consideration of public comments are discussed in the subsequent section, "Discussion of Final Rule and Comments."

1. Impoundment Size

In both the 1979 and 1983 regulations at 30 CFR 816.49, OSMRE classified impoundments based on size and required larger impoundments to meet more stringent requirements than smaller impoundments. A similar classification was included in the 1983 rules for sedimentation ponds at 30 CFR 816.46(c)(2) and for coal mine waste impounding structures at 30 CFR 816.84(b).

OSMRE adopted the MSHA criteria for impounding structures in the 1979 rule (44 FR 15401) and continued to apply them in the 1983 rules. In 30 CFR 77.216, MSHA imposes minimum plan requirements for design, construction and maintenance information that take into account size and potential hazards to miners for certain impounding structures (see "Discussion of Final Rule and Comments" for specific MSHA criteria). Under §§ 816.46(c)(2) and 816.49 of the 1983 rules, structures meeting MSHA criteria were required to meet MSHA requirements. Similarly, the requirements for coal mine waste impounding structures in § 816.84(b) of the 1983 rules were also based on the MSHA criteria.

In *In re Permanent II (Round III)*, plaintiffs objected to OSMRE using this distinction between sizes of coal mine waste impounding structures in § 816.84(b), contending that the distinction had the effect of resulting in less scrutiny for smaller impoundments. Plaintiffs maintained that OSMRE's deferral to the classification system used by MSHA was improper, and that OSMRE should independently classify impoundments. Plaintiffs contended that the Secretary had not justified using MSHA's distinction in terms of the Act.

The court remanded §816.84(b) insofar as it deferred to the MSHA criteria, finding that the Secretary must independently consider and justify the adoption of a distinction based on impoundment size, and that he had not properly justified using the MSHA criteria. (620 F. Supp. at 1536–1537.) The court also remanded § 816.49 to the extent those provisions required a distinction between large and small impoundments. (620 F. Supp. at 1537.)

On November 20, 1986 (51 FR 41958), OSMRE announced its intention to propose a new rule to comply with the court order. After reconsidering the administrative record of the previous rules, as well as the legislative history of the Act and the opinion of the District Court, on October 21, 1987 (52 FR 39364), OSMRE proposed §§ 816.49(a), 816.46(c)(2) and 816.84(b). The criteria to determine which impoundments must meet the more stringent stability requirements of § 816.49(a)(3) would be based on both size and a provision whereby a small impoundment would be subject to more stringent requirements if the regulatory authority determined that it was located where failure would be expected to cause loss of life or serious property damage. The justification for using these criteria is included in the subsequent "Discussion of Final Rule and Comments" section of this preamble.

2. Spillways

The 1983 rules at 30 CFR 816.49(a)(8) and 816.84(b)(2) required that all impoundments, including coal mine waste impounding structures, include a combination of principal and emergency spillways designed and constructed to safely pass the design precipitation event. This requirement for a combination of spillways was challenged in *In re Permanent II (Round III)*. The Secretary determined that the challenge had merit and stated his intention to propose a rule specifying that one spillway that can safely pass the design precipitation event may serve as a combination principal and emergency spillway. (620 F. Supp. at 1538 and 1571–1572.) On November 20, 1986 (51 FR 41952), OSMRE announced the suspension of §§ 816.49(a)(8) and 816.84(b)(2) to the extent that they required separate principal and emergency spillways where one spillway may safely pass the design precipitation event. Consistent with the Secretary's stated intent, OSMRE included proposed revisions to these sections in the October 21, 1987 (52 FR 39364), proposed rule.

3. Stability

On June 21, 1982 (47 FR 26760), OSMRE proposed that static safety factors for impoundments be determined "by prudent engineering design." In response to comments on the 1982 proposal and in order to simplify the requirement, OSMRE adopted in § 816.49(a)(3) of the 1983 rule (48 FR 44004) a single static safety factor requirement of 1.5 and a seismic safety factor requirement of 1.2 for all impoundments.

Challengers to the 1983 rule in *In re Permanent II (Round III)* contended that OSMRE's 1982 proposed rule had not included a static safety factor of 1.5 for small impoundments, and therefore the public was not given adequate notice that this requirement would apply to small sedimentation ponds. The court remanded this rule for additional rulemaking to the extent that it applied to small sedimentation ponds not previously required to meet the 1.5 static safety factor. (620 F. Supp. at 1568–1570.) Accordingly, on November 20, 1986 (51 FR 41958), OSMRE suspended § 816.49(a)(3) insofar as it applied to small sedimentation ponds. OSMRE proposed revisions to § 816.49(a)(3) on October 21, 1987 (52 FR 39364).

4. Foundations

The 1983 rule (48 FR 44004) in § 816.49(a)(5)(i) required that foundations and abutments for impounding structures be designed to be stable under all conditions of construction and operation. Section 816.49(a)(5)(i) also required sufficient foundation investigation and laboratory testing to determine design requirements for foundation stability for all impoundments, regardless of size. That provision was challenged in *In re Permanent II (Round III)* on the basis that the rule violated the Administrative Procedure Act because the requirements for foundation investigation and laboratory testing were not included for small sedimentation ponds when OSMRE proposed the rule on June 21, 1982 (47 FR 26759).

The court remanded § 816.49(a)(5)(i), rejecting the application of foundation investigation and laboratory testing to small ponds because there was insufficient notice in the proposed rule that these requirements were being applied to small ponds. (620 F. Supp. at 1568–1570.) On November 20, 1986 (51 FR 41958), in response to the court

action, OSMRE suspended § 816.49(a)(5)(i) insofar as it applied to small sedimentation ponds. OSMRE proposed revisions to § 816.49(a)(5)(i) on October 21, 1987 (52 FR 39364).

5. Certification of Siltation Structures

An October 30, 1986, amendment to the Act authorized land surveyors to certify the construction of siltation structures. (Sec. 123, Pub. L. 99–591, 100 Stat. 3341–267.) The certification requirement of section 515(b)(10)(B)(ii) of the Act was amended by inserting after "qualified registered engineer" the phrase, "or a qualified registered professional land surveyor in any State which authorizes land surveyors to prepare and certify such maps or plans." Prior to this amendment, section 515(b)(10)(B)(ii) required that siltation structures be certified only by a qualified registered engineer. Consistent with this amendment, OSMRE proposed revisions to § 816.46(b)(3) on October 21, 1987 (52 FR 39364).

6. Inspection of Impoundments

The 1979 impoundment regulations at § 816.49(h) (44 FR 15402) authorized land surveyors to perform and certify the annual inspection of small impoundments except for coal processing waste dams and embankments. During the preparation of the 1983 rule (48 FR 44004) OSMRE inadvertently omitted this provision from § 816.49. The fact that the provision was missing was not noticed until OSMRE promulgated a final rule on April 24, 1985 (50 FR 16194), to implement a November 4, 1983, amendment to the Act which authorized qualified land surveyors in certain States to certify cross sections, maps and plans.

Although neither the 1979 nor the 1983 rule included any comments on the merits of land surveyors doing the annual inspection of small impoundments, comments received during the preparation of the 1985 final rule supported land surveyors' capability to perform these inspections (50 FR 16197, April 24, 1985). OSMRE found the comments on this point to have merit and stated in the preamble to the 1985 rule that it would consider proposing a revision to § 816.49(a)(10) to allow post-construction inspections of small impoundments by qualified land surveyors. However, OSMRE believed that it was inappropriate to include such a provision in the final 1985 rule because it had not been included in the proposed rule (49 FR 38959). OSMRE proposed the implementation of this provision in § 816.49(a)(10) on October 21, 1987 (52 FR 39364).

II. Discussion of Final Rule and Comments

After consideration of the administrative record of this rule, as well as the legislative history of the Act and the opinions of the District Court in *In re Permanent II (Round III)*, and in light of current technical information on impoundment design, construction and inspection, OSMRE is amending its permanent regulatory program. Consistent with its findings when promulgating the 1979 and 1983 rules, OSMRE hs not identified any differences between impoundments for surface and underground mines that would necessitate different regulatory provisions for underground mines. Therefore, the permitting rules governing impoundments for surface mining activities at 30 CFR 780.25 and for underground mining activities at 30 CFR 784.16 are identical. Likewise, the rules for surface mining activities at 30 CFR 816.46, 816.49 and 816.84 are identical to the rules for underground mining activities at 30 CFR 817.46, 817.49 and 817.84, respectively. Thus, the following discussion of 30 CFR 780.25, 816.46, 816.49 and 816.84 also applies to 30 CFR 784.16, 817.46, 817.49 and 817.84, respectively.

In addition to the rule language revisions discussed in the remainder of this preamble, OSMRE has made minor editorial changes to improve the clarity of the rule. For instance, the plural nouns, "impoundments" and "sedimentation ponds," have been replaced with the singular "impoundment" and "sedimentation pond." This usage more clearly prescribes requirements applicable to each permitted structure.

General Comments

In addition to comments received on specific provisions of the October 21, 1987, proposed rule, OSMRE received several general comments. One commenter asserted that it appeared that OSMRE was again drafting rules with nationwide application but designed for conditions found in the eastern States; however, no specific examples were included in the comment. OSMRE should, the commenter maintained, redraft these rules to recognize regional differences and allow States to tailor their regulatory programs accordingly.

OSMRE is charged under SMCRA with establishing national permitting requirements and performance standards. In meeting this requirement, OSMRE has attempted to set such standards in a manner that is both uniform and flexible. However, during the analysis of this particular comment OSMRE was unable to identify any conditions at western mines that would be affected differently from similar conditions at eastern mines. Although minimum Federal requirements and standards must always be met, State regulatory authorities may incorporate local considerations into their programs, so long as all provisions of State programs are no less effective than the requirements of SMCRA and the Federal regulations.

Another commenter maintained that in numerous instances OSMRE failed to disclose the basis and technical justification for the proposed rule changes (specific instances are discussed subsequently with the relevant rule sections), and therefore the rule should be withdrawn pending sensitivity analyses of the impacts of proposed changes and disclosure of technical justifications, or the rulemaking record should be reopened for public comment after disclosure of such information.

OSMRE believes that the proposed and final preambles adequately discuss the basis for and the purpose of the rule. The impacts of the rule are addressed under the criteria of Executive Order 12291, the Regulatory Flexibility Act, and the National Environmental Policy Act of 1969, as summarized in III, "Procedural Matters."

OSMRE received a comment on the background discussion of the preamble to the proposed rule (52 FR 39365) concerning the 1983 renaming of § 816.46 from "Hydrologic balance: Sedimentation ponds" to "Hydrologic balance: Siltation structures." OSMRE's reason for making this change, as the preamble to the proposed rule noted, was "to be consistent with the wording of section 515(b)(10)(B)(ii) of the Act and to reflect rule changes which provided for the use of certain siltation structures other than sedimentation ponds, such as chemical treatment facilities or mechanical structures that have a point-source discharge." (52 FR 39365.) The commenter suggested that this could leave the reader with the notion that some sort of siltation structure having point sources of discharge must be used to control sediment.

OSMRE did not intend to convey this notion, but was providing an example of suitable structures. OSMRE understands the commenter's concern, and has included a more accurate description of the rule in the background section of this preamble.

Sections 780.25(c)/784.16(c) Permitting Requirements for Permanent and Temporary Impoundments

Section 780.25(c) of OSMRE's permanent program regulations establishes permitting requirements applicable to the design of permanent and temporary impoundments. Final revisions to § 780.25(c) are primarily organizational changes.

The first sentence of § 780.25(c) of the 1983 rule, which read, "Permanent and temporary impoundments shall be designed to comply with the requirements of § 816.49 of this chapter," has been retained as § 780.25(c)(1) in this rule. Two commenters suggested identical revisions to the language of this pargraph so that it would read like a permitting requirement rather than a performance standard. They suggested that the sentence read, "Each permit application shall include design plans for each permanent and temporary impoundment demonstrating compliance with the requirements of § 816.49 of this chapter." Although OSMRE recognizes the basis for this suggestion, this change was not made in the final rule. Existing rule language at § 780.25(a) adequately introduces all the requirements of § 780.25 in a permitting context so that changes to the other paragraphs of § 780.25 are unnecessary.

As proposed, this rule moves to § 780.25(c)(2) the previous § 816.49(a)(1) requirement that a copy of the plan submitted to the District Manager of MSHA under 30 CFR 77.216 also be submitted to the regulatory authority as part of the permit application. This requirement was moved because it is more closely related to the permitting provisions of Part 780 than to the performance standards of Part 816.

The first sentence of § 780.25(c)(2) was revised, as suggested by three commenters, by adding the phrase "meeting the size or other criteria of the Mine Safety and Health Administration" to indicate that MSHA requires review only of plans for those impoundments that meet the criteria of 30 CFR 77.216(a). This is a more accurate reference to the requirement which applies only to impoundments meeting the MSHA criteria.

Two commenters maintained that language for sedimentation ponds in § 780.25(b), a section not included in the proposed rule, presents the same problem as described above in that it requires that each plan comply with MSHA's requirements. The above change to § 780.25(c)(2) of the final rule makes it clear that OSMRE requires that only impoundments meeting MSHA criteria meet MSHA requirements and is adequate to address the commenters' concern with § 780.25(b).

The second sentence of § 780.25(c)(2) has been revised at the suggestion of a commenter to be consistent with OSMRE's existing rules at § 780.25(a)(1)(v), which allow for the submittal of detailed design plans after the submittal of the permit application. OSMRE has added the phrase, "in accordance with paragraph (a) of this section", to the second sentence of § 780.25(c)(2). This clarifies that detailed design plans can be submitted to the regulatory authority in accordance with the schedule in the general plan.

One commenter suggested that OSMRE revise § 780.25(c)(2) to replace the requirement to submit to the regulatory authority the plan required by MSHA with a requirement to submit to the regulatory authority "documentation proving that this plan was approved by MSHA". The commenter cited the burden placed on operators because of the large volume of paper included in a MSHA submittal and the sizeable number of copies of such plans required by the regulatory authority. The commenter further noted that operators cannot be certain which information in the submittal is relevant to MSHA's needs and which is necessary under SMCRA and that some of the information is sent to the regulatory authority merely because it was sent to MSHA and not because it is necessary for the review under SMCRA.

The proposal to submit to the regulatory authority a certification of MSHA's approval in lieu of the plan required for MSHA's review is unacceptable. MSHA's approval does not constitute approval under SMCRA. MSHA's mandate to provide for the safety of miners warrants considerations in their review different from those of OSMRE under SMCRA, particularly with respect to public safety and environmental effects.

OSMRE considered whether or not the removal of the requirement to submit the plan required by MSHA to the regulatory authority would reduce the paperwork requirements of this provision. OSMRE does not believe that this would accomplish a reduction in the burden on applicants. Although OSMRE's information needs under SMCRA are not identical to those of MSHA, particularly in respect to OSMRE's reclamation plan requirements, the design and construction information included in the plan submitted to MSHA does satisfy to a great extent OSMRE's needs for design and construction information. Removing this requirement would necessitate the preparation by the applicant of detailed design and construction documentation for OSMRE that, although possibly different in minor respects, would essentially be duplicative of the information prepared for MSHA. Further, because the design and construction information needs of both agencies are very similar, there would be little to be gained by having the applicant separate out the information necessary for review by OSMRE from that necessary for review by MSHA. In addition, the requirement to submit the entire MSHA documentation to the regulatory authority accomplishes the goal of having to the extent possible uniform requirements from agency to agency and from statute to statute.

This same commenter maintained that this requirement serves no useful purpose because the information necessary for review under SMCRA that is found in the plan required by MSHA is already required elsewhere in the SMCRA permit.

OSMRE disagrees. Consideration of the plan required to be submitted to MSHA is an integral part of the review of the design and construction of an impoundment because of the level of specificity that it provides. The requirement is included precisely because it satisfies a documentation need not covered elsewhere in regulations. To the extent that the information included in the plan also meets other requirements of OSMRE's regulations, for example the general requirement applicable to impoundments in § 780.25(a)(1)(ii) to submit "a description, map, and cross section of the structure", OSMRE considers such other related requirements will have been met.

The final rule at § 780.25(c)(3) allows the regulatory authority to establish engineering design standards in lieu of engineering tests for small impoundments located where impoundment failure would not be expected to cause loss of life or serious property damage. The design standards, which will be implemented through the State program approval process, will ensure stability comparable to the minimum static safety factor of 1.3 for small impoundments that is specified in § 816.49(a)(3)(ii). OSMRE approval of any design standards issued by the regulatory authority will be based on the adequacy of those standards to ensure achievement of that minimum static safety factor.

This approach provides for the promulgation of a national standard based on a 1.3 safety factor (see discussion of § 816.49(a)(3)(ii) for more

detail) while giving the regulatory authority flexibility to establish engineering design standards to accommodate local conditions. Under this provision, a regulatory authority can establish specific embankment slopes, minimum freeboard requirements, etc., as long as minimum stability is achieved. The proposed language of § 780.25(c)(3) was slightly revised in the final rule to clarify that engineering design standards will be acceptable only if they "ensure stability comparable to a 1.3 minimum static safety factor."

OSMRE received four comments supporting this change. One commenter suggested the OSMRE adopt the design criteria for small impoundments found in U.S. Soil Conservation Service (SCS) *Pond: Practice Standard 378*, 1985 (*SCS Practice Standard 378*), and thereby meet the requirement in section 515(b)(8)(B) of SMCRA that permanent water impoundments be compatible with structures constructed under Pub. L. 83–566 (see the discussion of § 816.49(a)(1) for more information on this compatibility requirement). Adopting these criteria, the commenter believed, would take advantage of the SCS's considerable experience in the design and construction of impoundments, while not placing an undue burden on coal mine operators.

The requirement that small impoundments comply with SCS design criteria was included in OSMRE's original permanent program regulations (44 FR 15401; March 13, 1979), but was later removed to "allow appropriate professionals the latitude necessary for application of technological advances and innovative techniques as well as of updated design guides." (47 FR 26756; June 21, 1982). Although, in most cases, OSMRE considers the SCS criteria for small impoundments adequate in lieu of engineering tests to show compliance with the 1.3 safety factor, and encourages regulatory authorities to consider adoption of such criteria, it would be inappropriate to incorporate the SCS criteria into these regulations. To do so would unnecessarily restrict the ability of States to adopt or establish design standards that are as adequate as the SCS criteria, though not identical in all respects. In States that have had adequate design criteria in place for years, such a requirement would mean overhauling an otherwise acceptable system without any improvement in environmental protection.

Sections 816.46(b)(3)/ 817.46(b)(3) Certification of Siltation Structures

In response to an October 30, 1986, amendment to the Act (see 5. *Certification of siltation structures* in "Background"), OSMRE is amending § 816.46(b)(3) to authorize land surveyors in certain States to certify the construction of siltation structures before they are placed in operation. Prior to the amendment, the Act authorized only qualified registration engineers to certify siltation structures. This new provision, which was supported by one commenter, authorizes the certification of siltation structures by a qualified registered professional land surveyor in any State which authorizes land surveyors to prepare and certify cross sections, maps, and plans in accordance with § 780.25.

Sections 816.46(c)(2)/ 817.46(c)(2) Sedimentation Pond Spillways

Because the spillway requirements for sedimentation ponds are based on the spillway design requirements for permanent and temporary impoundments in § 816.49, final changes in § 816.49 (a)(8) and (c)(2) necessitate changes in § 816.46(c)(2) to ensure consistency. Comments received by OSMRE addressed the spillway requirements as they apply to both sections. The similar provisions in these two sections, the comments and OSMRE's responses, which are applicable to all impoundments, including sedimentation ponds, are addressed later in the discussion of § 816.49 (a)(8) and (c)(2) under four headings: *Single Spillway Provision, Spillway Linings, Design Precipitation Events*, and *Storage Control*. The following discussion summarizes the final changes in § 816.46(c)(2).

Final § 816.46(c)(2) has been restructured, and language prescribing single spillway configuration requirements has been added in paragraphs (i) (A) and (B). The reasons for this restructuring and for further specifying the spillway provisions are addressed in the discussion of comments for § 816.49 (a)(8) and (c)(2) concerning impoundments.

Under § 816.46(c)(2), a sedimentation pond spillway or spillways must have sufficient capacity to safely pass the specified precipitation event. A single spillway is sufficient for a large or small sedimentation pond as long as it passes the specified precipitation event.

Section 816.46(c)(2) changes the provision in § 816.46(c)(2)(ii) of the 1983 rule, which specified that ponds "may use a single spillway if the spillway (A) is an open-channel of nonerodible constructain and capable of maintaining sustained flows; and (B) is not earth- or grass-lined." OSMRE is allowing a single open-channel spillway as long as the specified design precipitation event can be accommodated. However, language has been added at final § 816.46(c)(2)(i) that limits the type of single spillway configurations that may be approved by the regulatory authority. Paragraph (c)(2)(i)(A) authorizes a single open-channel spillway of nonerodible construction and designed to carry sustained flows. Paragraph (c)(2)(i)(B) authorizes a single earth- or grass-lined spillway designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected. The discussion of § 816.49(a)(8) addresses the rationale for these additions, as well as relevant comments.

The rule includes at § 816.46(c)(2)(iii) a provision, applicable to temporary structures, authorizing the regulatory authority to approve the design of a sedimentation pond that relies primarily on storage to control the runoff from the design precipitation event in lieu of meeting the spillway requirements at § 816.46(c)(2)(i). The rule stipulates that this will be allowed when it is demonstrated by the operator and certified by a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 780.25(a) that the sedimentation pond will safely control the design precipitation event, the water from which will be safely removed in accordance with current, prudent, engineering practices. The regulatory authority may approve such a sedimentation pond if it is located where failure would not be expected to cause loss of life or serious property damage, except where (1) in the case of a sedimentation pond meeting MSHA criteria, the pond is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the regulatory authority; or (2) in the case of a sedimentation pond not meeting MSHA criteria, the pond is designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the regulatory authority.

OSMRE has replaced the sentence "in the absence of an adquate, or any, spillway" which appeared in the proposed rule, with "in lieu of meeting the requirements in paragraph (c)(2)(i) of this section." Paragraph (c)(2)(i) authorizes the regulatory authority to approve a single spillway oniy when it

is an open-channel spillway. OSMRE believes that a closed-conduit type spillway alone will not adequately pass the design precipitation event without a considerable reliance on storage. In the absence of having a combination of principal and emergency spillways or a single open-channel spillway meeting the requirements of § 816.46(c)(2)(i), a sedimentation pond would have to meet the requirements for structures relying primarily on storage in § 816.46(c)(2)(iii).

OSMRE believes that the provision allowing sedimentation ponds that rely primarily on storage will be useful for those sedimentation ponds where the runoff area is small, or where pumps or a decant structure will be used to control the water level in the facility. OSMRE believes that current, prudent, engineering practice requires that at least 90 percent of the water stored during the design precipitation event be removed within the 10-day period following the event.

Section 816.46(c)(2)(ii)(A) requires that large sedimentation ponds, those meeting the size or other qualifying criteria of 30 CFR 77.216(a), shall have sufficient spillway capacity to safely pass a 100-year 6-hour precipitation event, or greater event as specified by the regulatory authority.

Section 816.46(c)(2)(ii)(B) requires that small sedimentation ponds, those not meeting the size or other qualifying criteria of 30 CFR 77.216(a), shall have sufficient spillway capacity to safely pass a 25-year 6-hour precipitation event, or greater event as specified by the regulatory authority. In both cases, the 6-hour precipitation event is the same as in the 1983 rule.

Although these two provisions were proposed as paragraphs (c)(2)(i) and (c)(2)(ii), respectively, because of a restructuring of final § 816.46(c)(2), they are relocated without additional change to paragraphs (c)(2)(ii)(A) and (c)(2)(ii)(B), respectively, of the final rule.

Sections 816.49(a)(1)/817.49(a)(1) Impoundment Size Distinction

Section 515(b)(8)(B) of the Act requires that "permanent impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Pub. L. 83–566 (16 U.S.C. 1006)." Public Law 83–566, the Watershed Protection and Flood Prevention Act of 1954, authorizes the planning and construction of Federal water control facilities. In implementing Pub. L. 83–566, the U.S. Soil Conservation Service (SCS) has established criteria for the design and construction of impoundments. The SCS criteria divide impounding structures into two categories based on size and potential hazard. Larger and/or potentially more hazardous impoundments must meet the more stringent design and construction requirements of *SCS Technical Release 60*, while smaller and less hazardous impoundments must meet the less stringent requirements of *SCS Practice Standard 378*.

Under the size criteria adopted by the SCS, dams over 35 feet high and those with a product (storage times the height of the dam) of 3000 or more are subject to the more stringent requirements of *SCS Technical Release 60*. In addition, all dams, regardless of their size, located "where failure may cause loss of life, serious damage to homes, industrial and commercial buildings, important public utilities, main highways, or railroads," and dams located "in predominantly rural or agricultural areas where failure may damage isolated homes, main highways or minor railroads or cause interruption of use or service of relatively important public utilities" are subject to the requirements of *SCS Technical Release 60*. Thus, in implementing Pub. L. 83–566 the SCS has adopted more stringent design and construction requirements for impoundments that exceed a specified size, as well as for those where failure may cause loss of life or serious property damage.

The regulations of the Mine Safety and Health Administration (MSHA) also reflect the engineering consensus that larger impoundments present a greater potential downstream hazard than do smaller impoundments. Thus, MSHA regulates impoundments which "can: (1) Impound water, sediment or slurry to an elevation of five feet or more above the upstream toe of the structure and can have a storage volume of 20 acre-feet or more; or (2) impound water, sediment or slurry to an elevation of 20 feet or more above the upstream toe of the structure; or (3) as determined by the District Manager, present a hazard to coal miners." (30 CFR 77.216(a)).

In implementing the requirements of section 515(b)(8)(B) of SMCRA, OSMRE could have adopted the SCS criteria, and thus ensured that "impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Pub. L. 83–566." Further, OSMRE could have restricted application of the criteria to permanent impoundments, as section 515(b)(8)(B) does not apply to temporary impoundments. However, in view of this broader mandate of section 102(a) of the Act "to protect society and the environment," OSMRE has adopted a rule that is based on the size and hazard distinctions established by the SCS, yet incorporates this more stringent MSHA criteria. In addition, this rule applies to temporary, as well as permanent, impoundments, thus ensuring that more impoundments meet these more stringent standards than is required by section 515(b)(8)(B).

First, § 816.49(a)(1) applies the MSHA criteria, including the MSHA size distinction, is differentiating between impoundments. Impoundments meeting the MSHA criteria are automatically subject to both the more stringent standards of OSMRE's rules (see discussion of § 816.49(a)(3), *Stability*) and the MSHA regulations at 30 CFR 77.216 to 77.216–5. By adopting the MSHA criteria at 30 CFR 77.216(a), § 816.49 subjects all impoundments 20 feet high or more, as well as those impounding 20 acre-feet or more, to its more stringent stability requirements. Compared to the SCS threshold of 35 feet in height, OSMRE's threshold of 20 feet in height will subject more dams to the greater stability requirements of this rule than would otherwise be the case if OSMRE simply adopted the SCS criteria to satisfy the minimum requirements of section 515(b)(8)(B) of the Act.

Second, OSMRE has included language in the rule to ensure that impoundments which do not meet the MSHA criteria, but are "located where failure would be expected to cause loss of life or serious property damage," are also subject to the more stringent stability requirements. OSMRE interprets the phrase "loss of life or serious property damage" to mean loss or damage of the same magnitude as recognized by the SCS in applying its standards (see above).

In addition to providing a high level of protection to society and the environment for large and/or potentially more hazardous impoundments, this rule includes reasonably stringent stability requirements for smaller and potentially less hazardous impoundments, and thus provides an appropriate degree of environmental protection for every structure.

Beyond meeting the mandates of sections 102(a) and 515(b)(8)(B) of the Act, the criteria chosen by OSMRE reflect the direction given to OSMRE by section 201(c)(12) of the Act to cooperate with other Federal agencies to minimize duplication of inspection, enforcement, and administration of the Act. Although acting under a different legal authority from OSMRE, MSHA carries out many similar inspection and enforcement responsibilities. By incorporating

MSHA's criteria into this rule, OSMRE is enhancing regulatory consistency between the two agencies.

This combined consideration of potential impoundment hazard based on the locational standards employed by the SCS, along with the more stringent MSHA size distinctions, is fully consistent with the stability and safety requirements of section 515(b)(8)(B) of the Act. Moreover, it accomplishes a level of regulatory uniformity with MSHA that is consistent with section 201(c)(12) of the Act while meeting the mandate of section 201(a) of the Act to protect "society and the environment" beyond the MSHA criteria, which derive from the Federal Coal Mine Health and Safety Act's narrower mandate to protect the health and safety of miners.

SCS Practice Standard 378 and *SCS Technical Release 60* have been entered in the OSMRE Administrative Record for this rule.

In addition to incorporating the size and hazard criteria described above, OSMRE has made two minor organizational changes in the rule. OSMRE has reorganized §§ 780.25(c) and 816.49(a)(1) to clarify impoundment size distinctions relative to permitting and to performance standards, respectively. The first sentence in final § 816.49(a)(1) is the same as in the 1983 rule, except that the phrase "size or other" is inserted before "criteria" to be consistent with other provisions of the rule.

OSMRE has relocated from § 816.49(a)(1) of the 1983 rule to § 780.25(c)(2) the provision requiring that a copy of the plan submitted to the District Manager of MSHA under 30 CFR 77.216 also be submitted to the regulatory authority as part of the permit application. This sentence was relocated because it is a permitting provision rather than a performance standard.

OSMRE received four comments on the adoption of the MSHA criteria, three supportive, one in opposition. The three supporting commenters essentially based their support on the fact that it would be beneficial for OSMRE and MSHA to have a uniform size classification.

One of the supporting commenters acknowledged that evaluating impoundments based on size and hazard is generally accepted and appropriate because larger structures can be expected to present more of a danger to life and property and require more care in design and construction than small impoundments. The commenter added that the MSHA classification increases protection because it results in the application of a more stringent standard to more structures than would be covered under other criteria, including the SCS guidelines. Further, the commenter pointed out, consistent classification systems by agencies regulating impoundments have proved beneficial by minimizing conflicting requirements and this improving the quality of construction and maintenance of structures.

The other two commenters supporting OSMRE's adoption of MSHA criteria conceded that although it is the most stringent of the criteria discussed by OSMRE in the October 21, 1987, preamble to the proposed rule, it is beneficial to operators because they are, generally, complying with MSHA criteria already, and the use of the same criteria will avoid burdening operators with an additional standard.

One commenter objected to the adoption of the MSHA criteria, suggesting that it would result in the application of stability, construction and inspection requirements for small impoundments below those necessary to assure the protection intended to be afforded by SMCRA. The commenter further maintained that OSMRE failed to take into account the requirement in section 515(b)(8) of SMCRA that all impoundments, without regard to size or storage volume, be designed, constructed and maintained so as to assure that they will achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Pub. L. 83–566. The commenter further suggested that OSMRE's evaluation of impoundments would allow small impoundments to be approved absent sufficient safeguards.

Although the requirement in section 515(b)(8)(B) of SMCRA neither suggests nor precludes the adoption of a size distinction, it does require that permanent impoundments be constructed to achieve stability and a margin of safety "compatible with that of structures constructed under Pub. L. 83–566." As discussed previously, the SCS employs a size distinction in building impoundments under Pub. L. 83–566, whereby smaller, potentially less hazardous dams are subject to less stringent design and construction requirements. In addition to adopting more stringent criteria for differentiating between impoundments than that established by the SCS under Pub. L. 83–566, OSMRE has applied reasonably stringent stability criteria to smaller impoundments to the extent that they will not be approved absent sufficient safeguards (see discussion of § 816.49(a)(3) *Stability*).

This same commenter claimed that OSMRE's reliance on the SCS guidelines and the *Federal Guidelines for Dam Safety* (the latter document was cited by OSMRE in the preamble to the proposed rule as an example of a Federal document employing a size distinction) to support adoption of the MSHA criteria is misplaced. Although the commenter did not attempt to refute the assertion in the *Guidelines* that larger impoundments generally created a greater risk in terms of the potential for loss of life and serious property damage, the commenter maintained that the *Guidelines* set forth a definition of "dam" which applied to all structures in which there is a potentially significant downstream hazard. Specifically, the commenter continued, although the definition identified dams as artificial barriers which either were 25 feet or more in height measured at the downstream toe, or had impoundment capacity of 50 acre-feet or more, its lower-end exclusion applied only to structures of less than six feet in height or which impounded less than 15 acre-feet of storage volume, less than the 20 acre-feet threshold under MSHA criteria. Because of this very limited exclusion, the commenter suggested, the *Guidelines* definition is, depending on the natural ground slope, potentially more or less inclusive than the MSHA classification. And even this lower-end exclusion, the commenter added, could be waived if a structure presented a downstream hazard.

It is because of OSMRE's concern about the potential downstream hazards of small impoundments that these rules include the qualifying phrase "or located where failure would be expected to cause loss of life or serious property damage." Thus, the regulatory authority shall apply the more stringent performance standards to a small impoundment if its failure would be expected to cause loss of life or serious property damage. Thus, the commenter's concern about how inclusive the MSHA criteria are, relative to those in the *Guidelines*, will be met by the ability of regulatory authorities to apply more stringent requirements where necessary due to the location of the dam.

The commenter also maintained that the *Federal Guidelines for Dam Safety* were not intended as guidelines or standards for the technology of dams, but were developed to establish basic principles applicable to all dams. In addition, the commenter pointed out, they were developed as part of a review of national policy for thousands of major structures creating potential risks comparable to those of the earthen embankment Teton Dam in Idaho, which failed in 1976. Although, the commenter

conceded, the failure of an impoundment below the MSHA standards might be of little consequence in a national context, OSMRE's responsibility under SMCRA to protect the environment still stands. The real message of the *Guidelines*, the commenter maintained, is that if OSMRE pursues a differential classification, the criteria must ensure a minimum level of safety regardless of structure size or volume.

As mentioned before, the rule provides a reasonable minimum level of safety for all impoundments. And, as noted in the discussion of § 816.49(a)(3) *Stability*, OSMRE's minimum requirements for all dams, regardless of size or potential hazard, are appropriately stringent in light of SMCRA's requirement to protect the environment.

This same commenter was puzzled by OSMRE's reliance on the SCS guidelines as support for differential classification, because the SCS guidelines, unlike MSHA's and OSMRE's regulations, include numerous design and performance standards for small impoundments, including specifications for minimum top width, slope controls, minimum freeboard, side slope configurations, inlet protection, spillways, and other standards. The commenter pointed out that if the SCS, acting under the authorization of Pub. L. 83–566, deemed it necessary to establish such design and performance standards, why does OSMRE consider the same unnecessary in implementing section 515(b)(8)(B) of SMCRA. The commenter asked OSMRE to justify how the adoption of size distinctions, absent design and construction standards commensurate with those of the SCS, would provide for the stability and adequate margin of safety that the SCS has accomplished under Pub. L. 83–566.

OSMRE recognizes that safety requirements can be approached from either the perspective of establishing design standards or by setting minimum safety factors. Although the SCS has adopted design standards and minimum safety factors in the technical manual, OSMRE believes that the adoption of safety factors provides desirable flexibility in the design of impoundments. OSMRE believes that instead of restricting qualified professionals in the design of impoundments, the adoption of safety factors provide equivalent protection and allows them to employ more flexible design standards in designing safe and stable impoundments. OSMRE believes that the adoption of the equivalent minimum safety factor requirements in this rule provides for the construction of impoundments with an adequate level of safety compatible with that achieved in the construction of impoundments by the SCS (see discussion of *Stability* for technical basis for choice of required safety factors).

This same commenter maintained that the MSHA classification itself is inadequate to satisfy safety concerns. The commenter cited a disaster involving a structure on the Left Fork of the Ages Creek in Ages, Kentucky, that was built in lifts which did not individually meet the criteria of 30 CFR 77.216 but which impounded a total amount of water far in excess of the criteria. The loss of a life and destruction of homes in this instance, in derogation of congressional intent under SMCRA, the commenter asserted, can be attributed to this "loophole" in the MSHA classification.

The Ages Creek structure failed because of compliance problems rather than the lack of governing regulations. The structure, which was permitted by MSHA as a refuse pile rather than as an impoundment, failed due to the large quantity of water entrapped within the pile in violation of MSHA's 30 CFR 77.215(e) and OSMRE's 30 CFR 816.83(a).

Furthermore, OSMRE includes in these new impoundment regulations a provision which addresses the commenter's concern about a "loophole" in the MSHA classification. Under § 816.49(a)(3), a series of small structures which individually do not meet the criteria of 30 CFR 77.216 would still be subject to the more stringent stability requirements for large impoundments if structural failure would be expected to cause loss of life or serious property damage. In such a case, it is the potential downstream hazard that dictates which stability standard applies, not the size of each structure.

And, finally, the Ages structure was built of coal mine waste. Under 30 CFR 816.81(c)(2), all coal mine waste structures permitted by OSMRE, including refuse piles and impounding structures, must meet the more stringent long-term safety factor of 1.5, regardless of size.

The final point made by this commenter was that OSMRE's effort to maintain regulatory consistency with MSHA is a fundamental distortion and misunderstanding of its congressional mandate. The commenter disputed OSMRE's assertion in the October 21, 1987, preamble (52 FR 39368) that SMCRA warrants consistency between the regulations of OSMRE and MSHA.

The commenter cited the passage of SMCRA in the wake of the Buffalo Creek, West Virginia, disaster of 1972 and the awareness by Congress that regulations issued under the Federal Coal Mine Health and Safety Act of 1969 were insufficient to provide for the protection of the public-at-large and the environment. The commenter reminded OSMRE that its responsibilities under SMCRA do not duplicate MSHA's responsibilities under the 1969 Act, but are supplementary to them. Whereas MSHA's responsibility is to the safety of miner's on-site, SMCRA goes beyond that by addressing the safety of the public, both on and off the minesite. The commenter suggested that OSMRE tacitly acknowledged this in adopting an "escape clause" which allows more stringent treatment of small impoundments where failure would be expected to cause loss of life or serious property damage. However, the commenter added, this "escape clause" is much too narrow in light of the fact that it only addresses "life and serious property damage," whereas SMCRA mandates consideration of risk of damage to the environment as well. In failing to go beyond MSHA's standards, the commenter maintained, OSMRE must independently justify, and allow public comment on such justification, that the numeric size and volumetric limitations adopted by MSHA are scientifically and technically sound and supported in the literature and remain so despite the fact that the MSHA standards were adopted in 1975.

In sum, the commenter suggested that in order to independently justify the criteria used by MSHA on technical bases, and to further demonstrate how the rule provides a degree of assurance of stability with a margin of safety commensurate with Pub. L. 83–566 and guidelines adopted thereunder, OSMRE should conduct investigations and comparisons and renotice the rule.

Prudence dictates, the commenter concluded, that assurance of protection of the public and the environment should be provided by the most rigorous and most protective technical standards currently in general use, not by blind deference to an agency whose mandate is not protection of the general public and the environment, and whose regulations have already proven fatally inadequate to the task.

OSMRE does not dispute this commenter's interpretation that SMCRA goes beyond the Federal Coal Mine Health and Safety Act. That is why OSMRE has included in its regulations a provision for considering the potential for loss of life or serious property

damage in determining the potential hazard of an impoundment. OSMRE is not deferring to MSHA on questions of impoundment hazards, but is adopting under SMCRA what it believes to be a reasonable basis for differentiating between larger, more hazardous impoundments and smaller, less hazardous ones. In addition to incorporating the size distinction and the consideration of the potential hazard to miners under MSHA's rules at 30 CFR 77.216(a)(3), OSMRE has included in this rule consideration of the potential hazard of an impoundment to the public-at-large. An impoundment that is not large enough to meet the MSHA criteria, and not otherwise hazardous to miners, would not be subject to MSHA's review. However, such an impoundment would be subject to the more stringent stability and safety requirements of OSMRE's rules if its failure would be expected to cause loss of life or serious property damage. Thus, OSMRE has established a hazard evaluation based on SMCRA's mandate to protect society and the environment, and, contrary to the commenter's assertion, has gone beyond the MSHA standards for regulating impoundments.

The commenter raised the point that OSMRE's provision for considering the potential loss of life or serious property damage is deficient in not including similar consideration of the hazard to the environment. OSMRE does not deny the importance of the mandate under SMCRA to protect the environment, as well as society. The establishment in these rules of stringent safety and stability standards for all impoundments provides considerable environmental protection. By establishing performance standards for all small impoundments, OSMRE has established a level of environmental protection for such impoundments and the areas potentially affected by them that does not exist elsewhere in Federal regulations. At the same time, when considering the potential destruction resulting from an impoundment failure, OSMRE believes it is reasonable to place the highest priority on the protection of downstream populations. OSMRE believes that the provisions included in this rule are a reasonable response to the urgent need to protect lives and property and SMCRA's mandate to protect the environment.

Finally, concerning the commenter's assertion that OSMRE has not technically justified its incorporation of the MSHA criteria, OSMRE points to section 515(b)(8)(B) of SMCRA which requires that impoundments be as stable and safe as those constructed under Pub. L. 83–566 (*i.e.*, built by the SCS). Since the requirements of this rule are more stringent than for impoundments built by the SCS, it stands to reason that they must meet the level expected by the Congress under section 515(b)(8)(B) of SMCRA. In addition, OSMRE has technically justified its choice of minimum safety factors (see discussion of § 816.49(a)(3) *Stability*) for all categories of impoundments.

Sections 816.49(a)(3)/817.49(a)(3) Stability

Section 816.49(a)(3)(i) requires impoundments meeting the size or other criteria of 30 CFR 77.216(a) or located where failure would be expected to cause loss of life or serious property damage to have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2 (see 3. *Stability* in "Background"). The phrase "located where failure would be expected to cause loss of life or serious property damage" differs from the proposed phrase, "located where failure may cause loss of life or serious property damage." OSMRE believes that the phrase "would be expected" provides a more reasonable test than the term "may" in considering the likelihood of the occurrence of loss of life or serious property damage. With this change, this provision is consistent with similar references in the permitting provisions at § 780.25(c)(3) and the spillway provisions at § 816.49(a)(8)(i)(D).

For impoundments not meeting the size or other criteria of 30 CFR 77.216(a), except coal mine waste impounding structures, and located where failure would not be expected to cause loss of life or serious property damage, § 816.49(a)(3)(ii) requires a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or compliance with the requirements of § 780.25(c)(3). The phrase "located where failure would not be expected to cause loss of life or serious property damage" differs from the proposed phrase, "not located where failure may cause loss of life or serious property damage," for the same reasons discussed relative to the parallel change in paragraph (a)(3)(i) above.

OSMRE selected the 1.3 safety factor for non-hazardous small impoundments based on the U.S. Mining Enforcement and Safety Administration's *Engineering and Design Manual—Coal Refuse Disposal Facilities* (Prepared by D'Appolonia Consulting Engineers, Inc., Pittsburgh, Pa., 1975). The manual suggests a 1.3 safety factor for new coal refuse embankments that have a low hazard potential (p. 5.144). These are structures located in rural or agricultural areas where failure would cause only slight damage to structures such as farm buildings, forests or agricultural land, or minor roads. Because coal refuse impounding structures are, generally, of greater concern from a hazard standpoint than other impoundments, and because the manual considers the 1.3 safety factor to be adequate for coal refuse impounding structures that have a low hazard potential, OSMRE believes that this is a reasonable safety factor for other impoundments with low hazard potential. However, because of OSMRE's concerns relative to the safety of coal mine waste impounding structures, § 816.81(c)(2) requires all such structures to meet a minimum static safety factor of 1.5.

In addition, under § 816.49(a)(3) an impoundment, irrespective of size, is subject to the more stringent stability requirements specified in § 816.49(a)(3) if the regulatory authority determines that it is located where failure would be expected to cause loss of life or serious property damage. This additional safeguard links the criteria for determining if an impoundment is potentially hazardous directly to the purpose stated in section 102(a) of SMCRA to protect society and the environment from the adverse effects of surface coal mining operations. By requiring the regulatory authority to ensure that a small impoundment meets the more stringent stability standards for large impoundments where failure would be expected to cause loss of life or serious property damage, the provision covers those potentially hazardous small impoundments that may not be hazardous to miners under MSHA criteria, but may pose a threat to other populations or property.

All of the comments received by OSMRE concerning this provision addressed the stability requirements for small impoundments in § 816.49(a)(3)(ii). One commenter suggested that requiring small impoundments to meet a minimum safety factor of 1.3 is unnecessary because of the slight hazard potential of such structures. The commenter stated that stability of these embankments depends on proper construction and maintenance practices more than a mathematical analysis. Due to the size of small impoundments, the commenter added, it is often difficult to perform a sufficient number of checks of possible failure surfaces and thus accurately estimate the minimum safety factor. Such calculated safety factors, the commenter said, may lead to false

indications of stability. The commenter suggested that, in the case of small impoundments, OSMRE replace this requirement with a requirement that embankments be stable under all conditions of construction and use.

In addition to reviewing MSHA's *Engineering and Design Manual—Coal Refuse Disposal Facilities*, OSMRE reviewed *SCS Design Guide 378, SCS Technical Release 60*, and a soil mechanics text (Terzaghi and Peck, 1967) and found that these sources did not substantiate the commenter's assertion that an accurate minimum safety factor cannot be estimated for small embankments. The soil mechanics text (*Ibid.*, page 259), in a discussion on sources of error in stability computations, listed three sources of error but did not reference computation problems in detecting deeper failures within the embankment. However, calculations are not necessary if design standards are established by the regulatory authority in accordance with § 780.25(c)(3). Based on the consideration of this technical information and the option to employ design standards, OSMRE believes that the commenter's concern is adequately addressed. Thus, the 1.3 safety factor will continue to be applied to small impoundments.

Two other commenters suggested that the establishment of a national stability standard for small impoundments is unwarranted. The commenters further suggested that the 1.3 static safety factor should be applied to small impoundments only when failure would be expected to cause loss of life or serious property damage. In other situations, the commenters urged, it is sufficient to simply require that standard engineering practices be used. These commenters pointed out the SCS has not adopted a minimum safety factor for small impoundments under the authority of Pub. L. 83–566 and that ten years of experience with SMCRA has not indicated a need for such a standard. Rather than create an additional administrative burden on operators without effecting an added benefit to the public, the commenters maintained, OSMRE should adopt the design guidance found in *SCS Practice Standard 378* to ensure the stability of small impoundments.

OSMRE believes that performance standards rather than design standards represent the preferred approach to regulating impoundment design and construction. Performance standards create minimum national standards that are more adaptable to variations in climate, geology, topography and other regional physical conditions.

OSMRE rejects the commenter's suggestion that the 1.3 static safety factor should apply only to small impoundments where failure would be expected to cause loss of life or serious property damage. As discussed earlier, OSMRE selected the 1.3 safety factor as an appropriate minimum standard necessary to ensure stability with a margin of safety that adequately considers potential environmental effects as required under SMCRA. Because of the necessity to ensure the most stringent stability requirements in cases where impoundment failure would be expected to cause loss of life or serious property damage, OSMRE retains the 1.5 static safety factor for *all* potentially hazardous impoundments. Furthermore, design standards that ensure stability comparable to a 1.3 safety factor may be established by the regulatory authority under § 780.25(c)(3) in lieu of engineering tests.

One of these two commenters also argued that the requirement that a licensed professional certify the design and construction of small structures should provide assurance that good engineering practice will be applied and negate the need for the safety factor requirement. The same commenter also maintained that smaller impoundments will not receive less scrutiny during construction and inspection because the operators have a vested interest in ensuring that impoundments are stable, even if only to avoid the cost of rebuilding the structures, reclaiming the environment, and paying fines associated with the violations should they experience failures.

OSMRE considers it important to apply both the minimum safety factor requirement and the requirement that individuals certifying impoundment design and construction be licensed as professionally qualified. If either were dropped in deference to the other, it would increase the potential that impoundments would be inadequately designed or constructed.

Providing additional rationale for this position, this same commenter pointed out that in Ohio, the Department of Natural Resources, which regulates the design and construction of certain dams, does not regulate structures of a small size because of the low hazard potenital. In fact, the commenter maintained, they frequently will exempt a larger dam from regulation if their review indicates the downstream hazard potential is low, while dams that are not exempted are subject to strict design standards and construction inspection and maintenance requirements. The commenter added that, in addition to Ohio, MSHA and the SCS do not have stability requirements. The commenter also noted that since the implementation of SMCRA in Indiana (May 3, 1978) there have been many hundreds of small ponds built in accordance with accepted design practices, and the commenter knew of no instance where a properly designed and built small impoundment caused any sort of problem whatsoever. This commenter summarized the position by suggesting that there is ample technical evidence that designing small impoundments according to certain non-analytical, predetermined standards is a common, standard, accepted and prudent engineering practice.

Again, consistent with OSMRE's position concerning design guides mentioned earlier, OSMRE acknowleges that designing and constructing impoundments in accordance with the SCS design guides will, generally, result in impoundments meeting the requirements of these regulations. OSMRE recognizes that safe structures can be built employing accepted and prudent engineering practice that conform to the performance standards of these regulations and that such practices can be a part of the regulatory program.

Finally, these two commenters and a third perceived an inconsistency between the language of § 816.49(a)(3)(ii), which requires a 1.3 static safety factor, and § 780.25(c)(3), which allows States to develop design standards that do not include safety factors. Commenters assumed that OSMRE's language in § 780.25(c)(3) was intended to leave open the option for the regulatory authority to develop design standards in lieu of requiring demonstration of the 1.3 safety standard. A fourth commenter was more specific in this regard in suggesting that OSMRE revise the language to allow the regulatory authority the option of establishing engineering design standards for small impoundments through the State program approval process lieu of engineering tests.

Section 780.25(c)(3) authorizes the regulatory authority to establish engineering design standards in lieu of requiring engineering tests to meet the required 1.3 static safety factor for small impoundments. Because § 780.25(c)(3) was not cross-referenced in proposed § 816.49(a)(3)(ii), that authority was not readily evident in the proposed rule. To correct this oversight, the final § 816.49(a)(3)(ii) includes a cross-reference to § 780.25(c)(3) to clarify that

small impoundments located where failure would not be expected to cause loss of life or serious property damage must either have a minimum static safety factor of 1.3 or, alternatively, meet design standards developed in accordance with § 780.25(c)(3).

One commenter, in supporting the 1.3 static safety factor for non-hazardous impoundments as logical and sound engineering practice, noted that the rule would ensure an adequate level of safety for less hazardous impoundments while allowing engineers and, as applicable, land surveyors, the latitude to exercise professional judgment in determining how to best meet the required safety factor. In addition, this commenter pointed out, the regulatory authority has an opportunity to review the methods used in the determination of the safety factor when the detailed design plans are submitted as required by § 780.25(a)(3).

One commenter suggested that § 816.49(a)(3)(i) should read: "Impoundments meeting the size or other criteria of 77.216(a) of this title or *other impoundments* located where failure * * *." OSMRE believes that the final rule as originally written clearly indicates that impoundments must meet the 1.5 safety factor if they meet the criteria of 30 CFR 77.216 or if they are located where failure would be expected to cause loss of life or serious property damage. Thus, the suggested change has not been made.

A final commenter on this provision maintained that the requirement in SMCRA to protect the environment as well as life and property warrants application of the 1.5 safety factor to all impoundments regardless of size. OSMRE disagrees. As stated in the earlier discussion relative to size distinction, OSMRE believes that adequate environmental protection is ensured by applying the 1.3 static safety factor and the provisions in § 816.49 to non-hazardous small impoundments.

Sections 816.49(a)(5)(i)/817.49(a)(5)(i) Foundations

Final § 816.49(a)(5)(i) requires that the foundation and abutments for impounding structures be stable during all phases of construction and operation, and be designed based on adequate and accurate information on the foundation conditions (see 4. *Foundations* in "Background"). The rule requires that for impoundments meeting the size or other criteria of 30 CFR 77.216(a) foundation investigation and any necessary laboratory testing of foundation material must be performed to determine the design requirements for foundation stability. The final rule does not prescribe any specific tests, but requires the designer to conduct whatever testing and investigation are necessary to determine that the foundation of the structure will be stable. The rule requires the designer to determine if it is necessary to conduct laboratory tests of foundation material depending upon whether tests of similar material already have been conducted or are available.

One commenter supported the provision as a logical and sound engineering practice. Two commenters suggested that, although the requirement that foundation and abutments be stable during construction and operation is justified, the provision concerning the determination of the adequacy and accuracy of the foundation information is vague. Instead of this requirement, these commenters suggested, the engineer should be given the latitude to use judgment in evaluating the foundation and abutment conditions to ensure that the performance standard is met in accordance with current, prudent, engineering practice.

OSMRE agrees that the alternative proposed by the commenter expresses a similar intent; however, the rule language is more specifically aimed at acquiring adequate and accurate information of the foundation conditions upon which to base subsequent designs.

These same two commenters further maintained that the requirement for foundation investigations and laboratory testing for MSHA-regulated impoundments was redundant and unnecessary. They argued that plans for MSHA structures must comply with the requirements of 30 CFR 77.216–2(a) (5) and (13), which address the properties of the foundation materials and slope stability, respectively. Allowing MSHA to establish the geotechnical information necessary for structures under their jurisdiction, they said, complies with section 201(c)(12) of SMCRA to minimize duplication with other Federal agencies.

Although, as the commenters pointed out, MSHA does address foundations in 30 CFR 77.216–2(a) (5) and (13), the MSHA rules require only that the plan describe the physical and engineering properties of the foundation and the computed minimum factor of safety range for slope stability. OSMRE's provisions, on the other hand, actually stipulate foundation investigation and laboratory testing requirements for impoundments meeting the requirements of 30 CFR 77.216(a) and supplement rather than duplicate the requirements in the MSHA rules.

Another commenter opposed the proposal to allow increased flexibility in the determination of testing for foundation stability. OSMRE has an obligation, the commeter maintained, to establish minimum standards for ensuring that foundation investigations, including testing, are adequate to ensure the stability of foundations, abutments and foundation material. In view of the increased risk being introduced by allowing land surveyors to certify impoundments (see discussion of § 816.49(a)(10)), the commenter added, there is a greater need for standardizing testing of impoundments and for ensuring that all impoundment foundations are properly constructed. The commenter concluded that, inasmuch as OSMRE intends to allow greater flexibility to the designing engineer in foundation investigation and construction, a requirement should be adopted for an engineer to inspect and certify each phase of impoundment construction.

The existing regulations in § 816.49(a)(10)(i) require regular inspection of impoundments during construction. OSMRE believes that this provision satisfies this commenter's concern. OSMRE further believes that it would not be feasible to establish a set of standardized tests for investigation and testing of the foundations of impoundments. As noted in MSHA's *Engineering and Design Manual—Coal Refuse Disposal Facilities* (p. 5.53), the type and extent of investigation necessary depends upon the size of the planned embankment, the complexity of the site geology, the nature of the foundation materials, and whether or not the embankment will impound water. Based on the complexity of a site, the site investigation for each project will vary and must be complete enough to provide the necessary data for analysis of the site and the design of the structure. Furthermore, where the required safety factor is achieved over a wide range of foundation conditions, detailed foundation investigation would be unnecessary.

Sections 816.49(a)(8)/817.49(a)(8) Permanent and Temporary Impoundment Spillways; Single Spillway Provision

The spillway requirements of § 816.46(c)(2) are also included in § 816.49(a)(8) to ensure consistency between the spillway requirements for sedimentation ponds and those for all impoundments. The comments addressed these requirements as they would apply to both §§ 816.46(c)(2) and 816.49(a)(8). The comments and OSMRE's response applicable to all impoundments, including sedimentation

ponds, are addressed in the following discussion.

Final § 816.49(a)(8) has been restructured and single spillway configuration requirements have been added in paragraphs (i) (A) and (B). The reasons for this restructuring and for clarifying the spillway provisions are addressed in the following discussion. All final revisions to § 816.49(a)(8) have also been made to § 816.46(c)(2) for sedimentation ponds.

Section 816.49(a)(8) requires that impoundments include either a combination of principal and emergency spillways, or a single spillway designed and constructed to safely pass the applicable design precipitation event (see 2. *Spillways* in "Background"). Four commenters addressed the single spillway provision; one supported it without qualification while three objected to its application as envisioned in the proposed rule.

One of the objecting commenters suggested that a single spillway is an unacceptable alternative to a combination of principal and emergency spillways in the case of an embankment-type impoundment, regardless of its size. The elimination of the principal spillway, which typically consists of a drop-inlet pipe, the commenter said, would inhibit the pond's storage of water during any storm event, thus affecting the mine operator's ability to treat or contain the water. By requiring the use of both a principal spillway pipe and an open-channel emergency spillway, the commenters suggested, the regulatory authority is assured of a stable, nonerodible system with steady flow and stable velocity that will conduct storm flow safely and without sediment. The same commenter suggested, however, that the single spillway allowance is acceptable in cases of small excavated impoundments because such impoundments are not equipped with the drop-inlet pipe as aa primary spillway.

A second commenter objected to the single spillway provision to the extent that it would allow single conduit spillways without ensuring appropriate storage control. Because of safety concerns, the commenter suggested that a single conduct spillway should be allowed only for extremely small drainage areas, perhaps as large as four acres. The commenter pointed out that there are two disadvantages to the single conduit spillway: (1) Near maximum capacity is attained at relatively low heads and there is little increase in capacity beyond the designed head such that a flood larger than the selected inflow design flood would result in more discharge than the spillway could handle; and (2) overtopping is more likely to occur than with an open-channel spillway because conduit spillways are more likely to become obstructed or clogged. The commenter went on to state that obstruction is even more likely to occur if the structure is a permanent impoundment, due to the minimum or non-existent maintenance after bond release. Therefore, in addition to restricting the use of single conduit spillways to small drainage areas, the commenter suggested that such spillways only be allowed for temporary impoundments and only in cases where failure would not be expected to cause loss of life or serious property damage.

A third commenter presented a threefold objection to the single spillway provision. First, the use of a single spillway has the potential to result in the inability of sedimentation ponds to attain adequate water quality limitations and to adequately remove sediment. The commenter conceded that these problems can be avoided by proper placement of the single spillway outlet and by paying more attention to the removal of sediment to ensure that the sediment storage volume is not exceeded.

The commenter's second concern was that use of a single spillway would result in increased peak stormwater discharges, with increased potential for downstream flooding, particularly in steep-sloped regions of Appalachia where peak discharge response to storm events is quick and the off-site impacts of the increased peak flow due to mining can be severe. The commenter pointed out that Congress was concerned about this problem and intended the hydrologic protections of SMCRA to address the "greater peak flows, more rapid changes in discharge, * * * and increased flooding of streams" resulting from contour mining in Appalachia. (H.R. Rep. No. 95–218, 95th Cong., 1st Sess., 111 (1977).)

The commenter added that discharge problems, which are moderated through the size and configuration of spillways and the existence of storage capability, are exacerbated by any reduction in the ability to control discharge, including the discharge resulting from storm events of a lesser magnitude than the design precipitation event. Thus, the commenter concluded, reliance on a single spillway rather than dual spillways increases the possibility of discharge problems. Even where the single spillway is designed to adequately pass the design event, the commenter added, it results in the creation of a permanent pool immediately below the spillway, thus eliminating the capability of the pond to control stormwater runoff and to moderate the increased downstream peak flow.

This same commenter's third concern was that the use of a single spillway would increase the level of saturation of the pond material and, thereby, threaten the stability of the pond. The commenter's concern about the downstream impacts resulting from this increased likelihood of pond failure was heightened because of the use of embankment ponds on steep-sloped areas.

If OSMRE implements the single spillway provision in proposed §§ 816.46(c)(2) and 816.49(a)(8), the commenter concluded, in order for the impoundment to function safely and effectively, the provision must be accompanied by a requirement that such spillway be an open-channel design because of the potential for pipe or conduit spillways to become blocked and cause structural failure.

In summarizing these three concerns, this same commenter pointed out that OSMRE did not accompany its October 21, 1987, proposal with any references or technical justifications for the adoption of the single spillway provision, nor did OSMRE address the ability of impoundments to attain, under various conditions, the water quality discharge limits, to moderate peak flow, and to prevent additional contributions of runoff outside the permit area in order to prevent flooding or flood height increases. The commenter urged OSMRE to conduct sensitivity analyses and computer modelling of small, medium and large watersheds under various mining conditions to determine the impacts of the proposed single spillway provision. The commenter further suggested that, upon completion of the above analyses, the comment period be reopened for more discussion of the proposed provision.

OSMRE believes that the concerns of the commenters are satisfied by the performance standards, certification and bond release requirements of OSMRE's rules. The qualified registered professional must consider the impacts of increased peak storm water discharges, saturation of the pond material and other specific design parameters on the structural plan in the design and certification of the impoundment. If a structure is designed with an open-channel serving as both a principal and emergency spillway, it must meet all of the provisions of the regulations. for instance, the discharge water in a sedimentation pond must

meet the effluent limitations of § 816.46(c)(1)(iii) (B) and (C). Also, in determining the safety factor, consideration must be given to any increase in the water level caused by using a single open-channel spillway.

As a result of the review of comments and further technical consideration, OSMRE has modified this provision to allow the regulatory authority to approve a single spillway only when it is of open-channel configuration meeting the requirements of § 816.49(a)(8)(i). OSMRE believes that a closed-conduit type spillway alone will not likely pass the design precipitation event without a considerable reliance on storage. In the absence of a combination of principal and emergency spillways or a single open-channel spillway meeting the requirements of § 816.49(a)(8)(i), an impoundment would have to meet the requirements in § 816.49(c)(2) for structures relying primarily on storage.

Sections 816.49(a)(8)(i)/817.49(a)(8)(i) Permanent and Temporary Impoundment Spillways; Spillway Linings

The requirements included in § 816.49(a)(8)(i) relative to spillway linings are also included in § 816.49(c)(2)(i) to ensure consistency between the spillway requirements in the rules for sedimentation ponds and those for all impoundments. Comments received on these proposed sections addressed these requirements as they would apply to both. Those comments and OSMRE's response applicable to all impoundments, including sedimentation ponds, are addressed in the following discussion.

OSMRE had proposed in § 816.49(a)(8) to prohibit the use of earth- or grass-lined single spillways. This prohibition was first introduced in the 1983 rules for small sedimentation ponds at § 816.46(c)(2)(ii) to provide an additional safeguard to the use of single spillways in such ponds (48 FR 44046). Hence, in proposing to allow the use of a single spillway for impoundments under § 816.49(a)(8), OSMRE considered it appropriate to include the prohibition on earth- or grass-lined single spillways found in the previous rules for small sedimentation ponds.

OSMRE received eight comments on this provision, seven of which opposed various aspects of the prohibition against earth- or grass-lined spillways. As a result of the review of comments and further technical consideration, OSMRE has modified the prohibition against grass- and earth-lined spillways. In its place, language has been added to final § 816.49(a)(8)(i)(B) that specifies that the regulatory authority may approve a single earth- or grass-lined spillway designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected. Also, the requirement at paragraph (a)(8)(i)(A) specifies that the regulatory authority may approve a single open-channel spillway of nonerodible construction and designed to carry sustained flows. These same revisions have been made to the final rule for sedimentation ponds at § 816.46(c)(2)(i) (A) and (B).

One commenter suggested that the prohibition against earth- or grass-lined spillways was unnecessary in sparsely populated areas where impoundments present little risk to life and property, such as Wyoming. In addition, the commenter maintained that it was possible to design stable earth- or grass-lined channels for flood flows.

Another commenter suggested that restrictions on grass-lined channels for small impoundments were inappropriate for semi-arid States, such as North Dakota, where such spillways generally function adequately because of the rare occurrences of flows through emergency spillways. The commenter maintained that this is because impoundments in North Dakota are designed to contain the runoff from a 10-year 24-hour or larger precipitation event and are dewatered after precipitation events to ensure control through storage. Although, the commenter acknowledged, grass-lined spillways are not ideal for "sustained flows," requiring that a spillway be "capable of maintaining sustained flows" is unnecessary in areas where sustained flows are rarely experienced. The commenter suggested that OSMRE recognize regional differences in spillway requirements by qualifying this provision to allow the regulatory authority to approve grass-lined open channels where there are no sustained flows.

Another commenter agreed with OSMRE in the prohibition of earth-lined spillways, but criticized the restriction on grass-lined spillways for essentially the same reason as the previous commenter: Not all spillways are subject to sustained flows. This commenter went on to point out that the provision requiring that spillways be of nonerodible construction could be interpreted to prohibit the use of rock-lined spillways which are capable of handling sustained flows. Additionally, the commenter noted that adequate single spillways can be designed with a combination lining of both rock and grass such that the sustained flows are channeled through the rock portion while the occasional storm flows pass over the grass portion. The commenter suggested that the language in § 816.49(a)(8) should be revised to recognize that linings such as grass and rock can be nonerodible provided that spillway design ensures that flow velocities do not exceed certain critical limits.

This same commenter also suggested that OSMRE adopt the phrase "single open channel spillway" instead of "open channel single spillway." OSMRE believes that this suggested revision places the various modifiers in their appropriate order and has adopted it, with the addition of a hyphen between "open" and "channel" in the final rule.

Another commenter objecting to the prohibition on earth- and grass-lined spillways maintained that such a prohibition is not supported in the technical literature. The commenter cited *SCS Technical Release 60* as a standard which acknowledges permissible flow velocities for vegetation- and earth-lined spillways. By not acknowledging that there are varying site-specific circumstances, the commenter suggested, the proposed rule would not allow engineers the necessary flexibility to design cost effective spillways. It was suggested that OSMRE revise the rule so that engineers would be allowed to exercise professional judgment in determining, in each case, the most cost effective design that will meet the requirement to have a nonerodible spillway.

One commenter noted that spillway stability is influenced by factors other than spillway lining, including the slope of the land at the point of discharge. The commenter maintained that earth- and grass-lined spillways have been used with satisfactory results and that such spillways can meet the requirement in § 816.49(a)(8) to be of nonerodible construction. Making this provision final, the commenter suggested, would result in a requirement to convert spillways to concrete-lined channels and thus substantially increase costs without adding any benefit. Instead of prohibiting earth- or grass-lined spillways, the commenter advised, OSMRE should require applicants to demonstrate in each case that such spillways are of nonerodible construction and therefore stable.

Taking a similar position to the above commenters, another commenter suggested that prohibition on earth- and grass-lined spillways disregards prudent, engineering practices and drastically exceeds SCS standard guidelines and practices. This commenter also asked if impoundments employing a previously approved earth-

or grass-lined spillway would need to be modified to meet the new requirement.

Still another commenter suggested that spillways for impoundments with large reservoir storage capacities could be earth-lined if they infrequently carried water.

Two commenters pointed out that structure without dams, such as incised structures, pose little or no danger to life and property and should not be subject to the strict requirements applicable to impoundments with dams.

As noted by the commenters, grass- or earth-lined spillways are appropriate under certain conditions and when properly designed to safely pass the design storm. In most cases, grass- or earth-lined spillways are used for emergency flows which are infrequent and not sustained. In all cases, the design flow velocity must be below the permissible velocity for the type of spillway lining. The prohibition on grass- or earth-lined spillways was included in the proposed rule to prevent the use of such spillways to carry sustained flows. Based on the comments and the guidelines in *SCS Practice Standard 378* and *SCS Technical Release 60*, OSMRE is allowing grass- or earth-lined spillways when they are designed to carry short term, infrequent flow at non-erosive velocities that can be safely handled by the vegetated or earth spillway. Since the rule has been revised to allow grass- or earth-lined spillways, previously approved spillways would not need to be modified.

Only one commenter addressing this provision suggested a more stringent spillway lining requirement. In order to prevent embankment failure due to erosion of the spillway channel, the commenter suggested, OSMRE should require that all open-channel spillways be constructed in solid ground and not within the impoundment embankment unless the spillway is lined with concrete.

OSMRE appreciates the commenter's concern for properly located and designed spillway channels, but the provisions were not added to the final rule. These are factors that should be considered by the professional who designs and certifies the impoundment and are at a level of detail that is inappropriate for the rule.

Sections 816.49(a)(8)(ii)/817.49(a)(8)(ii) Permanent and Temporary Impoundment Spillways; Design Precipitation Events

The requirements of § 816.49(a)(8)(ii) relative to design precipitation events also are included in § 816.46(c)(2)(ii) to ensure consistency between the spillway requirements for sedimentation ponds and those for all impoundments. The comments addressed these requirements as they would apply to both sections. The comments and OSMRE's response applicable to all impoundments, including sedimentation ponds, are presented in the following discussion.

Final § 816.49(a)(8)(ii)(A) requires that impoundments meeting the size or other criteria of 30 CFR 77.216(a) be able to pass a 100-year 6-hour precipitation event, or greater event as specified by the regulatory authority. Section 816.49(a)(8)(ii)(B) requires that impoundments not meeting the size or other criteria of 30 CFR 77.216(a) be able to pass a 25-year 6-hour precipitation event, or greater event as specified by the regulatory authority. These two provisions were proposed as paragraphs (a)(8)(i) and (a)(8)(ii), respectively; because of a restructuring of final § 816.49(a)(8), they appear in paragraphs (ii) (A) and (B), respectively, of the final rule. Similar organizational adjustments have been made in § 816.46(c)(2) for sedimentation ponds.

In the October 21, 1987, proposed rule, OSMRE had described the impoundments to which the design events in § 816.49(a) (i) and (ii) would apply as "large impoundments meeting the size or other criteria of § 77.216(a)" and "small impoundments not meeting the size or other criteria of § 77.216(a)", respectively. In the final paragraphs at § 816.49(a)(ii) (A) and (B), the words "large" and "small", respectively, have been deleted because these terms are redundant and possibly confusing in light of the references to the size or other criteria of § 77.216(a).

The rule also removes previous § 816.49 (b)(7) and replaces (c)(2) with a new provision concerning storage impoundments (discussed later). The previous § 816.49 (b)(7) and (c)(2) stipulated two different design precipitation events, depending on whether an impoundment was permament or temporary. The sections were removed because it is more appropriate from a safety standpoint to make the design precipitation event dependent upon whether an impoundment is large or small, respectively, rather than whether it is permanent or temporary. The 100-year 6-hour design precipitation event for larger impoundments under § 816.49(a)(8)(ii)(A) is the same as the event in § 816.46(c)(2)(ii)(B) for larger sedimentation ponds. Likewise, the 25-year 6-hour design precipitation event for smaller impoundments under § 816.49(a)(8)(ii)(A) is the same as the event in § 816.46(c)(2)(ii)(B) for smaller sedimentation ponds. The changes require that all impounding structures, except for structures constructed of coal mine waste or intended to impound coal mine waste and meeting the criteria in 30 CFR 77.216(a), be designed to meet one of the two specified precipitation events depending on impoundment size. See §§ 816.84(b)(2) through 817.84(b)(2) for the design events that apply to coal mine waste impounding structures.

OSMRE received two comments on the requirements applicable to larger impoundments. One commenter concurred with OSMRE's proposed provision on the specified design event for larger impoundments. A second commenter objected to the specified 100-year 6-hour event for impoundments meeting MSHA criteria because MSHA does not necessarily require the 100-year 6-hour event in all cases. The commenter suggested that OSMRE revise the provision to require adherence to MSHA standards without specifying the design event.

As stated in the discussion of comments on other provisions of these rules, OSMRE's responsibility under SMCRA is not the same as MSHA's responsibility under the Federal Coal Mine Health and Safety Act of 1969. Where OSMRE adopts more stringent requirements than MSHA it does so consistent with SMCRA's mandate to protect society and the environment.

OSMRE received eight comments on the design event in § 816.49(a)(8)(ii)(B) applicable to smaller impoundments. Four commenters requested that OSMRE return to the requirement in the 1979 regulations whereby such impoundments were subject to a 25-year 24-hour event. One of the four commenters pointed out that most existing small impoundments in North Dakota were designed, approved, and constructed under the 25-year 24-hour event requirement, and that these impoundments continue to operate without problems. This design event, the commenter added, is an adequate standard consistent with *SCS Practice Standard 378*. To require the 25-year 6-hour event, this commenter suggested, would have significant economic effects with negligible additional benefit, especially in light of the fact that the regulatory authority already has the authority to require a more stringent design event in individual cases, as warranted, where failure would be expected to cause loss of life or serious property damage.

Another of the four commenters favoring the 25-year 24-hour event maintained that requiring the new design event for small impoundments

would necessitate the rebuilding of most existing small impoundments. The commenter suggested that the least costly method of providing for the passage of this larger peak flow, to increase the height of the embankment to provide more temporary storage and a greater head on the discharge structure during the design event, would not always be possible because of topographic and stability constraints. Alternatives, the commenter maintained, would include widening earth-channel spillways or, in some cases where drop-inlet spillways are used, removal of the entire embankment and reconstruction with larger drop-inlet spillways.

Still another of the four commenters pointed out that Pennsylvania has successfully employed the SCS 25-year 24-hour standard by requiring the routing of different storm events through the impoundment or sufficient storage in the impoundment to contain the runoff from the storm event. In addition, the commenter noted, the storm event that is applied increases in magnitude as the pond drainage area increases. On the other hand, the Federal 6-hour requirement, the commenter pointed out, while resulting in higher peak rainfall and runoff values, results in lower total runoff values than the 24-hour event. Further, the commenter maintained that the 6-hour event originated from MSHA requirements for coal waste impounding structures which necessitate a more stringent requirement because of the available storage for surface runoff and the need to route the entire storm event through the emergency spillway. However, in the case of non-coal waste impoundments, which normally contain appreciable runoff storage capacities, the commenter suggested that the regulatory authority be allowed to specify the use of other currently accepted design events such as the 24-hour duration event accepted by the SCS and employed in Pennsylvania.

One commenter suggested that OSMRE add a new subsection stipulating that all spillways having designs previously approved by the regulatory authority that have good compliance records shall be exempted from the new rules.

OSMRE adopted the 25-year 6-hour design precipitation event in 1983 to provide consistency with the requirements for temporary impoundments (48 FR 44046). These same requirements were reproposed in 1987 (52 FR 39364) to provide for consistency between siltation structures and impoundments. As noted by the commenter, the 25-year 6-hour event probably results in higher peak rainfall intensity and runoff values than the 24-hour event, but in lower total runoff values. OSMRE selected the 25-year 6-hour event to guard against sudden, potentially more dangerous storms of short duration. The final rule will remain as proposed; however, the regulatory authority may specify, in accordance with § 780.25(c)(3), other standards that are in accordance with current, prudent, engineering practices.

Two other commenters suggested that, in light of the fact that a permanent impoundment will likely have a life of more than 25 years, all permanent impoundments, including those not meeting the MSHA criteria, should be subject to the 100-year 6-hour design requirement.

The SCS recommends a minimum design storm of 50-year frequency for the largest structure, whether permanent or temporary, that can be built under *SCS Practice Standard 378*. Based on this standard, OSMRE disagrees with the suggestion that the 100-year 6-hour design event should be required for small permanent impoundments. OSMRE believes that it is more appropriate to base the design storm on the size of the structure, which is more closely related to hazard potential, than on the life of the structure. Further, regulatory authorities can exercise discretion and specify a greater design event than the 25-year 6-hour event on a case-by-case basis if they believe that the expected life of the impoundment or potential hazard of the impoundment warrants more stringent requirements.

Another commenter found the 25-year 6-hour event requirement acceptable, but asked if impoundments designed under the 10-year 24-hour event and approved by both the State and OSMRE, would need to be modified to meet the new requirement. Also, the commenter asked whether the design event pertained to the spillway requirement or the containment capacity of the impoundment.

The 10-year 24-hour event is the containment and treatment requirement of § 816.46(c)(1)(iii)(C) relative to effluent limitations, and generally an impoundment meeting that requirement would not need to be modified. This containment and treatment requirement is not affected by the design storm events that apply to spillways in this rule. However, if the impoundment storage necessary to control the runoff from the design precipitation event exceeds the storagee needed to contain or treat the 10-year 24-hour event, the size of the impoundment would have to meet the larger storage requirement.

Sections 816.49(a)(10)/817.49(a)(10) Inspection of impoundments

Section 816.49(a)(10) specifies the qualified professionals who are authorized to meet the requirement for inspecting each impoundment in accordance with paragraph (a)(10)(i) of that section. In addition to the professionals listed in the previous rule, inspections also may be performed by qualified registered professional land surveyors as specified in paragraph (a)(10)(iv). See 6. *Inspection of impoundments* in "Background" for rationale for the change.

Also, § 816.49(a)(10)(ii) authorizes a qualified registered professional land surveyor as specified in paragraph (a)(10)(iv) to provide the certified report of the inspection results to the regulatory authority. In addition to this change, a language change was made to the 1983 rule. The language in this section that the impoundment has been "constructed and/or maintained" as designed differs from the language in the 1983 rule which read "constructed and maintained." This change is intended to make clear that the construction will not necessarily have to be recertified every time a maintenance inspection is conducted.

Section 816.49(a)(10)(iv) authorizes certain qualified registered professional land surveyors, in accordance with § 780.25(a), to inspect, certify and submit the report required for any temporary or permanent impoundment that does not meet the size or other criteria of 30 CFR 77.216(a), except for coal mine waste impounding structures (see 6. *Inspection of impoundments* in "Background"). In accordance with § 780.25(a), a qualified registered professional land surveyor is authorized to inspect and certify small impoundments in any State which authorizes land surveyors to prepare and certify such plans. The rule does not allow land surveyors to certify coal mine waste impounding structures, which are covered by § 816.84. OSMRE believes that the more complicated design and construction requirements of coal mine waste impounding structures necessitate certification by a professional engineer. The rule also requires that the land surveyor be experienced in the construction of impoundments to be consistent with the experience requirement for professional engineers in § 816.49(a)(10).

The changes in paragraphs (a)(10)(ii) and (a)(10)(iv) are not to be confused with the provision in the introductory language in paragraph (a)(10) allowing inspections by a "qualified professional specialist, under the direction of a

professional engineer." The requirement in the introductory language is retained from the 1983 rule. Under paragraphs (a)(10)(ii) and (a)(10)(iv), the "qualified registered professional land surveyor" will be authorized to conduct certain inspections and certify reports independently. Under the provision in the introductory language in paragraph (a)(10), the "qualified professional specialist" can perform inspections only under the direction of a "professional engineer."

One commenter supported the provision in § 816.49(a)(10)(ii) requiring that all inspection reports be filed with the regulatory authority immediately following the inspection. Several commenters objected to this provision on the basis that it would create unnecessary paperwork. They suggested that maintaining inspection records on the mine site and submitting them periodically would be adequate. One commenter further added that the proposed requirement could trigger the issuance of unnecessary notices of violation by regulatory authorities, while other commenters suggested that some regulatory authorities do not want the records sent to their offices but prefer that they be kept at the mine site to reduce their paperwork problems.

OSMRE believes it is necessary to have the inspection report sent to the regulatory authority so that any problems can be brought to the State's attention, and in order to provide the State the opportunity to adequately monitor corrective actions that may be necessary. Having the information on file in the State office also provides advance information to inspectors before beginning an inspection trip. OSMRE is sensitive to the concern that regulatory authorities' paperwork burdens should be reduced where possible. However, several regulatory authorities commented on this proposed rule, and none suggested that this reporting requirement presented a burden.

Two of the commenters who objected to the filing requirements also objected to the requirement for an annual inspection and certification by a registered professional engineer for all impoundments, regardless of size, on the basis that it is unnecessary and would result in yet another paperwork requirement for operators without effecting an added public benefit. They noted that presently only structures meeting MSHA criteria must be certified annually and argued that if small impoundments are properly designed and constructed, an annual inspection by a qualified person, not necessarily an engineer, should be sufficient to detect any significant structural problems.

This commenter incorrectly maintained that annual certifications are required only for those impoundments meeting MSHA criteria. Under existing § 816.49(a)(10)(i), which was not reproposed, inspections are required for all impoundments "at least yearly," while under paragraph (a)(10)(ii), the inspector must "promptly, after each inspection, provide to the regulatory authority a certified report * * *." Again, for the same reasons mentioned above, OSMRE considers the annual certification to the regulatory authority to be an important component of impoundment safety and protection of the public.

Two commenters suggested that there was an inconsistency between OSMRE's inspection and certification provisions. They maintained that where an engineer performs the quarterly inspection of impoundments not meeting MSHA criteria under paragraph (a)(11), it is necessary under paragraph (a)(10)(ii) to certify the results each quarter. This, the commenter suggested, conflicts with the annual inspection requirement in paragraph (a)(10)(i). The point the commenter made is that, so long as MSHA has determined that regulating smaller structures is unnecessary, and that annual certifications are not required, it would seem reasonable for OSMRE to adopt the same regulatory philosophy. Any significant problems with small impoundments, the commenter concluded, would be observed and brought to the operator's attention during the regulatory authority's complete quarterly inspection.

OSMRE considers the inspection and certification requirement of § 816.49(a)(10) and the "examination" requirement of paragraph (a)(11) to be distinctly different requirements serving distinctly different purposes. The examination under paragraph (a)(11) by a "qualified person" occurs quarterly for impoundments not meeting the criteria of 30 CFR 77.216(a) and weekly for those meeting the criteria. This serves the need to monitor large impoundments more frequently because of their greater potential hazard. The inspection and accompanying certification by a "qualified registered professional engineer" or a "qualified registered professional land surveyor" under paragraph (a)(10) ensures a more stringent level of inspection and ensures that the regulatory authority is made aware of the condition of impoundments.

OSMRE does, however, recognize that the clarity of the proposed inspection and examination provisions could be improved as noted by the commenter. Therefore, OSMRE has revised paragraph (a)(10)(ii) in the final rule to read, "The qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(10)(iv) of this section, shall promptly, after each inspection required in paragraph (a)(10)(i), provide the regulatory authority with a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter." The added reference will make clear that the certification report requirement does not apply to the examination referenced in paragraph (a)(11).

As discussed previously relative to storage control in § 816.49(a)(10), a commenter maintained that the inspection and certification provisions of the proposed rules are not consistent. The commenter suggested that the provision in § 816.49(a)(8) requiring that impoundments relying primarily on storage demonstrate sufficient control in the judgment of a qualified registered professional engineer contradicts the land surveyor provision of § 816.49(a)(10)(iv) authorizing land surveyors to certify impoundments not meeting the criteria of 30 CFR 77.216(a).

OSMRE believes this comment has merit and has changed § 816.49(a)(8) of the final rule to allow qualified professional registered land surveyors to certify structures that rely primarily on storage to control the design precipitation event and, thus, remove a limitation on the land surveyor provision of § 816.49(a)(10)(iv). This change makes the rules consistent with the authority of qualified registered professional land surveyors to certify impoundments that do not meet the criteria of 30 CFR 77.216(a).

One commenter supported the land surveyor inspection and certification provision, suggesting that land surveyors are as qualified as engineers to make the physical measurements that are involved in post-construction certification.

One commenter urged rejection of the provision at § 816.49(a)(10)(iv) authorizing qualified registered professional land surveyors to inspect and certify impoundments not meeting the MSHA criteria, suggesting that it would weaken the enforcement process and contribute to the construction of potentially hazardous structures because land surveyors lack the

technical expertise in the hydraulics of impoundment dam and spillway design. This commenter also maintained that regulatory authorities' workload prevents them from devoting the necessary technical staff to investigate and determine if land surveyors are experienced in the construction of impoundments. This same commenter also asked how much experience in impoundment dam, embankment, and spillway construction a land surveyor must have in order to be competent to certify impoundments.

One commenter was alarmed by the proposal in § 816.49(a)(10)(iv) to authorize land surveyors to inspect and certify impoundments not meeting the size or other criteria of 30 CFR 77.216(a), maintaining that the provision may result in the certification of impoundments by individuals lacking proper training and knowledge of hydrologic and geologic considerations attendant to such structures. This commenter also incorporated by reference earlier objections to the October 2, 1984 (49 FR 38958), proposed provision to allow land surveyors to certify the design of impoundments not meeting the criteria of 30 CFR 77.216(a), which was issued in final on April 24, 1985 (50 FR 16194).

This commenter reaffirmed an objection to the 1985 rule on the basis that it authorized land surveyors to certify the design of components of plans that the commenter believed were outside of the professional capability of land surveyors and beyond the intent of the November 4, 1983, amendment to SMCRA. The commenter voiced opposition to allowing the design of any water-retaining impoundments, regardless of size, by anyone other than a qualified, registered professional engineer with experience in the design of such impoundments. Such an allowance, the commenter maintained, in addition to creating a significant public hazard, is inconsistent with the November 4, 1983, SMCRA amendment which did not intend to authorize land surveyors to certify the design of such components.

In response to this commenter's concerns about the 1984 proposal (50 FR 16195), OSMRE noted that activities properly within the field of surveying vary among the States and that the rule authorized "surveyors only to perform those functions in a particular State for which they have authority under State law." Because of variations that exist from State to State, OSMRE declined to further restrict properly authorized land surveyors in design certification and continues to maintain the same position.

In objecting to the October 21, 1987, proposal in paragraph (a)(10)(iv) of § 816.49 to allow qualified registered professional land surveyors to inspect and certify impoundments not meeting the size or other criteria of 30 CFR 77.216(a), the commenter noted the wide disparity among various States in the qualifications and capabilities of professional land surveyors to undertake such certifications. It is precisely because of this disparity that OSMRE must rely on State licensing authorities to ensure that land surveyors are authorized to perform only those design certifications that they are qualified to perform in consideration of their background, training, and experience.

This same commenter further addressed two fundamental concerns. First, as with the objection to the design certification provision of the 1985 rule, the commenter suggested that the annual inspection and certification of impoundments is a matter which involves questions of material stability and geology which are outside of the traditional competence of the surveying profession. In support of this contention, the commenter quoted from a statement to the Congress by the American Institute of Professional Geologists (AIPG) supporting the 1983 SMCRA amendment: " * * * the 'lead' or primary role for preparation and certification of geological and geotechnical documents is the sole responsibility of professional geologists or of registered professional engineers qualified in the earth sciences." The commenter urged OSMRE to add limiting language to § 816.49(a)(10)(iv) such that, in addition to restricting the provision to any State which authorizes land surveyors to prepare and certify plans for impoundments, it would be restricted to States which authorize land surveyors to perform and certify inspections of impoundments.

This same commenter's second fundamental concern was that OSMRE must establish national minimum standards for experience and training of land surveyors in the area of impoundment certification to avoid problems in States which (1) do not have minimum qualifications for engaging in the practice of land surveying; or (2) may have standards that do not suffice to ensure a minimum level of competence in this technical area; or (3) allow "grandfathering" of practicing land surveyors based solely on surveying experience without requiring any formal training. The requirement in the proposed rule, "shall be experienced in the construction of impoundments," the commenter argued, was vague and not sufficient to ensure a minimum level of competence. The commenter concluded, limiting this provision to those impoundments that do not meet MSHA criteria does not ensure adequate safety because such impoundments still may present a threat to the public and the environment.

As discussed elsewhere in this preamble (see 6. *Inspection of Impoundments* in I. Background), OSMRE found that comments received during the preparation of the 1985 final rule authorizing design certifications by land surveyors presented compelling arguments for authorizing qualified registered professional land surveyors to inspect and certify those impoundments not meeting the criteria of 30 CFR 77.216(a). Certainly it is reasonable to accept that if land surveyors are qualified to certify design and construction, then they would also be qualified to inspect the impoundments that they have designed.

OSMRE acknowledges concerns about the technical qualifications of land surveyors in the hydraulics of impoundment dam and spillway design. Consequently, OSMRE limited this authority to impoundments not meeting the size or other criteria of 30 CFR 77.216(a). Also, OSMRE requires that the land surveyor shall have experience in the construction of impoundments, in accordance with paragraph (a)(10)(iv). Furthermore, the rule provide many levels of protection, of which design certification is only one. Section 816.49(a)(2) requires that the certifying land surveyor have previous experience in impoundment design and construction. Any design which is certified by a land surveyor must conform to the performance standards of the regulatory program and be submitted to the regulatory authority for review as part of a permit application. Under § 816.49(a)(10), impoundments are given frequent inspections, while under § 816.49(a)(11), all small impoundments are examined for structural weakness and hazardous conditions at least quarterly. Thus, OSMRE concludes that it is proper to authorize qualified registered professional land surveyors to certify the design and construction of small impoundments.

Concerning the commenter's suggestion that OSMRE add limiting language to § 816.49(a)(10)(iv) restricting its application to States which authorize land surveyors to perform and certify inspections of impoundments, OSMRE does not see what this would change in practice. If land surveyors lack the authority under a State law to inspect

impoundments, then, it follows, this provision in OSMRE's rules would not apply in such a State.

Another commenter made the general suggestion that professional geologists should be more involved in the design and certification of impoundments. This rule does not affect the authority previously granted to professional geologists.

A final commenter on the land surveyor provision suggested that OSMRE also allow qualified registered landscape architects to certify maps and plans for small impoundments, certify construction, and perform annual inspections. The commenter maintained that most landscape architects are trained in hydrology for calculating storm water runoff; hydraulics for designing ditches and culverts; earthwork for determining cut and fill volumes, required grading and construction techniques; and soil mechanics for determining the behavior of soil under various loading conditions. Coupled with practical experience and registration, the commenter suggested, the landscape architect is very capable of developing plans, managing construction, and conducting annual stability and hazardous-condition inspections on all small impoundments.

The November 4, 1983, and October 30, 1986, amendments to SMCRA specifically authorized an expanded role for land surveyors in impoundment design, but do not provide such authorization to landscape architects. This rule does not authorize landscape architects to prepare independently or to certify cross sections, maps and plans. Lacking proper authorization, it would be inappropriate for OSMRE to consider such revisions to the rules at this time.

Sections 816.49(c)(2)/817.49(c)(2) Temporary Impoundments; Storage Control

The requirements included in § 816.49(c)(2) concerning the use of storage to control the design precipitation event are also included in § 816.46(c)(2)(iii) to ensure consistency between the spillway requirements in the rules for sedimentation ponds and those in the rules for all impoundments. Comments on these sections addressed these requirements as they would apply to both sections. Those comments and OSMRE's response applicable to all impoundments, including sedimentation ponds, are addressed in the following discussion.

Under final § 816.49(c)(2), the regulatory authority is authorized to approve the design of a temporary impoundment that relies primarily on storage to control the runoff from the design precipitation event in lieu of meeting the requirements in § 816.49(a)(8)(i) when it is demonstrated by the operator and certified by a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 780.25(a) that the impoundment will safely control the design precipitation event, the water from which will then be safely removed, in accordance with current, prudent, engineering practices. The regulatory authority may only approve such an impoundment if it is located where failure would not be expected to cause loss of life or serious property damage except where (1) in the case of an impoundment meeting MSHA criteria, it is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the regulatory authority; or (2) in the case of an impoundment not meeting MSHA criteria, it is designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the regulatory authority.

A similar storage control provision was proposed on October 21, 1987, in § 816.49(a), but has been moved in the final rule to § 816.49(c) in response to a comment suggesting that it only apply to temporary impoundments (comment discussed later). This same language is included in § 816.46(c)(2)(iv) for sedimentation ponds, which generally are temporary structures, to ensure consistency between the provisions applicable to temporary impoundments and those applicable to sedimentation ponds. Section 816.46 does not contain separate provisions for permanent and temporary sedimentation ponds. However, because the requirements in § 816.49 apply to all impounding structures, a permanent sedimentation pond would have to meet all of the requirements applicable to permanent impoundments in § 816.49(a) and 816.49(b).

OSMRE believes that this new provision will be useful for those impoundments where the runoff area is small, or where pumps or a decant structure would be used to control the water level in the facility. As OSMRE stated in the October 21, 1987, preamble to the proposed rule (52 FR 39360), OSMRE believes that current, prudent, engineering practice requires that at least 90 percent of the water stored during the design precipitation event be removed within the 10-day period following the design precipitation event.

Two commenters suggested that OSMRE's proposed prohibition on storage impoundments with moderate or high downstream hazard potential was unjustified. The commenters maintained that such impoundments pose no greater downstream threat than conventional impoundments (those with spillways) provided they are designed in accordance with current, prudent, engineering practices. The commenters pointed out that removing at least 90 percent of the water stored during the design precipitation event within the 10-day period following the event is the same criteria as that of the MSHA for high hazard conventional impoundments. These commenters also maintained that current, prudent, engineering practice accounts for increased hazard potential by designing for a larger precipitation event.

OSMRE proposed a prohibition on using impoundments that rely primarily on storage to control the runoff from the design preciption event in the absence of an adequate or any spillway where they may pose a downstream hazard because of safety concerns. However, OSMRE also recognizes that the safety of such structures can be reasonably assured by requiring that they meet especially stringent design precipitation event requirements. In response to these comments, OSMRE added the provisions at §§ 816.49(c)(2) (A) and (B) authorizing the regulatory authority to approve the design of impoundments that rely primarily on storage if such impoundments are located where failure would not be expected to cause loss of life or serious property damage, except where (1) in the case of an impoundment meeting MSHA criteria, it is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the regulatory authority; or (2) in the case of an impoundment not meeting MSHA criteria, it is designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the regulatory authority.

The regulatory authority may find it appropriate to increase either the size or the duration of the event, or both, on a case-by-case basis depending on design concerns. For example, some large impoundments may warrant the application of the probable maximum precipitation of a 36-hour event. The design procedures of MSHA's *Engineering and Design Manual—Coal Refuse Disposal Facilities* include recommendations for the design precipitation event and flood routing techniques for designing structures in hazardous locations.

Two commenters suggested that, if OSMRE intends to equate the 10-day/90-percent removal standard with current,

prudent, engineering practice, the rule should so specify rather than merely stating such a contention in the preamble. Another commenter suggested that OSMRE require and implement through the State program approval process the development of engineering standards and operational standards (e.g., water testing, decanting protocol) for storage impoundments. The commenter also suggested that OSMRE abandon the 10-day/90-percent removal standard because, in the case of sedimentation ponds, it may actually run counter to the intent of the rule by not providing sufficient detention time to allow for settlement of suspended solids. The commenter added that during the first days after the precipitation event, and particularly in the case of multiple events, water may need to remain in the impoundment without discharge. OSMRE should, the commenter urged, address removal time on a case-by-case basis.

OSMRE is not requiring the 10-day period, 90-percent removal standard as a provision of § 816.49 for impoundments, but is allowing the necessary flexibility to address water removal procedures on a case-by-case basis. OSMRE beleives that this flexibility is particularly important in the case of sedimentation ponds because of the need to allow sufficient time for the settlement of suspended solids, as pointed out by the above commenter. However, OSMRE has retained the 10-day period, 90-percent removal requirement for coal mine waste impounding structures because of the variable nature of coal waste and the resultant stability concerns.

Another commenter maintained that the provision allowing impoundments without a spillway was both foolhardy and dangerous and that OSMRE failed to cite any technical literature to support its proposal. The commenter suggested that this provision, if implemented absent stringent conditions on design and operation, would (1) invite overtopping and structural failure of impoundments; (2) create significant increases in the phreatic surface of impoundments with potentially attendant structural weakness; (3) result in a likely increase in sediment pond size, a matter of great concern in steep-sloped areas due to question of downstream safety in the event of failure; and (4) necessitate close scrutiny of the sediment clean-out and decanting schedules and plans to ensure that the pond does not became incapable of storing the design event.

This same commenter went on to state that, should this provision become final, OSMRE should explicitly require careful analyses of the phreatic surface and of the stability of storage-based impoundments. Further, the commenter suggested, because there must be continual and routine maintenance of storage-based impoundments to ensure effective functioning through the decanting of stormwater, this provision should not be applied to permanent structures. Should OSMRE insist on applying this provision to temporary impoundments, the commenter followed, engineering standards and operational requirements for such structures must be developed by OSRME or required to be developed by individual states for OSRME's approval. Any provision finally adopted, the commenter maintained, presents a host of enforcement-related problems and warrants that OSRME recognize that the efficacy of storage-based impoundments is dependent on routine and timely maintenance and that the regulatory authority clearly has the duty to make such routine maintenance a permit condition.

This same commenter was further concerned that the 10-day/90-percent removal standard endorsed by OSRME, although a critical component of any final provision, may be too lenient in cases where two significant storm events occur within a 10-day period or where lesser storms continue over a multi-day period, as is common in the winter, causing structural failure.

In conclusion, this commenter urged that, prior to making this provision final, modelling and sensitivity analyses be conducted on storage-based impoundments under a wide range of watershed configurations and mining conditions to ensure proper restrictions on the use of such structures.

OSMRE agrees with this commenter's suggestion that the allowance for impoundments relying primarily on storage should apply only to temporary impoundments. Permanent impoundments without adequate spillways would present a host of stability and safety problems once regulatory jurisdiction terminates. Therefore, this provision, although originally proposed as part of the general requirements for impoundments in § 816.49(a), has been moved to the section for temporary impoundments, § 816.49(c). The new § 816.49(c)(2) replaces paragraph (2) of the 1983 rules, which specified a design precipitation event requirement for temporary impoundments which is no longer applicable. Language similar to that in § 816.49(c)(2) has been placed in a new § 816.46(c)(2)(iii) for sedimentation ponds so that the two requirements applicable to temporary structures are parallel.

The other concerns raised by this commenter may apply to any structure. It is only through the application of experienced judgment by qualified registered professionals that safe and reliable structures are designed, constructed, and inspected. The specific design criteria discussed by the commenter must be considered by the professional during the design sequence, but is an inappropriate level of detail for the rule. Consideration of the potential for overtopping, impoundment failure, increase in phreatic surface, and increase in impoundment size relative to steep-slope locations, need to be made by a professional authorized to design and construct structures. Sediment clean-out and decanting capabilities already must be considered in the inspection and certification of impoundments under existing § 816.49(a)(10)(ii). Further, States may develop more specific performance and operational requirements to suit their particular regional differences. OSMRE believes that the application of this approach assures proper design and construction of safe impounding structures.

As a result of the review of comments and further technical consideration, OSMRE has replaced the sentence "in the absence of an adequate, or any, spillway," which appeared in the proposed rule, with "in lieu of meeting the requirements in paragraph (a)(8)(i) of this section." Paragraph (a)(8)(i) allows the regulatory authority to approve a single spillway only when it is of open-channel configuration. OSMRE believes that a closed-conduit type spillway alone will not adequately pass the design precipitation event without considerable reliance on storage. In the absence of a combination of principal and emergency spillways or a single open-channel spillway meeting the requirements of § 816.49(a)(8)(i), an impoundment would have to meet the requirements of § 816.49(c)(2) for structures relying primarily on storage.

A final commenter maintained that proposed § 816.49(a)(8) is inconsistent with OSMRE's proposed provision at § 816.49(a)(10), which allows qualified registered professional land surveyors to inspect and certify impoundments not meeting MSHA criteria. The commenter suggested that the provision in § 816.49(a)(8) requiring that impoundments relying primarily on storage demonstrate sufficient control in the judgment of a qualified registered professional engineer contradicts the

land surveyor provision discussed here. The commenter suggested that OSMRE should carry over the land surveyor allowance to § 816.49(a)(8). This, the commenter argued, is consistent with the SMCRA amendments of November 4, 1983, and October 30, 1986, intended to authorize land surveyors to design and certify certain ponds that contain the design event.

OSMRE believes this comment has merit and has made the change in the final rule to allow qualified professional registered land surveyors to certify structures that rely primarily on storage to control the design precipitation event. This will make this provision consistent with other provisions that allow land surveyors to certify impoundments that do not meet the size or other criteria of 30 CFR 77.216(a).

Sections 816.84 (b)(2) and (f)/817.84 (b)(2) and (f) Coal Mine Waste Impounding Structure Spillways

Because the final spillway requirements for coal mine waste impounding structures are based in large part on the spillway design requirements for permanent and temporary impoundments in § 816.49(a)(8), § 816.84(b)(2) was revised to reflect the changes in § 816.49(a)(8). Rather than require a combination of principal and emergency spillways, § 816.84(b)(2) requires that each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of 30 CFR 77.216(a) have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the regulatory authority (see 2. *Spillways* in "Background"). The design precipitation event is increased from a 100-year 6-hour event to the probably maximum precipitation (PMP) of a 6-hour duration event in order not to conflict with the MSHA guidelines. The PMP is the amount of rainfall that has been determined by meteorologists to represent the maximum storm potential that can be expected for any specific area and in every instance is greater than a 100-year 6-hour storm.

OSMRE believes there is no need to require spillways for impounding structures so long as the structures are designed and constructed in accordance with the requirements of §§ 816.49 and 816.84. Under existing § 816.84(e), such structures shall be designed so that at least 90 percent of the water stored during the design precipitation event can be removed within a 10-day period. Final § 816.84(f) requires that, for such structures, at least 90 percent of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event.

One commenter voiced support for the allowance for one spillway in coal mine waste impounding structures, while another commenter stated support for the requirement for a probable maximum precipitation of a 6-hour duration event applicable to spillways.

Three commenters objected to the change in required design event from a 100-year 6-hour event to a probable maximum precipitation of a 6-hour duration event. Despite OSMRE's claim that this would be consistent with MSHA's requirements, the commenters pointed out, MSHA does not necessarily require this design event for spillways. Rather, the commenters added, MSHA's recommended minimum design storm criteria vary with the impoundment volume, depth and hazard potential. The commenters concluded that it would make more sense for OSMRE to remove specific design criteria from this provision and insert language that would simply require adherence to MSHA standards, particularly, as one commenter noted, because MSHA's requirements are complex and subject to change.

As discussed in the sections concerning spillways and size distinctions, OSMRE does not defer to MSHJA in meeting its statutory responsibility. OSMRE has selected the PMP storm for the design of coal mine waste impounding structure spillways to provide protection to society and the environment in line with the mandate of SMCRA. Also, the minimum design storm in the MSHA guidelines applies to both water and coal mine waste impounding structures and, thus, the MSHA guidelines address a wider range of design storms.

Two commenters suggested that the language in proposed § 816.84(f) was confusing in light of existing language in paragraph (e) of that section. While, the commenter acknowledged, the intent to present a design standard in paragraph (e) and a performance standard in paragraph (f) is understood, the two would be clearer if combined as a performance standard. As now written, the commenter concluded, proposed paragraph (f) could be misconstrued to not require drawdown for storms less than the design precipitation event.

Section 816.84(e) establishes the performance standard that the impounding structure shall be designed so that at least 90 percent of the water stored during the design precipitation event can be removed within a 10-day period. Section 816.84(f) requires drawdown for the design precipitation event and also discharge of the inflow from smaller storms to maintain the capacity of the impoundment to handle the inflow from the design storm when it occurs. Therefore, paragraph (e) is the required capability of the discharge system, and paragraph (f) is the standard for discharging the runoff in a reasonable time to ensure adequate continued capacity of the structure. Since the proceeding paragraphs serve two distinct functions, OSMRE believes they should be separate paragraphs.

Comments on Other Rule Provisions

OSMRE received several comments on provisions that were not part of the October 21, 1987, proposed rulemaking. Under the Administrative Procedure Act, OSMRE cannot revise the final rule to reflect any of these comments because the public has not been given an opportunity to respond to any proposed language.

One commenter maintained that swamps, dugout ponds, and excavated basins, regulated under 30 CFR 816.45, present almost no hazard potential because they are usually small and have little or no embankment. The commenter suggested that the spillway requirements, stability analyses, and inspection and certification requirements proposed for small impoundments in § 816.49(a) should not apply to such low-hazard impoundments. In response, OSMRE points out that § 816.49(a) applies to the sediment control measures in § 816.45 whenever they meet the definition of impoundments in § 701.5.

Two commenters suggested amending § 816.49(a)(6) dealing with slope protection and erosion control because the language is inconsistent and unnecessarily restrictive. Pointing out that paragraph (c)(6) requires slope protection to prevent surface erosion and sudden drawdown, the commenters questioned what, if any, effect slope protection would have in preventing sudden drawdown. The primary problem associated with sudden drawdown, the commenters maintained, is mass stability of an impounding structure embankment. The commenters suggested that OSMRE include performance standards addressing sudden drawdown with other stability standards.

The same commenters voiced concern about § 816.49(a)(7), which requires that embankment faces be vegetated, except

for riprapping of slopes where water is impounded. This provision, commenters maintained, does not allow for the construction of zoned embankments utilizing rock fill for the downstream sections of the structure. They further suggested that rock fill slopes could be designed to prevent erosion and thus meet the ultimate goal of the regulation. In conclusion, the commenters suggested that engineers should be allowed to utilize professional judgment to determine the most cost-effective design to meet the ultimate objective of the performance standard.

One commenter suggested that OSMRE revise § 816.84(b)(1) to remove the prohibition on retaining coal mine waste impounding structures permanently as part of the approved postmining land use. The commenter cited a recently completed experimental practice that demonstrated the effectiveness of direct vegetation establishment on an abandoned coal mine waste (slurry) impoundment to create a wetland habitat.

All of these comments addressed provisions not included in OSMRE's October 21, 1987, proposed rule. Therefore, they do not affect the final rule.

Reference Materials

Reference materials used to develop this final rule are as follows:

U.S. Soil Conservation Service, *Earth Dams and Reservoirs: Technical Release 60*, 1985.

U.S. Soil Conservation Service, *Pond: Practice Standard 378*, 1985.

U.S. Mining Enforcement and Safety Administration, *Engineering and Design Manual—Coal Refuse Disposal Facilities;* Prepared by D'Appolonia Consulting Engineers, Inc., Pittsburgh, Pa., 1975.

U.S. Mine Safety and Health Administration, *Information Report 1109; Design Guidelines for Coal Refuse Piles and Water, Sediment, or Slurry Impoundments and Impounding Structures*, 1979.

U.S. Mine Safety and Health Administration, *Amendment to Information Report 1109; Design Guidelines for Coal Refuse Piles and Water, Sediment, or Slurry Impoundments and Impounding Structures*, 1983.

Federal Coordinating Council for Science, Engineering and Technology, *Federal Guidelines for Dam Safety*, 1979.

Karl Terzaghi and Ralph B. Peck, *Soil Mechanics in Engineering Practice*, second edition, John Wiley & Sons, Inc., 1967.

III. Procedural Matters

Effect in Federal Program States and on Indian Lands

The rule applies through cross-referencing in those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The rule also applies through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR Part 750.

Effect on State Programs

Following promulgation of the final rule, OSMRE will evaluate permanent State regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

Paperwork Reduction Act

The information collection requirements contained in Parts 780, 784, 816, and 817 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance numbers 1029–0036, 1029–0039, 1029–0047, and 1029–0048. Sections of this final rule with information collection requirements are 30 CFR 780.25, 784.16, 816.49(a)(10), and 817.49(a)(10); and the public reporting burden of these sections is estimated to average, respectively, 36.1, 17.2, 1, and 1 hours per response. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and that it will not have a significant effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The rule will affect a relatively small number of surface coal mining operations. The rule does not distinguish between small and large entities. The economic effects of the rule are estimated to be minor, and no economic effects are anticipated as a result of the rule.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA), and has made a finding (FONSI) that this rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). The EA and FONSI are on file in the OSMRE Administrative Record in Room 5131A, 1951 Constitution Avenue, NW., Washington, DC 20240.

Author

The principal author of this rule is Robert A. Wiles, P.E., with assistance from Stephen M. Sheffield, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202–343–1502 (Commercial or FTS).

List of Subjects

30 CFR Part 780

Reporting and recordkeeping requirements, Suface mining.

30 CFR Part 784

Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 816

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

Accordingly, 30 CFR Parts 780, 784, 816 and 817 are amended as set forth below.

Dated: August 16, 1988.

James E. Cason,

Acting Assistant Secretary—Land and Minerals Management.

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

1. The authority citation for Part 780 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*; Pub. L. 100–34; and 16 U.S.C. 470 *et seq.*

2. Section 780.25 is amended by revising paragraph (c) to read as follows:

§ 780.25 Reclamation plan: Ponds, impoundments, banks, dams, and embankments.

* * * * *

(c) *Permanent and temporary impoundments.* (1) Permanent and temporary impoundments shall be designed to comply with the requirements of § 816.49 of this chapter.

(2) Each plan for an impoundment meeting the size or other criteria of the Mine Safety and Health Administration shall comply with the requirements of §§ 77.216–1 and 77.216–2 of this title. The plan required to be submitted to the District Manager of MSHA under § 77.216 of this title shall be submitted to the regulatory authority as part of the permit application in accordance with paragraph (a) of this section.

(3) For an impoundment not meeting the size or other criteria of § 77.216(a) of this title and located where failure would not be expected to cause loss of life or serious property damage, the regulatory authority may establish through the State program approval process engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in § 816.49(a)(3)(ii) of this chapter.

* * * * *

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

3. The authority citation for Part 784 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*; Pub. L. 100–34; and 16 U.S.C. 470 *et seq.*

4. Section 784.16 is amended by revising paragraph (c) to read as follows:

§ 784.16 Reclamation plan: Ponds, impoundments, banks, dams and embankments.

* * * * *

(c) *Permanent and temporary impoundments.* (1) Permanent and temporary impoundments shall be designed to comply with the requirements of § 817.49 of this chapter.

(2) Each plan for an impoundment meeting the size of other criteria of the Mine Safety and Health Administration shall comply with the requirements of §§ 77.216–1 and 77.216–2 of this title. The plan required to be submitted to the District Manager of MSHA under § 77.216 of this title shall be submitted to the regulatory authority as part of the permit application in accordance with paragraph (a) of this section.

(3) For an impoundment not meeting the size of other criteria of § 77.216(a) of this title and located where failure would not be expected to cause loss of life or serious property damage, the regulatory authority may establish through the State program approval process engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in § 817.49(a)(3)(ii) of this chapter.

* * * * *

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

5. The authority citation for Part 816 is revised to read as follows:

Authority: Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*, as amended; sec. 115 of Pub. L. 98–146, 30 U.S.C. 1257; and Pub. L. 100–34.

6. Section 816.46 is amended by revising paragraphs (b)(3) and (c)(2) to read as follows:

§ 816.46 Hydrologic balance: siltation structures.

* * * * *

(b) * * *

(3) Siltation structures for an area shall be constructed before beginning any surface mining activities in that area, and upon construction shall be certified by a qualified registered professional engineer, or in any State which authorizes land surveyors to prepare and certify plans in accordance with § 780.25(a) of this chapter a qualified registered professional land surveyor, to be constructed as designed and as approved in the reclamation plan.

* * * * *

(c) * * *

(2) *Spillways.* A sedimentation pond shall include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (c)(2)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (c)(2)(ii) of this section, except as set forth in paragraph (c)(2)(iii) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2)(iii) of this section, the required design precipitation event for a sedimentation pond meeting the spillway requirements of paragraph (c)(2) of this section is:

(A) For a sedimentation pond meeting the size or other criteria of § 77.216(a) of this title, a 100-year 6-hour event, or greater event as specified by the regulatory authority.

(B) For a sedimentation pond not meeting the size or other criteria of § 77.216(a) of this title, a 25-year 6-hour event, or greater event as specified by the regulatory authority.

(iii) In lieu of meeting the requirements in paragraph (c)(2)(i) of this section, the regulatory authority may approve a sedimentation pond that relies primarily on storage to control the runoff from the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 780.25(a) of this chapter that the sedimentation pond will safely control the design precipitation event, the water from which shall be safely removed in accordance with current, prudent, engineering practices. Such a sedimentation pond shall be located where failure would not be expected to cause loss of life or serious property damage, except where:

(A) In the case of a sedimentation pond meeting the size or other criteria of § 77.216(a) of this title, it is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the regulatory authority; or

(B) In the case of a sedimentation pond not meeting the size or other criteria of § 77.216(a) of this title, it is designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the regulatory authority.

* * * * *

7. Section 816.49 is amended by removing the suspension of paragraphs (a)(3), (a)(5)(i) and (a)(8), revising paragraphs (a)(1), (a)(3), (a)(5)(i), (a)(8), the introductory text of paragraph (a)(10), and paragraphs (a)(10)(ii), (a)(10)(iv), and (c)(2); and removing paragraph (b)(7) to read as follows:

§ 816.49 Impoundments.

(a) * * *

(1) An impoundment meeting the size or other criteria of § 77.216(a) of this title shall comply with the requirements of § 77.216 of this title and this section.

* * * * *

(3) *Stability.* (i) An impoundment meeting the size or other criteria of § 77.216(a) of this title or located where

failure would be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2.

(ii) Impoundments not meeting the size or other criteria of § 77.216(a) of this title, except for a coal mine waste impounding structure, and located where failure would not be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of § 780.25(c)(3).

* * * * *

(5) *Foundation.* (i) Foundations and abutments for an impounding structure shall be stable during all phases of construction and operation and shall be designed based on adequate and accurate information on the foundation conditions. For an impoundment meeting the size or other criteria of § 77.216(a) of this title, foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

* * * * *

(8) *Spillways.* An impoundment shall include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (a)(8)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(8)(ii) of this section, except as set forth in paragraph (c)(2) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(8) of this section is:

(A) For an impoundment meeting the size or other criteria of § 77.216(a) of this title, a 100-year 6-hour event, or greater event as specified by the regulatory authority.

(B) For an impoundment not meeting the size or other criteria of § 77.216(a) of this title, a 25-year 6-hour event, or greater event as specified by the regulatory authority.

* * * * *

(10) *Inspections.* Except as provided in paragraph (a)(10)(iv) of this section, a qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer, shall inspect each impoundment as provided in paragraph (a)(10)(i) of this section. The professional engineer or specialist shall be experienced in the construction of impoundments.

* * * * *

(ii) The qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(10)(iv) of this section, shall promptly after each inspection required in paragraph (a)(10)(i) of this section provide to the regulatory authority a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report shall include discussion of any appearance of instability, structural weakness or other hazardous condition, depth and elevation of any impounded waters, existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

* * * * *

(iv) In any State which authorizes land surveyors to prepare and certify plans in accordance with § 780.25(a) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the size or other criteria of § 77.216(a) of this title and certify and submit the report required by paragraph (a)(10)(ii) of this section, except that all coal mine waste impounding structures covered by § 816.84 of this chapter shall be certified by a qualifed registered professional engineer. The professional land surveyor shall be experienced in the construction of impoundments.

* * * * *

(c) * * *

(2) In lieu of meeting the requirements in paragraph (a)(8)(i) of this section, the regulatory authority may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 780.25(a) of this chapter that the impoundment will safely control the design precipitation event, the water from which shall be safely removed in accordance with current, prudent, engineering practices. Such an impoundment shall be located where failure would not be expected to cause loss of life or serious property damage, except where:

(A) In the case of an impoundment meeting the size or other criteria of § 77.216(a) of this title, it is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the regulatory authority; or

(B) In the case of an impoundment not meeting the size or other criteria of § 77.216(a) of this title, it is designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the regulatory authority.

* * * * *

8. Section 816.84 is amended by removing the suspension of paragraph (b)(2), revising paragraph (b)(2), and adding paragraph (f) to read as follows:

§ 816.84 Coal mine waste: impounding structures.

* * * * *

(b) * * *

(2) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of § 77.216(a) of this title shall have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the regulatory authority.

* * * * *

(f) For an impounding structure constructed of or impounding coal mine waste, at least 90 percent of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event.

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

9. The authority citation for Part 817 is revised to read as follows:

Authority: Pub. L. 95-87, 30 U.S.C. 1201 *et seq.*, as amended; sec. 115 of Pub. L. 98-146, 30 U.S.C. 1257; and Pub. L. 100-34.

10. Section 817.46 is amended by revising paragraphs (b)(3) and (c)(2) to read as follows:

§ 817.46 Hydrologic balance: siltation structures.

* * * * *

(b) * * *

(3) Siltation structures for an area shall be constructed before beginning any undergound mining activities in that area, and upon construction shall be certified by a qualified registered professional engineer, or in any State which authorizes land surveyors to prepare and certify plans in accordance with § 784.16(a) of this chapter a qualified registered professional land surveyor, to be constructed as designed and as approved in the reclamation plan.

* * * * *

(c) * * *

(2) *Spillways.* A sedimentation pond shall include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (c)(2)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (c)(2)(ii) of this section, except as set forth in paragraph (c)(2)(iii) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2)(iii) of this section, the required design precipitation event for a sedimentation pond meeting the spillway requirements of paragraph (c)(2) of this section is:

(A) For a sedimentation pond meeting the size or other criteria of § 77.216(a) of this title, a 100-year 6-hour event, or greater event as specified by the regulatory authority.

(B) For a sedimentation pond not meeting the size or other criteria of § 77.216(a) of this title, a 25-year 6-hour event, or greater event as specified by the regulatory authority.

(iii) In lieu of meeting the requirements in paragraph (c)(2)(i) of this section, the regulatory authority may approve a sedimentation pond that relies primarily on storage to control the runoff from the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 784.16(a) of this chapter that the sedimentation pond will safely control the design precipitation event, the water from which shall be safely removed in accordance with current, prudent, engineering practices. Such a sedimentation pond shall be located where failure would not be expected to cause loss of life or serious property damage, except where:

(A) In the case of a sedimentation pond meeting the size or other criteria of § 77.216(a) of this title, it is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the regulatory authority; or

(B) In the case of a sedimentation pond not meeting the size or other criteria of § 77.216(a) of this title, it is designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the regulatory authority.

* * * * *

11. Section 817.49 is amended by removing the suspension of paragraphs (a)(3), (a)(5)(i) and (a)(8), revising paragraphs (a)(1), (a)(3), (a)(5)(i), (a)(8), the introductory text of paragraph (a)(10), and paragraphs (a)(10)(ii), (a)(10)(iv), and (c)(2); and removing paragraph (b)(7) to read as follows:

§ 817.49 Impoundments.

(a) * * *

(1) An impoundment meeting the size or other criteria of § 77.216(a) of this title shall comply with the requirements of § 77.216 of this title and this section.

* * * * *

(3) *Stability.* (i) An impoundment meeting the size or other criteria of § 77.216(a) of this title or located where failure would be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2.

(ii) Impoundments not meeting the size or other criteria of § 77.216(a) of this title, except for a coal mine waste impounding structure, and located where failure would not be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of § 784.16(c)(3).

* * * * *

(5) *Foundation.* (i) Foundations and abutments for an impounding structure shall be stable during all phases of construction and operation and shall be designed based on adequate and accurate information on the foundation conditions. For an impoundment meeting the size or other criteria of § 77.216(a) of this title, foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

* * * * *

(8) *Spillways.* An impoundment shall include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (a)(8)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(8)(ii) of this section, except as set forth in paragraph (c)(2) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(8) of this section is:

(A) For an impoundment meeting the size or other criteria of § 77.216(a) of this title, a 100-year 6-hour event, or greater event as specified by the regulatory authority.

(B) For an impoundment not meeting the size or other criteria of § 77.216(a) of this title, a 25-year 6-hour event, or greater event as specified by the regulatory authority.

* * * * *

(10) *Inspections.* Except as provided in paragraph (a)(10)(iv) of this section, a qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer, shall inspect each impoundment as provided in paragraph (a)(10)(i) of this section. The professional engineer or specialist shall be experienced in the construction of impoundments.

* * * * *

(ii) The qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(10)(iv) of this section, shall promptly after each inspection required in paragraph (a)(10)(i) of this section provide to the regulatory authority a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report shall include discussion of any appearance of instability, structural weakness or other hazardous condition, depth and elevation of any impounded waters, existing storage capacity, any

existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

* * * * *

(iv) In any State which authorizes land surveyors to prepare and certify plans in accordance with § 784.16(a) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the size or other criteria of § 77.216(a) of this title and certify and submit the report required by paragraph (a)(10)(ii) of this section, except that all coal mine waste impounding structures covered by § 817.84 of this chapter shall be certified by a qualified registered professional engineer. The professional land surveyor shall be experienced in the construction of impoundments.

* * * * *

(c) * * *

(2) In lieu of meeting the requirements in paragraph (a)(8)(i) of this section, the regulatory authority may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 784.16(a) of this chapter that the impoundment will safely control the design precipitation event, the water from which shall be safely removed in accordance with current, prudent, engineering practices. Such an impoundment shall be located where failure would not be expected to cause loss of life or serious property damage, except where:

(i) In the case of an impoundment meeting the size or other criteria of § 77.216(a) of this title, it is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the regulatory authority; or

(ii) In the case of an impoundment not meeting the size or other criteria of § 77.216(a) of this title, it is designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the regulatory authority.

* * * * *

12. Section 817.84 is amended by removing the suspension of paragraph (b)(2), revising paragraph (b)(2), and adding paragraph (f) to read as follows:

§ 817.84 Coal mine waste: impounding structures.

* * * * *

(b) * * *

(2) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of § 77.216(a) of this title shall have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the regulatory authority.

* * * * *

(f) For an impounding structure constructed of or impounding coal mine waste, at least 90 percent of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event.

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Thursday
October 27, 1988

Part IV

Department of Housing and Urban Development

Office of the Secretary

24 CFR Parts 18, 905 and 990
Litigation Reporting and Related Requirements for Certain Recipients of HUD Assistance; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Parts 18, 905, and 990

[Docket No. R-88-1298; FR-2134]

Litigation Reporting and Related Requirements for Certain Recipients of HUD Assistance

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would specify litigation reporting and related requirements for certain recipients of HUD assistance. It sets forth the circumstances in which these recipients would have have to report their litigation activity to HUD, and prohibits recipients from using HUD assistance and related funds to pay the costs of litigation against the United States. The rule would also specify the conditions under which Public Housing Agencies and Indian Housing Authorities must obtain advance HUD approval to initiate or defend a claim in litigation and to dispose of certain liability claims that do not involve litigation. The rule would give HUD assistance recipients as much autonomy as possible in planning and executing their litigation activities, consistent with HUD's responsibility to ensure the integrity and safety of the Federal financial interest involved.

DATE: *Comment due date:* December 27, 1988.

ADDRESS: Interested persons may submit comments to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for inspection by interested persons in the Office of the Rules Docket Clerk at the address listed above.

FOR FURTHER INFORMATION CONTACT: For the Section 202 program of Housing for the Elderly or Handicapped, and the Section 8 Housing Certificate, Housing Voucher, and Moderate Rehabilitation programs: Lawrence Goldberger, Director, Office of Elderly and Assisted Housing, room 6130, (202) 755-5720; for other programs administered by the Assistant Secretary for Housing-Federal Housing Commissioner: James J. Tahash, Director, Planning and Procedures Division, Room 6182, (202) 426-3944; for programs administered by the Assistant Secretary for Public and Indian Housing: Thomas Sherman, Director, Office of Public Housing, Room 4204 (202) 755-5380; for the Research and Development program: Paul Gatons, Director, Housing and Community Studies, Room 8232, (202) 755-6900. The mailing address for each of the above individuals is: Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. The telephone numbers listed are not toll-free.

SUPPLEMENTARY INFORMATION: The information collection requirements contained in §§ 18.10, 905.510, 18.20, 905.520, 18.25, and 905.525 of this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980. No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**. Public reporting burden for the collection of information requirements contained in this rule are estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the Preamble heading.

Findings and Certifications

Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden (including the identifying docket number and title), to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., Room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for HUD.

Overview of Rule

This proposed rule would specify litigation reporting and related requirements for a number of recipients of HUD assistance. The rule consists of four discrete elements:

a. *Litigation reporting.* Recipients of HUD assistance would have to report to HUD on actual or threatened litigation involving an assisted activity in two circumstances: where HUD requests a report and, whether or not HUD has made a request, where it appears likely that the litigation (or threatened litigation, if commenced) will necessitate the use of additional HUD assistance or program income in connection with the litigation or the activity involved. Reporting would be required while the grant, cooperative, or other agreement with respect to the assistance involved remains in effect. (24 CFR 18.10 and 905.510)

b. *Litigation against the United States.* State and local governments, and Indian tribal, recipients of HUD assistance would be subject to the cost principle in OMB-Circular A-87 *Rev., Cost Principles for State and local Governments,* prohibiting the use of Federal funds to pay legal expenses for the litigation of claims against the United States. Other recipients of HUD assistance would be prohibited from using HUD assistance or program income to pay the litigation costs involved in pursuing a claim against the United States or defending a claim pursued by the United States. (24 CFR 18.15 and 905.515)

c. *Approval of PHA and IHA affirmative and defensive litigation.* Public Housing Agencies (PHAs) and Indian Housing Authorities (IHAs) would have to obtain advance HUD approval to initiate or defend a claim in litigation involving an assisted activity, if it appeared likely that the litigation would necessitate the use of additional HUD assistance or program income in connection with the litigation itself, or the activity involved in the litigation. For purposes of the rule, "litigation" would include settlements and appeals. If this HUD approval is required, approval would also have to be obtained for any contract for litigation services with respect to the litigation, if the PHA or IHA selects the legal counsel to be retained. (24 CFR 18.20 and 905.520)

d. *Approval of the disposition of liability claims not involving litigation.* PHAs and IHAs would have to obtain advance HUD approval of the proposed disposition of liability claims that do not involve litigation when the claim is filed, if the PHA or IHA does not have liability insurance; or when a claim, considered alone or together with all other outstanding claims against the PHA or IHA, exceeds its liability insurance coverage or the amount available to pay claims from any self-insurance reserve fund that it maintains. (24 CFR 18.25 and 905.525)

The rule is designed to accord HUD assistance recipients as much freedom as possible to plan and carry out their litigation and related activities. HUD regulation would be limited to situations in which HUD has a clear financial interest in the litigation. Where HUD

proposes to regulate, it would impose obligations on assistance recipients only to the extent necessary to accomplish the Federal purpose involved. A provision-by-provision analysis of the rule's significant provisions follow.

Definitions

1. *Types of assistance subject to the rule.* The rule would cover two types of assistance: "HUD assistance" and "program income." "HUD assistance" would be defined to mean:

(a) Assistance for the development, operation, or modernization of public and Indian housing under title I or II of the United States Housing Act of 1937, as appropriate.

(b) Annual contributions for assistance under section 8 of the United States Housing Act of 1937.

(c) Loans for housing for the elderly or handicapped under section 202 of the Housing Act of 1959.

(d) Rent supplements under section 101 of the Housing and Urban Development Act of 1965.

(e) Assistance under the Flexible Subsidy program under section 201 of the Housing and Community Development Amendments of 1978.

(f) Assistance for research and development under section 501 of the Housing and Urban Development Act of 1970.

Coverage of the Section 8 and public and Indian housing programs woud be particularly important, because they represent the Department's principal ones, both in terms of frequency of litigation affecting them, and the potential for increased financial exposure to the Department as a result of the outcome of the litigation. Based on our experience with this rule, the Department may propose to add other programs by subsequent rule making.

The rule would define "program income" to mean income:

(1) That a recipient of HUD assistance receives from any source; and

(2) That must be used for specific purposes relating to the assistance.

Examples of items that would not be considered "program income" include (but are not limited to):

(1) For the Public Housing program, donations, bond proceeds, State and local government payments, and income from non-HUD programs.

(2) Housing Assistance Payments made to housing owners under the Section 8 program.

(3) Syndication proceeds in connection with the Section 8 program.

The Department believes that the "program income" concept provides a more appropriate standard for delineating recipient litigation responsibilities than simple receipt of HUD assistance. The "program income" test acknowledges the fact that direct HUD assistance can generate income that must be used for specific purposes relating to the assistance, and is, therefore, a form of "Federal assistance" in which HUD has a clear financial interest.

The definition of "program income" in 24 CFR 85.25 (the Administrative Requirements for Grants and Cooperative Agreements, published on March 11, 1988, at 53 FR 8034) would not apply to this rule. The majority of the programs that would be subject to this rule (including the Section 8 program) are not covered by Part 85. Thus, the Department believes that it is appropriate to adopt a definition of "program income" that is sensitive to the particular requirements of this rule.

The Department specifically requests comment on the propriety of treating the items listed above as either included in the definition of "program income" or excluded from it.

The term "litigation" would specifically exclude criminal proceedings. The Department wishes to note that it has been encouraging PHAs to seek local prosecution of tenants who commit fraud in HUD-assisted programs administered by PHAs. This type of activity clearly falls within the exclusion from the rule's coverage.

2. *Types of recipients of HUD assistance subject to the rule.* The following persons or entities would be subject to the rule's requirements:

(a) Public Housing Agencies (PHAs) and Indian Housing Authorities (IHAs) in the Public and Indian Housing programs.

(b) Project owners and (as appropriate PHAs, and PHA contract administrators, in the project-based Section 8 programs.

(c) PHAs in the Housing Certificate and Voucher programs, and the Moderate Rehabilitation program.

(d) Owners of proejcts in the Section 202, the Rent Supplement, or the Flexible Subsidy program.

(e) Persons or entities receiving assistance under the Research and Development program.

3. *Time period during which litigation reporting responsibilities would apply.* The rule would specify the time period during which its litigation reporting responsibilities would apply by use of the term "period of HUD assistance". The term would be defined to mean the time period during which the relevant HUD assistance agreement (*e.g.*, the annual contributions contract for the public and Indian housing and Section 8 programs) remains in effect.

The time period delineated by this definition would be inclusive. Both before and after the effectivess of the agreement, the recipient would have no reporting responsibility, even if the litigation itself continues after the expiration of the agreement. During the period, however, reporting would be required, irrespective of when the litigation or threatened litigation arose.

4. *Administrative proceedings.* The proposed rule would define the term "litigation" to include "administrative proceedings (including binding arbitration)". The Department solicits comment on whether some forms of administrative proceedings should be excluded from the rule's coverage. Among others, the Department specifically seeks comment on whether personnel matters, bid protests, and labor-management disputes should be subject to the final rule.

Parts Amended

The proposed rule would make two amendments to title 24 of the Code of Federal Regulations to set forth the litigation reporting and related responsibilities of assistance recipients. It would amend existing 24 CFR Part 905 (Indian Housing) to apply these requirements to Indian housing under title II of the United States Housing Act of 1937. A new 24 CFR Part 18 would contain the rule's requirements for the other covered programs.

This separation is necessitated by the independent charter for Indian housing established by the Indian Housing Act of 1988 (Pub. L. 100-358, approved June 29, 1988) and the proposed rule that HUD published on June 29, 1988 (53 FR 24554) to consolidate all regulations from 24 CFR Chapter IX in a revamped Part 905. When this rule is made final, it will be inserted at the appropriate place in the reconstituted Part 905.

Note: For purposes of this preamble, all references to Part 18 apply to Part 905, with specific designations such as § 18.5 translating to § 905.505, § 18.10 to § 905.510, § 18.15 to § 905.515, etc.

Litigation Reporting Requirements

Proposed § 18.10 specifies two circumstances in which recipients of HUD assistance must report to HUD on their litigation activity. Paragraph (a) would require reporting only where HUD requests it; paragraph (b) would require reporting in all cases that meet its criteria. Under paragraph (a), HUD assistance recipients would have to report during the period of HUD assistance on any actual or threatened litigation involving them, if the matter involves a program, project, or activity

assisted with HUD assistance or program income.

Proposed § 18.10(b) would require reporting where the litigation or threatened litigation meets paragraph (a)'s criteria *and* it appears likely that the litigation or threatened litigation (if commenced) will necessitate the use of additional HUD assistance or program income, either in connection with the litigation (*e.g.*, for satisfying a judgment or paying a settlement or the costs of litigation) or in connection with the program, project, or activity involved. Reporting would be required at the earliest point that this standard is met while the litigation is pending or threatened.

If an assistance recipient is required to report to HUD under either of these provisions, § 18.10(c) would permit HUD to request such additional reports during the period of HUD assistance as the Department deems appropriate. Under § 18.10(d), HUD would determine the form, content, frequency, and timing of reports under proposed § 18.10.

Proposed § 18.10 reflects the Department's overall concern (described above) that litigation responsibilities be imposed only where they are strictly necessary to furthering a direct Federal financial interest, and only to the minimum degree necessary to accomplish that end. Proposed § 18.10(a) would require reporting *only* where HUD requests it and the litigation involves a program using HUD assistance or program income. Use of the HUD assistance/program income test would ensure that HUD has a discernible financial interest in the conduct and outcome of the litigation. Reporting upon request would permit HUD to choose only those cases that present significant issues from the Department's standpoint.

For the vast majority of cases, the Department does not expect to request assistance recipients to make reports. Assistance recipients would be wholly free to handle their own litigation as they deem best. Where a request is made, the only burden on recipients would be to report to HUD. The Department intends to limit reporting requests to the minimum content and time necessary to discharge its overall responsibility of safeguarding the Federal financial interest in the matter. Indeed, the Department believes that much of the necessary reporting may be done through the submission of existing documents and other written material.

Proposed § 18.10(b) differs from § 18.10(a) in that reporting would be mandatory whenever it appears likely that additional Federal assistance or program income will be needed for the assisted activity involved or to satisfy a judgment, pay a settlement or litigation costs, or otherwise in connection with the litigation. The Department believes that mandatory reporting is justified because of the immediacy of the Federal financial exposure: The likelihood for the need for more funding. As with proposed § 18.10(a), the only burden on assistance recipients would involve reporting, and HUD intends to limit the content and time of the reporting to the minimum, consistent with protection of the Federal interest.

The applicability of §§ 18.10(b) and 18.20(a) (approval of affirmative and defensive litigation) would depend on the need for "additional" HUD assistance or program income. The Department is considering defining this concept in the final rule, and seeks comment on how best to accomplish this.

One issue that the Department considered in developing the proposed rule was whether to impose reporting requirements where assistance recipients' litigation involved the construction or application of Federal or State constitutions, statutes, or regulations; or a HUD assistance grant or cooperative agreement. The concern was that these types of litigation could affect HUD's policies, even in the absence of a direct financial interest, and should be brought to HUD's attention through recipient reporting. The Department believes, however, that it would generally learn about important cases affecting HUD policy anyway, and that the burden of universal reporting on this category of litigation is not necessary to further HUD's interests. The proposed rule does not contain this provision.

Litigation Against the United States

Proposed § 18.15 prohibits HUD assistance recipients from using HUD assistance and related amounts to pay the recipient's costs of pursuing a claim against the United States or defending a claim pursued by the United States. It should be noted that this prohibition would apply not only where the original litigation is instituted by the Federal government or the recipient, but also to situations during litigation in which the recipient is pursuing or defending a claim against the United States.

For State and local government, and Indian tribal, recipients of HUD assistance, the rule would incorporate the disallowance of legal fees feature that has been adopted on a government-wide basis in 24 CFR 85.22. That "common" rule cross-references the cost principles specified in OMB Circular A-87. Section B.16. of Attachment B of the Circular provides, "Legal expenses for the prosecution of claims against the Federal government are unallowable." The Department understands that a "common" rule designed to codify Circular A-87 is under development within the Administration. When the "common" rule is issued, today's rule would be amended accordingly.

Circular A-87 applies to Federal grants and cooperative agreements and subawards to State and local governments, and federally recognized Indian tribes. Thus, for purposes of this proposed rule, 24 CFR 85.22 covers the public housing program under title I of the United States Housing Act of 1937, the Indian housing program under title II of the 1937 Act for federally recognized Indian tribes, and the Section 8 programs that are administered by PHAs (Housing Certificates, Housing Vouchers, Moderate Rehabilitation, and other Section 8 programs in which a PHA is the project owner or contract administrator). It does not, however, cover the other programs that would be subject to this rule.

The Department believes that it is appropriate to extend the disallowance of legal fees provision to the other recipients of HUD assistance covered by the proposed rule. Initially, such an extension would not introduce an unknown cost principle to Federal benefit law. As noted above, the "common rule" applies on a government-wide basis—to over 20 Federal agencies and a large number of programs. In the case of this proposed rule, applying the disallowance of legal fees doctrine to the public and Indian housing and PHA-administered Section 8 activities accounts for a clear majority of the funds to which this rule would apply. Extension to non-federally recognized tribes, Section 8 non-PHA owners, and several smaller programs would not constitute a significant shift in policy.

In addition, the Department believes that there is compelling justification for ensuring that the disallowance of legal fees principle applies to all HUD assistance recipients that would be covered by the rule. We believe that there are two justifications for this position.

First, since HUD assistance originates in the Federal Treasury, and program income indirectly emanates from the Treasury, permitting these funds to be used in litigation against the United States is tantamount to making United States taxpayers foot the bill for litigation against themselves. The Department believes that this is not only wasteful of scarce Federal resources,

but also unacceptable from the standpoint of sound public policy.

Second, we believe that HUD assistance and program income should be preserved for the benefit of program beneficiaries. Unsuccessful litigation against the United States can entail the outlay of significant sums that will either be lost to their intended beneficiaries or made up from additional HUD funds. These results impair the Department's ability to protect its financial interests and to accomplish its statutory responsibility to ensure that its programs are administered to provide the greatest benefit with the funds available.

The Department recognizes that the rule would not prohibit recipients of HUD assistance from using HUD assistance or program income for litigation against non-Federal parties, and that such litigation, if unsuccessful, could have the same deleterious effects as litigation against the United States. The Department believes, however, that recipient litigation against non-Federal parties (such as actions against vendors of goods and services) is far more frequent and far more directly related to the recipient's ability to carry out its statutory responsibilities to its program beneficiaries than litigation against the United States. We believe that this, along with the fact that it is inappropriate for Federal taxpayers to pay the costs of litigation against themselves, amply justify extending the disallowance of legal fees precept to all HUD assistance recipients that would fall within the ambit of this rule.

If assistance recipients that are not subject to § 85.22 wish to litigate against the Department, we believe that they should do so with funds that are not derived from HUD. The Department notes in this regard that one source of funds for some recipients' litigation costs is the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Under that Act, a recipient with no more than 500 employees and not more than $7 million in assets may obtain reimbursement from the government for its costs of litigation, if (1) it prevailed in the case, (2) the Federal government action or inaction and its litigation position were not substantially justified, and (3) there were no special circumstances that would make an award of fees against the United States unjust.

Section 18.15(c) would except Housing Assistance Payments to housing owners under the Section 8 program from § 18.15(a)'s prohibition. These amounts are "earned" rental payments, and constitute disposable income for the owner, not HUD assistance or program income that must be used for a program purpose.

PHA and IHA Litigation

Proposed § 18.20(a) would require PHAs and IHAs to obtain advance HUD approval during the period of HUD assistance to initiate or defend a claim in litigation that involves an assisted activity, at the earliest stage of the proceeding in which it appears likely that the litigation will necessitate the use of additional HUD assistance or program income in connection with the litigation itself, or the activity involved in the litigation. Under proposed § 18.20(b), HUD would give its approval, unless HUD determined that the PHA/IHA position would not be cost-beneficial.

Proposed § 18.20(c) would require that if approval of affirmative or defensive litigation is required, HUD must also approve any contract for litigation services with respect to the litigation, if the PHA or IHA selects the legal counsel to be retained. The Department understands that some PHA insurance policies provide that the insurer will select the attorney to handle the insurance claim, and such arrangements would not be subject to the rule.

Where the litigation services are covered by the rule, approval would be granted under proposed § 18.20(d), unless HUD determined that (1) any attorney involved would have a conflict of interest, or would otherwise be subject to disqualification under applicable requirements for attorney professional responsibility, or (2) the proposed fees and costs are unreasonable, based on the "going rate" in the area for attorneys performing similar work.

Section 18.20(e) would permit HUD to withdraw any previously provided approval in the litigation, or for a legal services contract, at any point in the proceeding that HUD determines that the respective standards for approval are no longer met.

As would be the case under proposed § 18.10(b), the trigger for HUD involvement under proposed § 18.20(a) would be the likelihood of increased Federal financial exposure. This would give the Department clear financial and programmatic interest in the conduct and outcome of the litigation, and would provide the rationale for HUD involvement with the recipient.

Unlike the recipient reporting requirements proposed in § 18.10, this provision would be limited to litigation involving PHAs and IHAs, and would require HUD approval of both affirmative and defensive litigation, including settlements and appeals. The Department believes that it is appropriate to limit the scope of this section to PHAs and IHAs. These entities are far more likely than other HUD assistance recipients to be party to litigation involving significant amounts that HUD may be asked to provide if the litigation is lost or the matter is settled. This potential financial exposure also would justify HUD approval of, rather than simply reporting on, the PHA's or IHA's conduct of the litigation. All claims in litigation would be subject to approval, irrespective of whether the original litigation is against the IHA or PHA or its position arises in the course of the litigation.

As noted above, approval would be given, unless HUD determined that the position of the PHA or IHA is not cost-beneficial. In making this determination, the Department would take into account factors such as the amount in controversy; the likely amount of an adverse judgment, including the likely amount of any HUD exposure; the likely litigation costs; the likelihood of the PHA/IHA position prevailing, both in the trial court and on appeal; and the possibility of reaching a settlement, including the likely settlement amount and the savings in litigation expenses if the matter is settled.

HUD approval of litigation services would only be required where the PHA's/IHA's proposed defense or settlement of a claim in litigation has the requisite potential financial effect. In order to safeguard this Federal interest, it is essential that the attorney's fees and costs to be paid by the PHA/IHA not be excessive and that the litigation not be marred by a conflict of interest or the disqualification of counsel for the PHA or IHA. It should be noted that HUD approval would involve inquiries only into these factors; the PHA or IHA would retain responsibility for all other aspects of its dealings with legal counsel, including determinations of counsel's competence and suitability for the task.

IHAs currently have special rules for litigation services contracts in their regulations. Section 905.310 requires IHAs to obtain approval of litigation services contracts in both defensive and affirmative litigation. As noted earlier, this provision is the subject of another pending rulemaking that would consolidate all the regulatory provisions dealing with Indian housing in 24 CFR Part 905. One of the purposes of that rulemaking is to evaluate current requirements for prior approval of various activities, with an eye toward decreasing the number of actions that require HUD approval and permitting

well-managed IHAs to dispense with some of the remaining approvals. The decision about what HUD approval should be required for IHAs' litigation services contracts will be made in the context of that rulemaking, where the experience with IHAs' litigation activities can be better judged.

Approval of Disposition of Liability Claims

Proposed § 18.25(a) requires each PHA and IHA to obtain advance HUD approval of its proposed disposition of a liability claim when:

—The claim is filed, if the PHA or IHA does not have liability insurance coverage or is self-insured; or

—A claim, by itself or when added to all other outstanding claims against the PHA or IHA, exceeds the PHA's or IHA's liability insurance coverage or the amount available in any self-insurance reserve fund that it maintains. Under proposed § 18.25(b), HUD would approve disposition of the claim, unless the disposition were not cost-beneficial.

This provision recognizes that liability insurance claims can have the same serious, adverse effect on the Federal financial interest as litigation. The basic design of this section is very similar to proposed § 18.20: The trigger for HUD involvement is the likelihood of direct Federal exposure, the HUD requirement is one of approval, and the provision is limited to PHAs and IHAs. As with proposed § 18.20, these elements reflect the potential scope of the Federal liability from insurance claims filed against PHAs and IHAs.

HUD approval to dispose of an insurance claim would be given, unless the PHA's or IHA's proposed disposition is not found to be cost-beneficial. In making this determination, HUD would consider factors such as the amount of the liability claim, the likely settlement, the extent of the likely HUD financial exposure, and whether it is preferable to litigate the claim, rather than to pay it.

Sanctions

If a HUD assistance recipient fails to comply with any of the requirements of the proposed rule, the Department would take whatever action may be appropriate under the assistance instrument: *e.g.*, the annual contributions contract or the regulatory agreement. In the case of PHAs and IHAs, however, the proposed rule would give the Department an additional enforcement tool. It would permit the Department to offset future operating subsidy amounts under section 9 of the United States Housing Act of 1937 (24 CFR Part 990), if the PHA or IHA has violated § 18.15 (or § 905.515). It would also permit HUD to offset future operating subsidy to the extent HUD determines that the failure of the PHA or IHA to comply with the requirements of § 18.20 or § 18.25 (or the analogous provisions of Part 905, in the case of Indian housing) worked to increase the demand for HUD assistance. (The Department is considering adding specific procedures for making the determination of the impact of a particular violation of § 18.20 or § 18.25.) Generally, the amount in question would be deducted in the PHA's or IHA's next fiscal year, but the Department would be authorized to provide a longer payback period, if recoupment of the amount in the next fiscal year would impose a hardship on the PHA or IHA. This additional enforcement mechanism would provide both effective deterrence and a sure, swift way of repaying amounts improperly spent by PHAs and IHAs under the rule.

The Department is considering including in the final rule authority for the Department to reject an application for additional HUD assistance to pay a judgment or the costs of litigation of any recipient of HUD assistance that fails to comply with the requirements of § 18.10, 18.15, 18.20, or 18.25. Public comment is requested on whether this authority should be added to the rule.

Implementation

The changes proposed by this rule would apply to litigation (as provided by §§ 18.10 through 18.20), and to liability claims not involving litigation (as provided by § 18.25), that are pending on, or arise on or after [insert effective date of rule].

Findings and Certifications

Environment

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations at 24 CFR Part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street SW., Washington, DC 20410.

Major Rule

This rule would not constitute a "major rule", as that term is defined in section 1(b) of Executive Order 12291 issued by the President on February 17, 1981. Analysis of the proposed rule indicates that it would not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect 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.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601), the Undersigned hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities. The rule would impose litigation requirements on certain recipients of HUD assistance. All covered recipients would be subject to reporting to HUD on their litigation activity. PHAs and IHAs would also be subject to obtaining HUD approval of their litigation, and their proposed disposition of liability claims.

The rule would apply to all HUD recipients, large and small; the additional rules for PHAs and IHAs would apply to all such entities, large and small. As described more fully in earlier parts of this preamble, any burden on entities subject to the rule has been kept to the minimum necessary to safeguard the Federal interest involved, and in any event, would not have a significant economic impact on any HUD assistance recipients, including small entities.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this rule would, if implemented, have federalism implications and, thus, are subject to review under the Order. Specifically, the rule's litigation reporting and related requirements would have substantial, direct effects on (1) PHAs administering the Section 8 and public housing programs and (2) the relationship between the Federal government and these entities. This is so because the rule would restrict PHAs' ability to structure their own litigation and related activities, by requiring them to report to HUD on certain types of litigation and to obtain approval of certain affirmative and defensive claims in litigation and certain liability claims that do not involve litigation; and by prohibiting them from using federally related funds to sue, or defend against suit by, the United States.

In developing the litigation reporting and related features of this rule, the Department has attempted to give PHAs as much freedom as possible to plan and execute their litigation activities, consistent with the Department's responsibility to ensure that it receives timely information on litigation and related matters that may result in the need for additional Federal assistance. Thus, HUD regulation is limited to situations in which the Department has a clear and direct financial stake in the outcome of the litigation. When HUD does regulate, the conduct of PHA litigation and related functions is affected only to the extent necessary to accomplish the Federal purpose involved.

The prohibition on litigation against the United States tracks existing regulatory authority, and is not a new policy subject to review under the Order.

The Department believes that although the proposed rule has significant effects on PHAs, it is designed to achieve a legitimate Federal purpose and is carefully crafted to limit its effects to those necessary to achieve that end. In these circumstances, the Department believes that the Order imposes no bar to implementation of the rule. For these reasons as well, the General Counsel has determined that the rule's federalism implications are not sufficiently significant to warrant preparation of a Federalism Assessment under section 6(b) of the Order.

Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, *the Family*, has determined that this rule does not have potential significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule involves litigation reporting and related requirements; any effect on the family would likely be indirect and insignificant.

Semiannual Agenda of Regulations

This rule is listed in the Department's semiannual agenda of regulations published on April 25, 1988 (53 FR 13854), under Executive Order 12291 and the Regulatory Flexibility Act at 49 FR 15960.

Information Collection Requirements

The collection of information requirements contained in this rule have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980. Sections 18.10, 905.510, 1820, 905.520, 18.25 and 905.525 of this proposed rule have been determined by the Department to contain collection of information requirements. Information on these requirements is provided as follows:

TABULATION OF ANNUAL REPORTING BURDEN PROPOSED RULE—LITIGATION REPORTING AND RELATED REQUIREMENTS FOR CERTAIN RECIPIENTS OF HUD ASSISTANCE

Description of information collection	Section of 24 CFR Affected	Number of respondents	Number of responses per respondent	Total annual responses	Hours per response	Total hours
Litigation Reporting Requirements (Reporting at HUD's request)	18.10(a), 905.510(a)	410	2.0	820	1.5	1230
Required Reporting	18.10(b), 905.510(b)	760	2.0	1520	1.4	2128
Additional Reports	18.10(c), 905.510(c)	480	1.3	624	1.5	936
Approval of Affirmative and Defensive Litigation (including Settlements and Appeals).	1820(a), 905.520(a)	407	2.5	1017	4.4	4474
Approval of Defensive Litigation Services	18.20(c), 905.520(c)	420	1.5	630	2.5	1575
Approval of Disposition of Liability Claims	18.25(a), 905.25	260	2.0	520	2.0	1040
Total Annual Burden						11,383

List of Subjects

24 CFR Part 18

Litigation reporting, Approval of defensive litigation and claims not involving litigation, Use of federally related funds to prosecute claims against the United States.

24 CFR Part 905

Grant programs: housing and community development, Grant programs: Indians, Indians, Loan programs: Indians, Low- and moderate-income housing, Public housing, Homeownership.

24 CFR Part 990

Grant programs: housing and community development, Low- and moderate-income housing, Public housing.

Accordingly, 24 CFR would be revised to read as follows:

1. A new Part 18 would be added to title 24, Code of Federal Regulations, to read as follows:

PART 18—LITIGATION REQUIREMENTS FOR CERTAIN RECIPIENTS OF HUD ASSISTANCE

Subpart A—General

Sec.

Subpart B—Requirements for Recipients of HUD Assistance, Including PHAs

Subpart C—Special Requirements for PHAs

Authority: For public housing programs under title I of the United States Housing Act of 1937, secs. 3, 4, 5, 6, 8, 9, 14, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437b, 1437c, 1437d, 1437f, 1437g, 1437*l*); for the Section 202 program of Housing for the Elderly or Handicapped, sec. 202, Housing Act of 1959 (12 U.S.C. 1701q); for the Rent Supplement program, sec. 101, Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); for the Flexible Subsidy program, sec. 201, Housing and Community Development Amendments of 1978 (12 U.S.C. 1715z–1a); for the Research and Development program, sec. 501, Housing and Urban Development Act of 1970 (12 U.S.C. 1701z–1); sec. 7(d), Department of Housing and Urban Development Act 42 U.S.C. 3535(d)).

Subpart A—General

§ 18.1 Summary and purpose.

(a) *Summary.* This part specifies the litigation reporting and related requirements that apply to recipients of HUD assistance under certain programs administered by the Department of Housing and Urban Development. It sets forth the circumstances in which these recipients must report their litigation activity to HUD, and prohibits them

from using HUD assistance and related funds to pay the costs of litigation against the United States. The part also specifies the conditions under which Public Housing Agencies (PHAs) must obtain advance HUD approval to initiate or defend a claim in litigation and to dispose of certain liability claims that do not involve litigation.

(b) *Purpose.* (1) The purpose of this part is to ensure that recipients of HUD assistance provide HUD with timely and meaningful information on litigation and related matters that may result in the need for additional HUD assistance, while at the same time according these recipients as much autonomy as possible to plan and execute their litigation activities. HUD regulation under this part is limited to situations in which HUD has a clear and direct financial stake in the conduct and outcome of the litigation. When HUD does regulate, the conduct of recipients' litigation is affected only to the extent necessary to accomplish the Federal purpose involved.

(2) This part is also designed to prohibit recipients of HUD assistance from using this assistance and related funds to litigate against the United States. For PHAs that own or operate public housing under title I of the United States Housing Act of 1937 or that administer assistance under section 8 of the Act, this prohibition tracks existing regulatory authority. (See 24 CFR 85.22(b), incorporating section B. 16. of Attachment B to OMB Circular A–87, published at 46 FR 9548, 9552 (1981), prohibiting State and local governments, and agencies and instrumentalities thereof, from using the proceeds of Federal grants, contracts, and other agreements to pay for the prosecution of claims against the Federal government.) Extending this prohibition to the other recipients of HUD assistance covered by this part not only prevents the impropriety of permitting federally related funds to be used in litigation against the Federal government, but it also ensures that this assistance is used as it was originally intended: To benefit program beneficiaries.

§ 18.3 Applicability.

(a) *In General.* This part applies to litigation involving recipients of HUD assistance (as provided by §§ 18.10 through 18.20), and to liability claims against PHAs that do not involve litigation (as provided by § 18.25), that are pending on, or arise on or after, [insert effective date of this rule].

(b) *Indian Housing Authorities.* 24 CFR Part 905, Subpart E, contains the litigation reporting and related requirements that apply to Indian Housing Authorities that own or operate Indian housing under title II of the United States Housing Act of 1937.

§ 18.5 Definitions.

Hud means the United States Department of Housing and Urban Development.

HUD assistance means:

(a) Grants, loans, or annual contributions made available for the development, operation, or modernization of public housing under title I of the United States Housing Act of 1937 (sections 4, 5, 6, 9, and 14 of the Act (42 U.S.C. 1437b, 1437c, 1437d, 1437g, and 1437*l*; 24 CFR Parts 941, 968, and 990)).

(b) Annual contributions made available for assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f; 24 CFR Parts 880 through 884 and 887.

(c) Loans made available for housing for the elderly or handicapped under section 202 of the Housing Act of 1959 (12 U.S.C. 1701q; 24 CFR Part 885).

(d) Rent supplements made available under section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s; 24 CFR part 215).

(e) Grants or loans made available under the Flexible Subsidy program under section 201 of the Housing and Community Development Amendments of 1978 (12 U.S.C. 1715z–1a; 24 CFR Part 219).

(f) Grants or cooperative agreements made available for research and development under section 501 of the Housing and Urban Development Act of 1970 (12 U.S.C. 1701z–1).

Indian Housing Authority (IHA) means any entity that:

(a) Is authorized to engage or assist in the development or operation of lower income housing for Indians; and

(b) Is established:

(1) By exercise of the power of self-government of an Indian tribe independent of State law; or

(2) By operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

Litigation means any civil action at law or any proceeding in equity, including any appeal or settlement in such an action or proceeding. The term includes administrative proceedings (such as binding arbitration), but does not include criminal proceedings or routine eviction matters.

Period of HUD assistance means the time period during which the following agreements remain in effect:

(a) For the public housing and Section 8 programs, the annual contributions contract under title I of the United States Housing Act of 1937.

(b) For the Rent Supplement program, the assistance contract.

(c) For the Section 202 program of Housing for the Elderly or Handicapped and the Flexible Subsidy program, the loan agreement.

(d) For the Research and Development program, the grant agreement or cooperative agreement.

Program income (a) means income that:

(1) A recipient of HUD assistance receives;

(2) Is derived from any source; and

(3) Must be used for specific purposes relating to the assistance.

(b) Examples of program income include (but are not limited to):

(1) For the Section 8 program, administrative fees, operating reserves, and investment income.

(2) For the Public Housing program, rental income, investment income, and other income that is taken into account in determining operating subsidy amounts under section 9 of the United States Housing Act of 1937 (24 CFR Part 990), and operating reserves.

(c) Examples of items that are not considered program income include (but are not limited to):

(1) For the Public Housing program, donations, bond proceeds, State or local government payments, and income from non-HUD programs.

(2) Housing Assistance Payments made to housing owners under the Section 8 program.

(3) Syndication proceeds in connection with the Section 8 program.

(d) The definition of program income in 24 CFR 85.25 does not apply to the term used in this part.

Public Housing Agency (PHA) means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality) that is authorized to engage in or assist in the development or operation of housing for lower income families.

Recipient of HUD assistance means the following persons or entities that receive HUD assistance:

(a) PHAs in the Public Housing program.

(b) Project owners and (as appropriate) PHAs, and PHA contract administrators, in the project-based Section 8 programs (24 CFR Parts 880, 881, 883, 884, and 886).

(c) PHAs and IHAs in the Housing Certificate and Moderate Rehabilitation progams (24 CFR Part 882), and in the Housing Voucher program (24 CFR Part 887).

(d) Persons or entities receiving assistance under the Research and Development program.

Threatened litigation means any communication, oral or written, announcing an intention to institute litigation.

Subpart B—Requirements for Recipients of HUD Assistance, Including PHAs

§ 18.10 Litigation reporting requirements.

(a) *Reporting at HUD's request.* At HUD's request, each recipient of HUD assistance must report to HUD during the period of HUD assistance on any litigation to which the recipient is a party or that is threatened against the recipient, if the litigation or threatened litigation involves a program, project, or activity assisted with HUD assistance or program income.

(b) *Required reporting.* (1) Whether or not HUD has requested a report under paragraph (a) of this section, each recipient of HUD assistance must report to HUD during the period of HUD assistance on any litigation to which the recipient is a party or that is threatened against the recipient, if:

(i) The litigation or threatened litigation involves a program, project, or activity assisted with HUD assistance or program income; and

(ii) It appears likely that the litigation or threatened litigation (if commenced) will necessitate the use of additional HUD assistance or program income in connection with:

(A) The litigation (*e.g.*, to satisfy a judgment, or to pay the costs of a settlement or the costs of litigation); or

(B) The program, project or activity involved in the litigation.

(2) The report required by paragraph (b)(1) of this section must be made at the earliest practicable point during the time that the litigation is pending or threatened in which the criterion specified in paragraph (b)(1)(ii) of this section is met.

(c) *Additional reports.* If a recipient of HUD assistance is required to report to HUD under paragraph (a) or (b) of this section, HUD may request such additional reports during the period of HUD assistance covering such time while the litigation is pending or threatened as HUD deems appropriate.

(d) *Manner of reports.* HUD will determine the form, content, frequency, and timing of reports required under paragraphs (a) and (b) of this section.

§ 18.15 Litigation against the United States.

(a) *Prohibition of litigation.* (1) State and local governments. The cost principle governing the use of Federal funds to pay litigation costs in connection with the litigation of claims against the Federal government that is contained in 24 CFR 85.22 (incorporating section B.16. of OMB Circular A–87) applies to:

(i) PHAs in the Public Housing program.

(ii) PHAs, and PHA contract administrators, in the project-based Section 8 programs (24 CFR Parts 880, 881, 883, 884, and 886).

(iii) PHAs and IHAs in the Housing Certificate and Moderate Rehabilitation programs (24 CFR Part 882), and in the Housing Voucher program (24 CFR Part 887).

(2) Other recipients of HUD assistance. A recipient of HUD assistance, other than a recipient referred to in paragraph (a)(1) of this section, may not use HUD assistance or program income to pay its litigation costs to pursue a claim against the United States or to defend a claim pursued by the United States.

(b) *Definitions.* For purposes of this section:

(1) "HUD assistance" does not include Housing Assistance Payments made to housing owners under the Section 8 program.

(2) The term "litigation costs" includes items such as attorneys' and witness' fees and court costs.

Subpart C—Special Requirements for PHAs

§ 18.20 Defensive litigation and settlements.

(a) *Approval of litigation.* (1) Each PHA must obtain advance HUD approval during the period of HUD assistance to initiate or defend a claim in litigation (including settlements and appeals), if:

(i) The litigation involves a program, project, or activity assisted with HUD assistance or program income; and

(ii) It appears likely that the litigation will necessitate the use of additional HUD assistance or program income in connection with:

(A) The litigation itself (*e.g.*, to satisfy a judgment or to pay the costs of litigation) or the settlement; or

(B) The program, project, or activity involved in the litigation.

(2) Recipients of HUD assistance must seek the approval required by paragraph (a)(1) of this section at any stage before or during the litigation in which the criterion specified in paragraph (a)(1)(ii) of this section is met.

(b) *Standards for approving litigation.* HUD will grant the approval referred to in paragraph (a) of this section, unless HUD determines, based on the facts and circumstances before it, that approval would not be cost-beneficial. In making this determination, HUD will take into account factors such as the amount in controversy in the litigation; the likely amount of a judgment for or against the PHA (as appropriate); the anticipated litigation costs, including contracts for litigation services; the likely amount of any HUD financial exposure; the likelihood of the PHA position prevailing in the trial court or on appeal; and the likelihood of reaching a settlement, including the likely settlement amount and any savings in litigation costs if the matter is settled.

(c) *Litigation services.* If HUD approval is required to initiate or defend a claim in litigation under paragraph (a) of this section, the PHA must request HUD approval of any contract for litigation services with respect to the litigation, if the PHA selects the legal counsel to be retained.

(d) *Standards for approving litigation services.* HUD will grant the approval referred to in paragraph (c) of this section, unless HUD determines that the legal counsel retained, or proposed to be retained, by the PHA would have a conflict of interest, or would otherwise be subject to disqualification under applicable requirements for attorney professional responsibility; or on the basis of the fees and costs paid to counsel for similar work in the same area, the proposed fees and costs are unreasonable.

(e) *Withdrawal of approval.* HUD may withdraw any approval provided under paragraph (a) or (c) of this section at any stage of the litigation at which HUD determines that the PHA's position in the litigation, or the litigation services contract, does not meet the standards for approval specified in paragraph (b) or (d) of this section, respectively.

§ 18.25 Approval of disposition of liability claims not involving litigation.

(a) *Approval of disposition of liability claims.* Each PHA must obtain HUD approval of its proposed disposition of a liability claim that does not involve litigation when:

(1) The claim is filed, if the PHA does not have liability insurance coverage or is self-insured; or

(2) A claim, by itself or taken together with all other outstanding claims against the PHA, exceeds its liability insurance coverage or the amount available to pay liability claims from any self-insurance reserve fund that the PHA maintains.

(b) *Standards for approval.* HUD will grant the approval referred to in paragraph (a) of this section, unless

HUD determines, based on the facts and circumstances before it, that approval would not be cost-beneficial. In making this determination, HUD will take into account factors such as the amount of the liability insurance claim; the likely amount of a settlement; the extent of the potential Federal financial exposure; and whether it is preferable to litigate the claim, rather than settle it.

(c) *Withdrawal of approval.* HUD may withdraw any approval provided under paragraph (a) of this section at any point at which HUD determines that the proposed disposition of the liability claim does not meet the standards for approval specified in paragraph (b) of this section.

PART 905—INDIAN HOUSING

2. The authority citation for 24 CFR Part 905 would be revised to read as follows:

Authority: Sec. 205, United States Housing Act of 1937 (as added by the Indian Housing Act of 1988 (Pub. L. 100–358, approved June 29, 1988)); sec. 7(b), Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

3. Part 905 would be amended by adding a new Subpart E, to read as follows:

Subpart E—Litigation Reporting and Related Requirements for Indian Housing Authorities

Sec.

Subpart E—Litigation Reporting and Related Requirements for Indian Housing Authorities

§ 905.501 Summary and purpose.

(a) *Summary.* This subpart specifies the litigation and related requirements that apply to Indian Housing Authorities (IHAs) under title II of the United States Housing Act of 1937, as added by the Indian Housing Act of 1988 (Pub. L. 100–358, approved June 29, 1988). It sets forth the circumstances in which IHAs must report their litigation activity to HUD, and prohibits them from using HUD assistance and related funds to pay the costs of litigation against the United States. The subpart also specifies the conditions under which IHAs must obtain advance HUD approval to initiate or defend a claim in litigation and to dispose of certain liability claims that do not involve litigation.

(b) *Purpose.* (1) The purpose of this subpart is to ensure that IHAs provide HUD with timely and meaningful information on litigation and related matters that may result in the need for additional HUD assistance, while at the same time according IHAs as much autonomy as possible to plan and execute their litigation activities. HUD regulation under this subpart is limited to situations in which HUD has a clear and direct financial stake in the conduct and outcome of the litigation. When HUD does regulate, the conduct of IHAs' litigation is affected only to the extent necessary to accomplish the Federal purpose involved.

(2) This subpart is also designed to prohibit IHAs from using this assistance and other funds subject to this subpart to litigate against the United States. For federally recognized Indian tribes, this prohibition tracks existing regulatory authority. (See 24 CFR 85.22(b), that incorporates section B.16. of Attachment B to OMB Circular A–87, published at 46 FR 9548, 9552 (1981), prohibiting federally recognized Indian tribes from using the proceeds of Federal grants, contracts, and other agreements to pay for the prosecution of claims against the Federal government.) Extension of the prohibition to non-federally recognized tribes not only prevents the impropriety of permitting federally related funds to be used in litigation against the Federal government, but also ensures that this assistance is used as it was originally intended: To benefit program beneficiaries.

§ 905.503 Applicability.

(a) *In general.* This subpart applies to litigation involving IHAs (as provided by §§ 905.510 through 905.520), and to liability claims against IHAs that do not involve litigation (as provided by § 905.525), that are pending on, or arise on or after, [insert effective date of this rule].

(b) *Other recipients of HUD assistance.* 24 CFR Part 18 contains the litigation reporting and related requirements for recipients of HUD assistance, as defined in 24 CFR 18.5.

§ 905.505 Definitions.

As used in this subpart:

HUD means the United States Department of Housing and Urban Development.

HUD assistance means grants, loans, or annual contributions made available for the development, operation, or modernization of Indian housing under title II of the United States Housing Act of 1937.

Indian Housing Authority (IHA) means any entity that:

(a) Is authorized to engage or assist in the development or operation of lower income housing for Indians; and

(b) Is established:

(1) By exercise of the power of self-government of an Indian tribe independent of State law; or

(2) By operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

Litigation means any civil action at law or any proceeding in equity, including any appeal or settlement in such an action or proceeding. The term includes administrative proceedings (such as binding arbitration), but does not include criminal proceedings or routine eviction matters.

Period of HUD assistance means the time period during which the annual contributions contract under title II of the United States Housing Act of 1937 remains in effect.

Program income (a) means income that:

(1) An IHA receives;

(2) Is derived from any source; and

(3) Must be used for specific purposes relating to the assistance.

(b) Examples of program income include (but are not limited to) rental income, investment income, and other income that is taken into account in determining operating subsidy amounts under section 9 of the United States Housing Act of 1937 (24 CFR Part 990), and operating reserves.

(c) Examples of items that are not considered program income include (but are not limited to) donations, bond proceeds, State or local government payments, and income from non-HUD programs.

(d) The definition of program income in 24 CFR 85.25 does not apply to the term as used in this subpart.

Threatened litigation means any communication, oral or written, announcing an intention to institute litigation.

§ 905.510 Litigation reporting requirements.

(a) *Reporting at HUD's request.* At HUD's request, each IHA must report to HUD during the period of HUD assistance on any litigation to which the IHA is a party or that is threatened against the IHA, if the litigation or threatened litigation involves a program, project, or activity assisted with HUD assistance or program income.

(b) *Required reporting.* (1) Whether or not HUD has requested a report under

paragraph (a) of this section, each IHA must report to HUD during the period of HUD assistance on any litigation to which the IHA is a party or that is threatened against the IHA, if:

(i) The litigation or threatened litigation involves a program, project, or activity assisted with HUD assistance or program income; and

(ii) It appears likely that the litigation or threatened litigation (if commenced) will necessitate the use of additional HUD assistance or program in connection with:

(A) The litigation (*e.g.*, to satisfy a judgment, or to pay the costs of a settlement or the costs of litigation); or

(B) The program, project, or activity involved in the litigation.

(2) The report required by paragraph (b)(1) of this section must be made at the earliest practicable point during the time that the litigation is pending or threatened in which the criterion specified in paragraph (b)(1)(ii) of this section is met.

(c) *Additional reports.* If an IHA is required to report to HUD under paragraph (a) or (b) of this section, HUD may request such additional reports during the period of HUD assistance covering such time while the litigation is pending or threatened as HUD deems appropriate.

(d) *Manner of reports.* HUD will determine the form, content, frequency, and timing of reports required under paragraphs (a) and (b) of this section.

§ 905.515 Litigation against the United States.

(a) *Prohibition of litigation.* (1) Federally recognized Indian tribal governments. The cost principle governing the use of Federal funds to pay for litigation costs in connection with the litigation of claims against the Federal government that is contained in 24 CFR 85.22 (incorporating section B.16. of OMB Circular A–87) applies to IHAs acting on behalf of federally recognized Indian tribal governments.

(2) Other Indian tribal governments. An IHA, other than an IHA referred to in paragraph (a)(1) of this section, may not use HUD assistance or program income to pay its litigation costs to pursue a claim against the United States or to defend a claim pursued by the United States.

(b) *Definition.* For purposes of paragraph (a) of this section, the term "litigation costs" includes items such as attorneys' and witness' fees and court costs.

§ 905.520 Approval of litigation.

(a) *Affirmative and defensive litigation.* (1) Each IHA must obtain advance HUD approval during the period of HUD assistance to initiate or defend a claim in litigation (including settlements and appeals), if:

(i) The litigation involves a program, project, or activity assisted with HUD assistance or program income; and

(ii) It appears likely that the litigation will necessitate the use of additional HUD assistance or program income in connection with:

(A) The litigation itself (*e.g.*, to satisfy a judgment or to pay the costs of litigation) or the settlement; or

(B) The program, project, or activity involved in the litigation.

(2) The IHA must seek the approval required by paragraph (a)(1) of this section at any stage before or during the litigation in which the criterion specified in paragraph (a)(1)(ii) of this section is met.

(b) *Standards for litigation.* HUD will grant the approval referred to a paragraph (a) of this section, unless HUD determines, based on the facts and circumstances before it, that approval would not be cost-beneficial. In making this determination, HUD will take into account factors such as the amount in controversey in the litigation; the likely amount of a judgment for or against the IHA; the anticipated litigation costs, including contracts for litigation services; the likely amount of any HUD financial exposure; the likelihood of the IHA position prevailing in the trial court or on appeal; and the likelihood of reaching a settlement, including the likely settlement amount and any savings in litigation costs if the matter is settled.

(c) *Litigation services.* If HUD approval is required to initiate or defend a claim in litigation under paragraph (a) of this section, the IHA must request HUD approval of any contract for litigation services with respect to the litigation, if the IHA selects the legal counsel to be retained.

(d) *Standards for approving litigation services.* HUD will grant the approval referred to in paragraph (c) of this section, unless HUD determines that the legal counsel retained, or proposed to be retained, by the IHA would have a conflict of interest, or would otherwise be subject to disqualification under applicable requirements for attorney professional responsibility; or on the basis of the fees and costs paid to counsel of similar experience for similar work in the same area, the proposed fees and costs are unreasonable.

(e) *Withdrawal of approval.* HUD may withdraw any approval provided under paragraph (a) or (c) of this section at any stage of the litigation at which HUD determines that the IHA's position in the litigation, or the litigation services contract, does not meet the standards for approval specified in paragraph (b) or (d) of this section, respectively.

§ 905.525 Approval of disposition of liability claims not involving litigation.

(a) *Approval of disposition of liability claims.* Each IHA must obtain HUD approval of its proposed disposition of a liability claim that does not involve litigation when:

(1) The claim is filed, if the IHA does not have liability insurance coverage or is self-insured; or

(2) A claim, by itself or taken together with all other outstanding claims against the IHA, exceeds its liability insurance coverage or the amount available to pay liability claims from any self-insurance reserve fund that the IHA maintains.

(b) *Standards for approval.* HUD will grant the approval referred to in paragraph (a) of this section, unless HUD determines, based on the facts and circumstances before it, that approval would not be cost-beneficial. In making this determination, HUD will take into account factors such as the amount of the liability claim; the likely amount of a settlement; the extent of the potential Federal financial exposure; and whether it is preferable to litigate the claim, rather than settle it.

(c) *Withdrawal of approval.* HUD may withdraw any approval provided under paragraph (a) of this section at any point at which HUD determines that the proposed disposition of the liability claim does not meet the standards for approval specified in paragraph (b) of this section.

PART 990—ANNUAL CONTRIBUTIONS FOR OPERATING SUBSIDY

4. The authority citation for 24 CFR Part 990 would be revised to read as follows:

Authority: Sec. 9, United States Housing Act of 1937 (42 U.S.C. 1437(g)); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3585(d)).

5. In § 990.110, a new paragraph (f) would be added, to read as follows:

§ 990.110 Adjustments.

* * * * *

(f) *Adjustments for violation of litigation reporting and related requirements.* HUD may make a downward adjustment in the amount of the PHA's operating subsidy, to the extent HUD determines that the PHA's failure to comply with the requirements of 24 CFR 18.15, 18.20, and 18.25, or §§ 905.515, 905.520, and 905.525, as appropriate, resulted in a diminution, or

additional use, of HUD assistance or program income (as these terms are defined in §§ 18.5 and 905.505). Any adjustment under this paragraph will be made in the PHA's next Fiscal Year, except that if an adjustment would cause a severe financial hardship on the PHA, the HUD Field Office may establish a recovery schedule that represents the minimum number of years needed for repayment.

Date: October 19, 1988.

Samuel R. Pierce, Jr.,

Secretary.

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Thursday
October 27, 1988

Part V

Department of Transportation

Coast Guard

33 CFR Parts 151, 155, and 158
46 CFR Part 25
Regulations Implementing the Pollution Prevention Requirements of Annex V of MARPOL 73/78; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 151, 155 and 158

46 CFR Part 25

[CGD 88-002]
RIN 2115-AC89

Regulations Implementing the Pollution Prevention Requirements of Annex V of MARPOL 73/78

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes rules to implement the requirements of the "Act to Prevent Pollution from Ships," as recently amended by Congress. These rules will implement Annex V of the International Convention for the Prevention of Pollution by Ships, 1973 entitled "Regulations for the Prevention of Pollution by Garbage by Ships." These regulations would apply to marine craft of any size or type, including commercially operated ships and fishing vessels, uninspected vessels, recreational boats, oil rigs and platforms. These proposed rules also specify that ports and terminals, including recreational boating facilities, commercial fishing facilities, and mineral and oil industry "shorebases", must ensure the availability of facilities to receive ship-generated garbage. The Coast Guard expects that these rules will reduce the incidence of discharges of plastics, including synthetic fishing nets, and other ship-generated garbage into the maring environment.

DATES: 1. Comments must be submitted on or before November 28, 1988.

2. Public hearings will be held at Washington, DC on November 10, 1988; at Houston, Texas on November 14, 1988 and at Seattle, Washington on November 15, 1988.

ADDRESSES: 1. Written comments should be submitted to Commandant (G-LRA-2/21), U.S. Coast Guard Headquarters—Room 2110, 2100 Second Street, SW., Washington, DC, 20593-0001 Attention: CGD 88-002. Normal office hours are between 8:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

2. Oral comments may be presented at any of three public hearings that will be held to discuss this proposal. One hearing will be held in Room 2232 of the Nassif Building (U.S. Department of Transportation Headquarters), 400 "D" Street SW., Washington, DC on November 10, 1988. A second hearing will be held in the Gulf Coast Grand Ballroom at the Houston Hobby Holiday Inn, Houston, Texas on November 14, 1988. The third hearing will be held in the East Room of the Seattle Sheraton Hotel, 1400 Sixth Avenue, Seattle, Washington on November 15, 1988. All hearings will begin at 10:00 a.m. and will continue until 3:30 p.m., unless all comments are heard earlier. In order to ensure that the opinions of the public are received by the close of the comment period, commenters appearing at the public hearings are requested to bring a written summary of their remarks for insertion into the rulemaking record.

3. Persons desiring to discuss potential regulatory standards for shipboard incinerators should submit written comments to: Commandant (G-MTH), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC, 20593-0001.

4. Persons interested in obtaining a copy of, or commenting upon, the Coast Guard's economic analysis of the designation of the Gulf of Mexico as a "Special Area" under Annex V of MARPOL 73/78 should write to Commander David Pascoe at the following address: Commandant (G-MER-3), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC, 20593-0001.

5. Persons desiring to learn about the specific requirements of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) certification process should write: U.S. Department of Agriculture—APHIS, PPQ, Federal Building—Room 656, 6501 Belcrest Road, Hyattsville, MD 20782 Attention: Dr. Ronald Caffey.

6. Persons desiring to comment on the information collection requirements in this Notice of Proposed Rulemaking should submit their comments to: Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503, Attention: Desk Officer, U.S. Coast Guard.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Joel R. Whitehead, Project Manager, Office of Marine Safety, Security and Environmental Protection (G-MPS-3), (202) 267-0491, between 7:00 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: For the convenience of the reader, the Supplementary Information explaining the Coast Guard's Proposed Rulemaking is organized as indicated below:

I. Preliminary Information

Interested persons are invited to participate in this proposed rulemaking by submitting written views, data or arguments. Each comment should include the name and address of the person submitting the comment, reference the docket number [CGD 88-002], identify the specific topic to which each comment applies and include sufficient detail to indicate the basis on which each comment is made. If an acknowledgement is desired, a stamped self-addressed postcard or envelope should be enclosed. All comments received before the expiration of the comment period will be considered before final action is taken on this proposal.

The Coast Guard will hold three public hearings, as described above, to allow interested persons an opportunity to express their views on this proposal. These public hearings are not adversary proceedings. Although all public hearings will be recorded, it is requested that participants supplement their remarks with written comments submitted either at the public hearing they attend or to the address listed the second paragraph in **ADDRESSES** above.

Drafting Information

The principal persons involved in drafting this notice are: Lieutenant Commander Joel R. Whitehead, Project Manager, Office of Marine Safety, Security and Environmental Protection and Mr. Stanley Colby, Project Counsel, Office of the Chief Counsel.

II. Background

The Act to Prevent Pollution from Ships (33 U.S.C. 1901-1911), as amended by Title II of Pub. L. 100-220, (101 Stat. 1458), hereafter referred to as the Act, requires the Secretary of the Department in which the Coast Guard is operating to administer and enforce Annex V of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution by Ships, 1973 (MARPOL 73/78). Annex V of MARPOL 73/78 is entitled "Regulations for the Prevention of Pollution by Garbage by Ships" and was designed to reduce the introduction of ship-generated garbage into the marine environment. These proposed regulations will apply to all marine craft (inspected or uninspected) on the navigable waters and within the 200 mile Exclusive Economic Zone, regardless of flag, and to U.S. ships

wherever they are located. Annex V prohibits ships from discharging plastics, limits other types of garbage discharges and requires that adequate reception facilities be provided at ports and terminals to receive ship-generated garbage. A particular focus of Annex V is to prevent the discharge of plastics, including synthetic fishing nets, and other persistent debris into the marine environment.

The Coast Guard published an Advance Notice of Proposed Rulemaking (ANPRM) for this rulemaking in the June 24, 1988 issue of the **Federal Register** (53 FR 23884). The complete text of Annex V of MARPOL 73/78 was printed as Appendix A of the ANPRM. In the ANPRM, the Coast Guard summarized the environmental, economic and safety concerns requiring a regulatory solution and explained its general approach to addressing Annex V in its regulations. The Coast Guard also solicited input from the public as to how best to implement the recent amendments to the Act in its regulations. Comments received prior to the preparation of these proposed rules are summarized below.

III. Regulatory Approach

The regulations proposed in this Notice modify or add to existing regulations in 33 CFR Parts 151, 155, and 158, and 46 CFR Part 25. Existing pollution prevention regulations implement Annexes I and II of MARPOL 73/78 as follows: Part 151 addresses shipboard requirements to prevent pollution and Part 158 discusses the reception facility requirements. This Notice proposes to add new subparts and to revise the general sections of Parts 151 and 158 to implement the requirements of Annex V as directed by Pub. L. 100–220. There are no new requirements imposed in these regulations which change Annex I or Annex II implementing requirements, although a few editorial or typographical errors found in those regulations have been corrected. Minor revisions to 33 CFR Part 158 are proposed which change references in 33 CFR Part 151 which were redesignated. In 46 CFR Part 25, the proposed rule would require uninspected vessels, including privately owned recreational boats, to retain garbage generated on board when it cannot be discharged in accordance with these regulations. This requirement was proposed for Title 46 because most uninspected vessel operators are likely to be familiar with this Title. Moreover, adding this change to Title 46 will create awareness among the boating public of their responsibilities under the Act, because these rules would then be included in the educational efforts of the U.S. Coast Guard Auxiliary, U.S. Power Squadron and other boating educational organizations on operators of recreational craft. Because many commenters questioned the relationship of recent amendments to the Act to other existing federal legislation, an effort has been made in this preamble to address their similarities and dissimilarities. Some of these laws are the Refuse Act (33 U.S.C. 407), the Clean Water Act (33 U.S.C. 1251 *et seq.*), the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Resource Conservation and Recovery Act of 1976 (RCRA) (42 U.S.C. 6901–6987), and the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA) (33 U.S.C. 1401 *et seq.*).

In drafting these proposed rules, the Coast Guard considered the comments received and discussions held with numerous industry representatives, environmental organizations and federal agencies. Section 1905(a) of the Act also requires the Coast Guard to consult with appropriate federal agencies in establishing regulations which set the criteria for determining the adequacy of reception facilities. Accordingly, the Coast Guard has consulted with many federal agencies, including the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, the National Marine Fisheries Service (NMFS) of the National Oceanographic and Atmospheric Administration (NOAA), the Environmental Protection Agency (EPA) and the Minerals Management Service (MMS) of the Department of the Interior.

The Coast Guard recognizes that implementation of Annex V of MARPOL 73/78 calls for a major change in the way in which ships and ports or terminals manage ship-generated garbage. Moreover, the Coast Guard is cognizant that much of the litter found on shores and beaches is derived from shore based sources and that Annex V of MARPOL 73/78 was not designed to address these pollution sources. In fact, Annex V of MARPOL 73/78 addresses only a portion of a much larger dilemma of solid waste management throughout the world. Effective implementation of Annex V over the next decade will require significant efforts in shipboard engineering, educational efforts targeted at commercial fishermen, merchant seamen and recreational boaters, and an effective enforcement program. The Coast Guard's proposed regulations lay the foundation for these efforts.

IV. Public Comments Received by the Coast Guard

The Coast Guard received a total of thirty-nine letters encompassing some 147 individual comments and suggestions as to how the Coast Guard should draft its regulations. These comments are discussed below and are arranged by topic.

1. Requests for Extension of Comment Period and Implementation of Annex V

The Coast Guard received four requests for an extension of the ANPRM comment period but was unable to grant these because of the short period of time before the Annex enters into force internationally. To ensure that the ANPRM was widely distributed, the Coast Guard directly mailed approximately 3,700 copies of the ANPRM to interested persons and organizations. One comment was received requesting that the Coast Guard delay implementation of Annex V. The Coast Guard is unable to do this since by the terms of MARPOL 73/78 and the domestic law implementing it, the Annex will be in effect on December 31, 1988.

2. Requests for Public Hearing

The Coast Guard received six requests to hold a public hearing. One commenter specifically requested a hearing to be held in Texas, because of the severe debris problems which exist in the Gulf of Mexico. The Coast Guard will hold hearings as announced above.

3. Applicability

The Coast Guard received three comments concerning the waters and vessels to which these regulations would apply. One commenter stated that the Coast Guard's regulations should apply to privately owned ships on contract to the government. The Act provides that ships owned or operated by the U.S. government which are in noncommercial service need not comply with regulations established by the Coast Guard and this is reflected in the proposed rules in 33 CFR 151.51. This exclusion does not apply to privately owned ships operated by owners under contract to the U.S. government. However, a privately owned ship that is bareboat chartered to the U.S. government is considered to be "operated by" the government and, if in noncommercial service, is therefore temporarily excluded. Within five years after the effective date of Annex V, government owned vessels must comply with regulations established by their own agencies to implement the requirements of Annex V.

One commenter from the Great Lakes commented that there is little to be gained by including the Great Lakes within waters subject to these rules since the Refuse Act already applies there. By section 2(b) of the Act, as amended (33 U.S.C. 1901(b)), Congress specifically applied the requirements of Annex V to the navigable waters of the United States, which include the Great Lakes. Therefore, the Coast Guard's proposed rules would apply to the Great Lakes.

4. Definitions

The Coast Guard received seventeen comments concerning the definitions of the words "garbage", "plastic", "reception facility", "disposal", "port" and "Great Lakes".

New definitions to the pollution prevention regulations are proposed in 33 CFR 151.05 and 33 CFR 158.120. It was not considered necessary to define Great Lakes in this proposal since this term is generally understood and a precise definition is not critical. It is important to the understanding of these proposed rules that there is a clear distinction made between the terms "terminal", "port", and "reception facility" as defined in existing regulations and in this proposed rule. As defined in the Act, "terminal" refers to a single waterfront facility or terminal handling "harmful substances." The term "port", however, is not so limited. A "port" can be a port authority, a group of terminals which decide to be grouped together as a cooperative unit, or a lighterage area, anchorage area, or any other area, designated by the Coast Guard Captain of the Port (COTP) for purposes of these regulations. Therefore, the Coast Guard has proposed amending the definition of "port", for Annex V purposes, to include specific types of facilities which cater to recreational boaters, commercial fishermen or mineral and oil industry operations. Under Annexes I and II, some terminals have formed "ports" or cooperatives to share expenses in cases where there was not sufficient demand for a single terminal to support its own reception facility. The Coast Guard expects similar arrangements to be made with respect to the provision of garbage reception facilities, especially to meet APHIS requirements.

A "reception facility" refers only to the means made available at a port or terminal for the disposal of specified garbage. A reception facility does not have to be a fixed part of a port or terminal; it may be a mobile service such as a tank truck, barge, "dumpster" or other commercial or municipal garbage disposal operation.

5. Discharge Limitations of MARPOL 73/78

Five commenters addressed what specific types of garbage may, or may not, be discharged as allowed by Regulations 3–6 of Annex V of MARPOL 73/78. Figure 1 graphically displays these limitations. One commenter suggested that the Coast Guard should require dunnage, lining and packing materials which will float, to be offloaded from ships to shoreside reception facilites prior to their departure from ports and terminals. This commenter suggested that if they were not offloaded prior to departure, the later discharge of these items might conflict with the ocean dumping prohibitions of the MPRSA. The present rulemaking does not deal with the MPRSA, and the Coast Guard does not have the authority under the Act to require the offloading of dunnage, etc. The MPRSA prohibits the transportation of materials from the United States for the specific purpose of dumping them into ocean waters, unless authorized by permit from the EPA. House Committee Report 100–360 (the report of the House of Representatives on H.R. 940, which became Title II of Pub. L. 100–220), discusses the relationship of the MPRSA and the Act to Prevent Pollution from Ships (APPS), as amended. The Report states that MPRSA "also prohibits the transport of any material from the United States for the purpose of dumping it into ocean waters." If dunnage or other materials are transported for the exclusive purpose of dumping them at sea, the prohibitions of the MPRSA would apply.

FIGURE 1.—MARPOL 73/78 ANNEX V

[Summary of garbage discharge restrictions]

Garbage type	All vessels except offshore platforms and associated vessels		Offshore platforms and associated vessels [2] (33 CFR 151.73)
	Outside special areas (33 CFR 151.69)	In special areas [1] (33 CFR 151.71)	
Plastics—includes synthetic ropes and fishing nets and plastic bags.	Disposals prohibited	Disposals prohibited	Disposals prohibited.
Floating dunnage, lining and packing materials.	Disposal prohibited less than 25 miles from nearest land.	do	Do.
Paper, rags, glass, metal bottles, crockery and similar refuse.	Disposal prohibited less than 12 miles from nearest land.	do	Do.
Paper rags, glass, etc. comminuted or ground [3].	Disposal prohibited less than 3 miles from nearest land.	do	Do.
Food waste not comminuted or ground	Disposal prohibited less than 12 miles from nearest land.	Disposal prohibited less than 12 miles from nearest land.	Do.
Food waste comminuted or ground [3]	Disposal prohibited less than 3 miles from nearest land.	do	Disposal prohibited less than 12 miles from nearest land.
Mixed refuse types	[4]	[4]	[4]

[1] Special areas for Annex V are the Mediterranean, Baltic, Red and Black Seas, and Persian Gulf areas. (33 CFR 151.53).
[2] Offshore platforms and associated vessels includes all fixed or floating platforms engaged in exploration or exploitation of seabed mineral resources, and all vessels alongside or within 500m of such platform.
[3] Comminuted or ground garbage must be able to pass through a screen with a mesh size no larger than 25 mm. (1 inch) (33 CFR 151.75).
[4] When garbage is mixed with other harmful substances having different disposal or discharge requirements the more stringent disposal restrictions shall apply.

Finally, there were two comments received concerning the discharge of incinerator ash from a ship's domestic incinerator into the oceans, as is currently practiced by many ships. One comment favored and one opposed this. Congress clearly intended that incineration at sea of ship-generated garbage be one option available to ship operators. In House Report 100–360 it expressly encouraged the U.S. Navy to consider this option for its 600-ship fleet in order to achieve compliance with Annex V of MARPOL 73/78. Moreover, the International Maritime Organization (IMO) document, "Draft Guidelines for the Implementation of Annex V of MARPOL 73/78" (Working Paper 10 of

the 25th Session of MEPC, hereafter referred to as MEPC 25/WP.10), specifically notes that "ash and clinkers" from incineration of ship-generated garbage are considered "garbage" within the meaning of Annex V since they are "operational wastes" and may, therefore, be discharged at sea outside of 12 nautical miles in accordance with Regulation 3(1)(b)(ii) of Annex V. Those ashes and clinkers which can pass through a 25 millimeter (1 inch) screen may be discharged beyond 3 nautical miles from land, provided that "clinkers" of plastic, if not fully reduced to ash, are still considered a plastic and subject to the no discharge requirements of Annex V. The Coast Guard's proposed rule would, then, prohibit the discharge of incinerator ash at sea within 3 nautical miles from nearest land, but not beyond. The EPA has advised the Coast Guard that it might consider incinerator ash brought ashore to be subject to the manifesting and testing requirements of RCRA. The Coast Guard is concerned that proper disposal of incinerator ash has not been fully studied and has submitted a request to the Marine Environment Protection Committee (MEPC) of IMO to place this issue on the agenda at its next session in March 1989 and that it become a part of its future work program.

The Coast Guard also received four comments concerning garbage discharge limitations specifically on board fixed and floating platforms. Three commenters recommended that food wastes and incinerator ash be allowed under the Coast Guard rules to be discharged by oil rigs, platforms and vessels alongside them. Another commenter stated that all discharges by these ships, except food wastes outside 12 nautical miles, should be prohibited. Two commenters said that the EPA's National Pollution Discharge Elimination System (NPDES) regulations authorized under the Clean Water Act presently allow oil rigs and other point sources to dischrage non-floating wastes and that Annex V duplicates these requirements. The Coast Guard takes the position that after December 31, 1988, an oil rig or platform operator could be in compliance with a valid NPDES permit and not be in compliance with Annex V of MARPOL 73/78 because these proposed rules go beyond the requirements of the NPDES permitting system. The EPA's NPDES permits issued to oil rigs and platforms prohibit the discharge of floating solid wastes and garbage, but allow sinkable wastes to be discharged unless they are specifically prohibited. Under Annex V, a higher standard is required for oil rigs and platforms, since no discharge of garbage (except food wastes beyond 12 nautical miles) is allowed. Because of this disparity between the NPDES process and Annex V requirements, the EPA has indicated that it is considering in future NPDES permits to require oil rigs and platforms to comply with Annex V. Based on consultations between the Coast Guard and EPA, the proposed Coast Guard regulations do not provide for exempting oil rigs and platforms from Annex V requirements because they have an NPDES permit.

Under the Coast Guard's proposed rules, uncomminuted food or victual wastes must be discharged beyond 12 nautical miles, whether the "ship" is an oil rig or platform or not. In accordance with IMO's Draft Guidelines, the Coast Guard does not consider "graywater" or "dishwater" to fall within the meaning of "garbage" under Annex V. Proposed definitions for these two terms are shown in the proposed 33 CFR 151.05 definitions.

6. Equipment Requirements for Ships

Four comments were received concerning mandatory equipment installations on board ships in order to comply with Annex V of MARPOL 73/78. Three commenters recommended that the Coast Guard mandate the installation of compactors, incinerators or comminuters on ships and another was opposed to mandatory requirements for equipment of any kind. The Coast Guard has examined the Act and determined that broad mandates for equipment installation are not authorized. Moreover, they would deny ship owners and operators the flexibility to tailor equipment needs to each ship based upon the particular circumstances of the ship, such as crew size, route, voyage length, etc. Some ships may not need any equipment on board at all, provided the crew properly manages their garbage by any of several means which may include product substitutions to avoid plastics in food stores and supplies, separation of plastics, legally discharging garbage at sea, and storage of garbage for final disposal ashore. Accordingly, the Coast Guard's proposed regulations allow, but do not mandate, the use of particular types of equipment such as incinerators, compactors, or grinders. This is discussed in further detail in the section by section analysis of the rules in Part IV below.

Six comments were received recommending that the Coast Guard establish environmental and safety standards for shipboard incinerators. At present, the only Coast Guard regulations applicable to incinerators used on board ship for disposal of ship-generated garbage are found in Marine Engineering and Electrical regulations found in 46 CFR Parts 50 through 64 and Parts 110 through 113, respectively. These regulations presently apply to U.S. ships only and do not address either airborne emissions or the ash and clinker residues they generate. In addition, through regulations stemming from the Clean Air Act, the EPA or states may regulate the airborne emissions from shipboard incinerators. The Coast Guard has recently discussed the possibility of drafting comprehensive incinerator design and performance standards with various organizations, including the American Society for Testing and Materials (ASTM) and the Society of Naval Architects and Marine Engineers (SNAME). The Coast Guard is hopeful that these initiatives, with the cooperation of the EPA, may lead to an acceptable industry standard which could then be adopted within Coast Guard regulations in a subsequent rulemaking. Persons interested in discussing such an initiative should contact the Coast Guard's Marine Technical and Hazardous Materials Division, Commandant (G-MTH), as indicated in the second paragraph in **ADDRESSES** above.

7. Operational Requirements

Three commenters proposed that garbage be separated into component types (plastics, dunnage, food wastes, etc.) in order to manage shipboard wastes. The Coast Guard believes these proposed rules allow flexibility for separation and encourage ship operators to consider the separation at the source of generation. The U.S. Navy, in a series of several major at sea tests on board their warships, has found that one very effective way of managing garbage is to separate plastics in each space where they are generated by placing separate containers for plastics and non-plastics. This method eliminates the need for later separation of plastics from large masses of aggregated garbage and places responsibility for garbage management on individual generators. However, because ships can legally discharge most types of garbage, except plastics, subject to the limitations discussed herein, the Ccast Guard's proposed rules do not mandate separation, but recognize this as one way of achieving compliance with these proposed rules.

Three commenters questioned whether commercial fishermen were required to recover derelict fishing gear

or garbage which becomes entrained in fishing nets during normal fishing operations. House Report 100–360 makes it clear that Congress did not intend for refuse or other flotsam found in nets to be considered garbage for the purposes of Annex V of MARPOL 73/78. This type of flotsam, if found, may legally be returned to the sea without being in violation of Annex V. Annex V prohibits the intentional discharge of fishing nets at sea. The Coast Guard recognizes that most fishing nets are lost accidentally during fishing operations and, due to their high cost, are rarely abandoned. The Coast Guard and NMFS encourage commercial fishermen to retrieve both fishing gear and other refuse found while fishing, especially since these types of debris can deplete existing stocks of marine seafood.

8. Recordkeeping Requirements, Waste Management Plans and Information Placards.

The Coast Guard received a total of seventeen comments favoring these requirements for certain ships and three opposing them. One commenter suggested that the Coast Guard's rules should require fishermen to record and report loss or recovery of fishing gear, establish a gear identification system and require degradable panels or sections on traps and nets. As indicated in the ANPRM, the Act requires the Secretary by December 31, 1989, to designate those U.S. ships which must maintain refuse record books or keep log entries, maintain a shipboard waste management plan, or display placards to notify crew and passengers of the requirements of Annex V. Congress allowed this additional time for the Coast Guard to pursue negotiations at the IMO so that an international standard or agreement could be reached. The Coast Guard does not favor establishing requirements solely for U.S. flag vessels without having first exhausted the possibility of consistent and mandatory international requirements for all ships subject to MARPOL 73/78. The Coast Guard intends to propose international requirements at the 27th Session of the MEPC.

While recording of lost fishing gear could fall within the scope of the Act, the Coast Guard believes that the suggestions concerning gear identification systems and biodegradable traps and nets are clearly beyond the scope of the Coast Guard's authority, especially since NOAA was tasked to study implementation of such a system in Title IV of Pub. L. 100–220, the "Driftnet Impact, Monitoring, Assessment and Control Act of 1987." The Coast Guard does not intend to specify requirements for these provisions in this rulemaking, but will propose an amendment to these regulations in early 1989. To facilitate this, the Coast Guard has reserved §§ 151.55, 151.57 and 151.59 of Part 151 for these three items. The twenty comments received in response to the ANPRM will be retained for consideration in developing this future proposal.

9. Special Areas

Six commenters noted support for designation of the Gulf of Mexico as a special area under Annex V. One commenter opposed this designation as being too costly. This designation would make the Gulf a no discharge zone, except that ground or comminuted food wastes could be discharged outside 12 nautical miles from the nearest land. As noted in the ANPRM, this proposed rulemaking will not address designation of the Gulf as a special area because an amendment to MARPOL 73/78 would be required and this could not be accomplished until after the entry into force date of Annex V. In anticipation of this, the Coast Guard has prepared a study entitled "Economic Analysis of Designation of the Gulf of Mexico as a 'Special Area' under Annex V of the MARPOL Protocol." The Coast Guard will consider the seven comments received on this topic in developing its position on whether the Gulf of Mexico should be designated as a special area under Annex V. Persons interested in either obtaining a draft copy of the Coast Guard's economic analysis, or in commenting on it should write Commandant (G–MER–3) at the address shown in the third paragraph of **ADDRESSES** above.

10. Reception Facilities

Twenty-five comments were received concerning the criteria the Coast Guard proposed in its ANPRM for adequacy of reception facilities: Capacity, accessibility and ability to receive APHIS regulated food wastes. In the proposed rule, ports or terminals must be able to receive all garbage generated by ships, subject to certain important exceptions. In the ANPRM, the Coast Guard provided a worksheet to assist port and terminal operators in estimating the amount of ship-generated garbage they may receive once Annex V enters into force. The worksheet was derived from formulae found in a 1978 IMO document entitled "Guidelines on the Provision of Adequate Reception Facilities in Ports." Several commenters complained that the worksheet or formulae provided in the ANPRM were awkward or unrealistic, two recommended defining "domestic wastes" on the worksheet and one suggested revising the formulae to include capacity of garbage generated from fixed or floating platforms. This worksheet, with minor revisions, appears at the end of the preamble of this document as Appendix A.

The Coast Guard is no longer considering requiring ports and terminals to provide reception facility capacity based upon these formulae. Nevertheless, for the reasons stated below, the Coast Guard feels these formulae may provide a reasonable guide for a terminal operator to estimate the capacity it may receive after December 31, 1988. As far as is known, there are only two major ports in the United States which have conducted an extensive examination of their ship-generated waste stream. One of these found that the formulae estimated a projected garbage capacity demand some 200–300% above its current demand. Depending on the location of the port, types of ships served and other factors, this may not be inaccurate. A second port is utilizing the worksheet formulae in conjunction with other publicly available data to determine its reception facility needs. It is important to realize that these formulae are premised upon several facts. First, the formulae were designed using data from oceangoing ships only, and therefore may not be suitable for estimating garbage reception needs for marinas, mineral and oil "shorebases", or ports or terminals serving predominantly recreational boaters or commercial fishermen. Secondly, the final "garbage capacity demand" generated by using the formulae presume that ships discharge all authorized garbage into the sea as allowed by Annex V. Finally, the formulae do not take into account the fact that ships may install incinerators which might reduce the expected amounts. Despite these shortcomings, the Coast Guard feels these formulae will be useful in assisting port and terminal operators to gauge an upper limit for their garbage reception needs.

The Coast Guard received eight comments concerning "accessibility" as a criterion for determining the adequacy of a garbage reception facility. Three commenters noted that reception facilities should be located so that they do not impede cargo handling or terminal operations. The Coast Guard concurs with this and has addressed this aspect in the proposed 33 CFR 158.410(a)(2). One commenter was opposed to "accessibility" as a criterion for adequacy whatsoever. Four more

indicated that port and terminal operators should be able to contract for reception facility services to commercial waste haulers in order to allow for flexibility of operations at a port or terminal. Two other commenters suggested that port and terminal operators should be able to have facilities available within a specified period of time. One commenter was opposed to requiring the installation of any equipment at ports or terminals whatsoever. The Act states that port or terminal operators must either provide, or ensure the availability of garbage reception facilities. The Coast Guard takes this to mean that contractual arrangements for Annex V reception facilities are perfectly acceptable in complying with these regulations, especially for APHIS regulated food wastes. Because most ports and terminals currently provide reception facilities for general garbage only, the real concern is the potential for ship delays due to the unavailability of APHIS facilities. The Coast Guard proposes that APHIS reception facilities must be made available within 24 hours after notice of need is given by an oceangoing ship.

Two commenters objected to the Coast Guard statement in the ANPRM that there should be no obligation on the part of any port or terminal to provide reception facilities for ships not having commercial transactions at that port or terminal. They stated that any port or terminal must make available their reception facilities to all ships. The Coast Guard does not believe this would be appropriate or effective to impose such a requirement. Port or terminal operators could provide reception facilities to any ship requesting them but would only be obligated to do this in the proposed 33 CFR 158.420 for ships having commercial transactions at a given port or terminal. Three commenters raised the issue that some states do not allow ship-generated garbage originating from outside the state to be brought ashore, apparently in contravention of the new requirements of Annex V of MARPOL 73/78. This issue is not addressed in this proposal and is currently undergoing legal review.

One commenter requested that the Coast Guard clarify who is responsible at a port or terminal for transportation and disposal of garbage. The Coast Guard does not feel it appropriate to mandate which parties at a port should convey garbage from ship to a reception facility, since in many cases collective bargaining agreements govern. As noted earlier, the Act mandates that persons in charge of ports and terminals "provide, or ensure the availability of" adequate reception facilities. This proposed rulemaking does not address disposal of garbage after it has reached a reception facility, since this is generally regulated under the authority of other federal, state and local laws. The proposed rule provides at 33 CFR 158.410(a)(3), that each facility must hold each federal, state and local permit or license required by environmental and public health laws and regulations and as a consequence would have to comply with these regulations concerning garbage handling and disposal.

11. Certificates of Adequacy (COAs)

The Coast Guard received numerous comments addressing whether, and how, the Coast Guard should issue COAs. It is proposed to define COAs in 33 CFR 158.120 as a document issued by the Coast Guard which certifies that a port or terminal meets the requirements of 33 CFR Part 158 with respect to reception facilities. A COA must have the application form which was submitted to the Coast Guard attached to it. The Coast Guard is seeking the approval of the Office of Management and Budget to amend an existing Information Collection item (OMB Approval #2115–0543) to include a new application form for COAs on Coast Guard "Form C." Although all ports and terminals are required to meet the requirements of these regulations for reception facilities, only a small fraction of them will be required to apply for a COA on Form C.

Six comments were received in favor of the Coast Guard issuing COAs and two opposed. Two of those in favor of issuing COAs suggested the Coast Guard issue COAs to large marinas of 100 or more boat slips. The Coast Guard believes that most ports and terminals should not be required to hold COAs because the intent of the COA is primarily to ensure that large oceangoing ships have reception facilities for their ship-generated garbage. The proposed rules would require that Annex V COAs be issued to ports and terminals which receive oceangoing ships subject to Annex I or II of MARPOL 73/78 and to those which receive more than 25 port arrivals annually by ships whose last port of call was outside the continental United States or Canada. The Coast Guard believes that many new approved APHIS facilities will be necessary at many ports and terminals which have previously had little demand. After December 31, 1988, ships will not be able to discharge plastics at sea and if those plastics have come into contact with foreign food wastes regulated by APHIS, those plastics must be deposited ashore and treated in accordance with APHIS regulations. Ships may elect to discharge these plastics ashore at a subsequent port or terminal with approved APHIS facilities.

However, the Coast Guard is still considering issuing COAs to some large commercial fishing facilities (see definition in 33 CFR 158.120) and is currently discussing this with NOAA and NMFS. Issuing COAs to ports and terminals which receive large oceangoing ships, and potentially to large commercial fishing facilities would ensure that ships would not be delayed due to lack of APHIS facilities and that fishing ships had a location to dispose of nets and net fragments.

12. Training and Education

Three comments were received on the subject of training and education of mariners. The Coast Guard will ensure that the discharge requirements of Annex V of MARPOL 73/78 appear on licensing and documentation examinations for U.S. Merchant Marine officers and appropriate documentation exams for unlicensed personnel. Moreover, when these rules are finalized, the Coast Guard expects that the Coast Guard Auxiliary, U.S. Power Squadron and other safety oriented organizations will include the requirements of the Act and these regulations in their boating courses for the recreational boater.

13. Enforcement and Penalties

The Coast Guard received four comment letters concerning enforcement of Annex V. One commenter suggested that the Coast Guard routinely take penalty action against foreign flag ships rather than refer violations to the Party flag state. The Coast Guard believes that this comment is one which need not be addressed by regulation. To the extent that procedures involving referral to the flag party state provides for the effective enforcement of Annex V prohibitions, the Coast Guard intends to employ those procedures. Where these procedures prove to be ineffective, or where the flag state of the ship is not party to MARPOL 73/78, the Coast Guard intends to exercise its civil penalty authority under the Act in a manner consistent with MARPOL 73/78 and international law.

Another commenter suggested the Coast Guard initiate a "ticketing" system for violations of Annex V. The Coast Guard is looking into such a system for this and other types of routine violations. One commenter asked the Coast Guard to clarify which level of government could enforce the

provisions of Annex V. In accordance with the Act, only the Coast Guard may assess civil penalties under its provisions. Through Memoranda of Understanding or other agreements, the Coast Guard expects to receive enforcement assistance from other federal agencies, including APHIS and the National Marine Fisheries Service. Moreover, the Coast Guard could receive third party notification of violations of these regulations by individuals, local law enforcement officials or state officials pursuant to existing or new Coast Guard-State agreements.

One commenter requested the Coast Guard outline the "Bounty System" allowed for by section 9 of the Act. This is in reference to the authorization granted to the Secretary of Transportation to return up to 50% of civil or criminal penalties collected to the person reporting Annex V related violations. In view of the limited amount of time to address the mandated provisions of Annex V and the Act, the bounty provisions have not been included in this proposal. The Coast Guard is considering the development of regulations implementing this provision which would be proposed in the **Federal Register** at a later date.

14. Environmental Impact

One person commented that the Coast Guard was required to prepare an Environmental Impact Statement as a part of this rulemaking. The Coast Guard has studied the environmental impacts that are possible as a result of this rule. The Coast Guard's Draft Environmental Assessment is discussed in greater detail under the heading "Environmental Impact" in Part VI below. Another commenter requested that the Coast Guard consider the positive environmental benefit provided by "offshore marine waste processing facilities." These facilities are not yet operational and there is not enough known about them for the Coast Guard to quantify any environmental impacts.

15. Economic Impact

Three comments were received concerning the economic impact of this rulemaking. One asked the Coast Guard to consider the positive economic benefits attributable to the reduction of beach cleanup costs, improvement of fisheries and preservation of wildlife and endangered species. The Coast Guard agrees that these are positive benefits which should result from this rulemaking, but notes that these are difficult to estimate with reliability. Two other commenters noted that the economic impact of these regulations upon drilling companies would have a significant adverse economic impact on their industry. The Coast Guard believes that certain industries and the operators of ships on certain trade routes will be economically impacted to a greater degree than others. For example, the oil and mineral industry could be affected more than other sectors because of the restrictions imposed by Regulation 4 of Annex V. Similarly, ships which operate predominantly in the special areas are more likely to install costly equipment, such as incinerators or compactors. One commenter from a large shipping company stated that it was budgeting $80,000 per vessel for equipment installation. This figure is consistent with the Coast Guard's estimate of approximately $75,000 for installation of a large incinerator. The potential economic impact of this rulemaking is discussed in Part VI below.

V. Section-by-Section Analysis of the Proposed Rules

Sections of the proposed rules which are essentially self-explanatory are not discussed in the section-by-section analysis that follows.

33 CFR 151.03 Applicability

The existing applicability section would be revised to clearly indicate that each subpart in this part (one for each Annex of MARPOL 73/78) now contains its own applicability statements.

33 CFR 151.05 Definitions

This section would be revised by adding definitions of several new words relevant to Annex V of MARPOL 73/78. They are discussed below:

1. "Commercial fishing facility" would be added to indicate that these facilities are considered "ports" for the purposes of these regulations.

2. "Garbage" would be defined exactly as it appears in Annex V of MARPOL 73/78. The most important concept in this definition is that "garbage" for the purposes of these regulations must be "ship-generated." Graywater and dishwater, as discussed earlier, are not considered garbage within the meaning of Annex V.

3. "Harmful substance" would be defined here exactly as it appears in MARPOL 73/78. It is important to note that "garbage," including but not limited to plastics, is considered to be a "harmful substance" since it is liable to "create hazards to human health, to harm living resources and marine life, to damage amenities" and because it is specifically subject to control by MARPOL 73/78.

4. "Plastic" would be defined to provide a technically acceptable and very broad definition of those materials which are prohibited from discharge under this proposal. An explanatory note would follow describing, to the nonscientific layman, the types of plastic items which are commonly found on ships and likely to be discharged. The proposed definition would include synthetic materials, including what are called "biodegradable" plastics. These plastics often consist of polymers connected by starch molecules which cause the plastic to break down when exposed to sunlight or water. The Coast Guard is concerned that the exclusion of biodegradable plastics from the definition of plastic might lead to a transfer of entanglement related environmental damages to ingestion related ones. The proposed definition is meant to include both plastic products, raw resin pellets and composite products in which the plastic component is a minor, but essential element in its functioning, for example, in a plastic-lined paper cup. This definition excludes glass, paints, varnishes, waxes (all of which might be considered "plastics" by other definitions), and plastic polymers naturally produced by living organisms but harvested and used by man, such as chitin. "Clinkers" of plastic or pieces which have not been fully reduced to ash by incineration, would still be considered "plastic" under these regulations.

5. "Recreational boating facility" would be defined to indicate that these are considered "ports" for the purposes of these regulations.

6. "Special area" would be revised to indicate the new sections in the regulations where each Annex's special areas are defined. The Mediterranean Sea, Black Sea, Baltic Sea, the Red Sea and the Gulf areas are currently designated as special areas for both Annex I and Annex V.

7. "Victual waste" would be defined to include "food wastes" since this latter term is used throughout Annex V but is not defined therein. "Victual wastes" and "food wastes" are interchangeable terms within the meaning of Annex V, however, the proposed regulations refer only to the term "victual wastes" for consistency.

33 CFR 151.08 Denial of Entry

A new paragraph (b) would be added to indicate that the Captain of the Port (COTP) may deny ships entry to ports and terminals which do not ensure the availability of adequate reception facilities for Annex V or for those ports and terminals required to hold a COA which do not have one.

33 CFR 151.09

The existing section "Control of discharge of oil" would be redesignated as 33 CFR 151.10 and a new "Applicability" section would be added in its place to list which ships must comply with Subpart B (Annex I of MARPOL 73/78). The Coast Guard believes that separate applicability sections would make it more clear to industry and enforcement personnel exactly which Annexes apply to which ships.

33 CFR 151.11 Exceptions for Emergencies

Paragraph (a) would be revised to change the existing 33 CFR 151.09 reference to read 33 CFR 151.10.

33 CFR 151.13 Special Areas for Annex I of MARPOL 73/78

This section would be revised to indicate that the special areas indicated apply to Annex I of MARPOL 73/78. This revision would also correct typographical errors in the description of the Mediterranean Sea and Gulfs Areas so that these two area descriptions read exactly as they appear in MARPOL 73/78. Finally, paragraph (g) would change the reference to "151.09" to read "151.10" to agree with the proposed reorganization.

33 CFR 151.30 Applicability

This section would list the ships which are subject to regulations implementing Annex II of MARPOL 73/78 without requiring the reader to make a cross-reference to the Annex I applicability, as is required now. This section currently appears as an exception to the applicability of Annex I in 33 CFR 151.03(a)(4). As proposed, there would be no difference between the old and new references, except that readability would be improved.

Subpart D

This proposed subpart would contain the regulatory additions necessary to implement the recent amendments to the Act and, concurrently, would implement Annex V of MARPOL 73/78. The proposed rules in Subpart D delineate shipboard requirements only.

33 CFR 151.51 Applicability

This section would define the ships that are subject to regulations implementing Annex V of MARPOL 73/78. This subpart would apply to all U.S. ships wherever located, and to foreign flag vessels (whether party to MARPOL 73/78 or not) when in the navigable waters of the U.S. or within the 200 mile Exclusive Economic Zone of the U.S. Readers should be aware that "ship" as defined in § 151.05 includes "all marine craft operating in the marine environment." Excluded from applicability of these regulations are U.S. government owned or operated ships if they are in noncommercial service and other vessels excluded by MARPOL 73/78.

33 CFR 151.53 Special Areas for Annex V of MARPOL 73/78

This section would state the special areas for Annex V. They are currently the same as for Annex I of MARPOL 73/78. The Coast Guard specified this as a separate section as an aid to the reader and to allow for the addition of other sea areas which have been proposed for designation under Annex V. An explanatory note has been added below this section to advise the reader that while these sea areas are defined as special areas, the discharge restrictions in proposed 33 CFR 151.71 would not go into effect until a sufficient number of states bordering the special area have notified IMO that reception facilities are available. IMO must also provide one year's notice to party states as to the effective date.

33 CFR 151.55 151.57 and 151.59 Recordkeeping Requirements, Waste Management Plans, and Placards

These sections would be reserved for a futrue rulemaking and would specify requirements for these three items authorized under the Act.

33 CFR 151.61 Inspection for Compliance and Enforcement

This section would allow the Coast Guard or other authorized federal agencies to inspect vessels to determine if they are operating in accordance with these regulations and Annex V of MARPOL 73/78. As part of the enforcement program, other federal agencies, such as APHIS and NMFS may inspect ships and report noncompliance to the Coast Guard for action.

33 CFR 151.63 Control of Discharges of Plastic or Garbage

This section would contain substantive enforcement requirements for the subpart. It provides that unless the person in charge of a ship can prove that no plastics are on board which might require disposal ashore, that person must discharge ship-generated garbage in accordance with paragraph (a)(1) or (a)(2) of this section, depending on whether plastics are separated before discharge or not. If plastics are separated on board ship, then remaining garbage may be either discharged (if allowed by § 151.69, § 151.71 or § 151.73), incinerated, or retained on board for later shore disposal. If plastics are not separated on board ship, garbage containing mixtures of plastic and other garbage must be either incinerated on board ship or retained on board for later shoreside disposal and garbage containing no plastics may be handled as allowed by paragraph (a)(1) of this section. If the master, operator, or person in charge of a ship has plastics requiring disposal aboard the ship and cannot show compliance with paragraph (a)(1) or (a)(2) of this seciton, it will be presumed that Annex V of MARPOL 73/78 has been violated. This section will form the basis of a multi-agency federal enforcement program.

33 CFR 151.65 Reporting Requirements for Garbage Regulated by USDA

This section would require ship operators to advise the port or terminal 24 hours in advance of arrival of the need for an APHIS reception facility. The Coast Guard believes this section is necessary based upon comments received and upon the fact that most terminals will not have their own APHIS approved reception facility but will instead contract for these services. This reporting requirement would lessen the possibility that ships would be unduly delayed while waiting to offload APHIS regulated garbage.

33 CFR 151.67 Operating Requirements: Disposal of Plastic

This section would contain the shipboard operating procedures for disposal of plastics. No person onboard U.S. ships, wherever located, may discharge plastics into the sea. Also, no person onboard foreign flag ships, both party and nonparty to MARPOL 73/78, may discharge plastics into the navigable waters or 200 mile Exclusive Economic Zone of the United States. Consistent with MARPOL 73/78, this section indicates that if plastics are mixed with non-plastics, then the entire mixture must be treated as though it were plastic.

33 CFR 151.69 Operating Requirements: Disposal of Garbage Outside Special Areas

This section would implement Regulation 3 of Annex V of MARPOL 73/78, establish three discharge zones as measured seaward from the baseline of the territorial sea, and prescribe allowable discharge requirements for persons on board ships located outside the special areas defined in § 151.53.

33 CFR 151.71 Operating Requirements: Disposal of Garbage Within Special Areas

This section would implement Regulation 5 of Annex V of MARPOL 73/78. Because the special areas are sea areas which are already severely polluted or are more likely to become polluted because of their unique oceanographic conditions, extraordinary discharge requirements are mandated. In these areas, only victual wastes may be discharged at sea, and then only when a ship is at least 12 nautical miles from the nearest land. No other discharge of garbage would be permitted.

33 CFR 151.73 Operating Requirements: Disposal of Garbage from Fixed or Floating Platforms

This section would implement Regulation 4 of MARPOL 73/78. It prohibits the discharge of garbage from all fixed or floating platforms which are engaged in the exploration, exploitation or associated offshore processing of seabed mineral resources. This prohibition also extends to all ships alongside or within 500 meters of such platforms. Beyond 12 nautical miles, only comminuted or ground victual wastes could be discharged into the sea from platforms or from ships alongside or within 500 meters of the platforms. The intent of this stringent requirement is to prevent the seabed beneath stationary vessels such as mobile offshore drilling units (MODU's), oil rigs, platforms, drillships, etc. from being inundated with ship-generated garbage. The Coast Guard interprets the phrase "exploration" to have the same meaning as the definition found in 33 CFR 140.10 and that "exploitation" is intended to mean the actual taking of seabed mineral resources.

33 CFR 151.75 Grinders or Comminuters

This section would specify a performance standard to discharge certain garbage at the distances from nearest land specified in § 151.69(a)(2) or § 151.73(b). The Coast Guard does not intend that each grinder or comminuter must have the screen attached, but they must be able to demonstrate compliance with this performance standard if requested by an authorized federal official.

33 CFR 151.81 Penalties for Violation

This section would be added as a clear statement of the penalties authorized under the Act.

33 CFR 155.350(a)(2) and 155.400(b)(2)

These sections would be revised by correcting references to "151.09" to "151.10."

33 CFR 158.100 Purpose

This section would be revised by adding a new paragraph (b)(3) to indicate that the purpose of the subpart is also to show the procedures for certifying the adequacy of reception facilities for garbage.

33 CFR 158.110 Applicability

This section would revise the existing applicability section to show that Subparts B, C, and E of Part 158 apply to ports and terminals that receive Annex I and II ships, as well as to ship repair yards. Paragraph (b) would be added to indicate that all ports and terminals within, or subject to the jurisdiction of the United States, must comply with the reception facility criteria of Subpart D. For the purposes of Annex V, ports include, but are not limited to, terminals and facilities which receive Annex I or II ships, or that are commercial fishing facilities, mineral and oil industry "shorebases" or recreational boating facilities, as defined later.

33 CFR 158.120 Definitions and Acronyms

This section would be revised by adding new definitions of "Certificates of Adequacy", "Commercial fishing facility", "Form C", "Garbage", "Harmful substance", "Mineral and oil industry shorebases", "Reception facility", "Recreational boating facility" and "The Act". Some of these are identical to their definitions in 33 CFR 151.05. The remaining are discussed below:

1. "Certificate of Adequacy" would be amended from its former definition to clarify that this form is issued by the Coast Guard and indicates that the port or terminal meets the requirements of the appropriate subpart to show compliance with Annex I, II or V of MARPOL 73/78.

2. "Commercial fishing facility", "Recreational boating facility", and "Mineral and oil industry shorebases" would be added to indicate that they are specific types of ports which must comply with the reception facility requirements of Annex V.

3. "Form C" would be added to indicate the name of the application form for a COA for garbage. Most persons in charge of a port or terminal would not have to complete Form C and be issued a COA, though all would be required to meet the reception facility requirements in 33 CFR 158.410 and 158.420. Form C appears later in this document, at the end of the preamble, as Appendix B.

4. "Reception facility" would be revised to add descriptive terms specific to an Annex V reception facility. The term is broadly defined but connotes the physical containment in which garbage is stored or conveyed. Annex V reception facilities may be "dumpsters" or other garbage containers, or even mobile facilities, such as a modified ship or barge.

33 CFR 158.130 Delegations

This section would be revised for clarity and to reflect the new delegation of authority to the COTP for Annex V. Paragraph (e)(1) delegates authority to the COTP to deny entry to ships to Annex I, II or V ports or terminals required to have a COA. Paragraph (e)(2) delegates the authority to deny entry to ports and terminals required to have adequate reception facilities, but are not required to have a COA.

33 CFR 158.135 Who Must Have a Certificate of Adequacy?

This section would be added to clarify who must have a COA. Addition of this section is necessary since all Annex I and II ports and terminals are required to be issued COAs and it is proposed that only a small portion of Annex V ports and terminals would be required to have COAs. Ports and terminals subject to Annex V of MARPOL 73/78 would have to hold COAs if they receive ships subject to Annex I or II of MARPOL 73/78. The Coast Guard is still considering issuing COAs to commercial fishing facilities to ensure that commercial fishermen have reception facilities to dispose of nets and net fragments.

33 CFR 158.140 Applying for a Certificate of Adequacy

This section would be revised by adding paragraph (a)(2). Until June 30, 1989 all Annex V COA applications made on Form C would be submitted to U.S. Coast Guard Headquarters at the address indicated on Form C. After this date, local COTPs will review and issue COAs to qualifying ports and terminals.

33 CFR 158.160 Issuance and Termination of a Certificate of Adequacy

This section would be revised to provide for the issuance, revocation, suspension and termination of Annex V COAs. This section spells out the responsibility of the COTP to physically inspect Annex I or II reception facilities prior to issuing a COA and the COTP's

responsibility only to review an Annex V reception facility application.

33 CFR 158.163 Reception Facility Operations

Paragraph (b)(2) would be revised by adding the word "operator" to indicate that an operator of a ship, in addition to a master, is authorized to examine a port or terminal's COA.

33 CFR 158.165 Certificates of Adequacy: Change of Information

This section would be revised for clarity and would list those sections of Form C which would, if changed, require written notification to the local COTP.

33 CFR 158.167 Penalties for Violation

This section would be added as a clear statement of the penalties authorized under the Act.

Subpart D—Criteria for Adequacy of Reception Facilities: Garbage

This new subpart would describe the criteria for determining the adequacy for Annex V reception facilities. All ports and terminals, whether or not they must have a COA, would have to comply with the requirements of §§ 158.410 and 158.420.

33 CFR 158.410 Reception Facilities: General

This section would contain the general requirements for Annex V reception facilities. It places the burden upon the port or terminal operator to ensure that it holds all federal, state and local permits for the handling of garbage. Ports and terminals which have an APHIS reception facility, autoclave or incinerator located on their property must have an APHIS Compliance Agreement for both the means of conveyance to and from ships and for the device which incinerates or sterilizes the garbage. Reception facilities for APHIS regulated wastes should be properly identified in accordance with APHIS Compliance Agreements. APHIS requires that a separate reception facility be available for APHIS regulated materials so that other nonregulated garbage not become contaminated. In absence of separate facilities, all garbage deposited in a garbage reception facility, if it contains any APHIS regulated garbage, must be treated in accordance with APHIS regulations. If a port or terminal contracts out for APHIS approved services, the contractor must obtain the certifications required by APHIS.

A port or terminal which receives more than 25 port arrivals annually by ships whose last port of call was outside the continental United States or Canada would have to show on Form C the name of the APHIS approved contractor. A port or terminal must also ensure that a reception facility (garbage container, "dumpster", etc.) is located so that garbage deposited from ships would not readily be able to enter the water and so that it will not interfere with terminal operations. Terminals such as ship repair yards would not have to provide APHIS reception facilities within 24 hours, if they could provide facilities before a ship departed. Finally, ports and terminals would have to ensure that APHIS garbage facilities were available within 24 hours after notice is given by ships.

33 CFR 158.420 Reception Facilities: Capacity and Exceptions

Ports and terminals would have to ensure the availability of garbage reception facilities capable of receiving all garbage that the master or person who is in charge of a ship wants to discharge ashore, subject to two exceptions. Ports and terminals would not be obligated to receive large quantities of spoiled or damaged cargoes not usually discharged, or garbage from ships not having commercial transactions with that port or terminal.

Subpart E—Port and Terminal Operations

The existing Subpart D would be redesignated "Subpart E" to order to allow for the placement of a new Subpart D implementing the reception facility requirements of Annex V in numerical sequence immediately after Annexes I and II requirements. Sections 158.400 and 158.420 would be redesignated §§ 158.500 and 158.520 respectively.

46 CFR 25.50–1 Criteria

This section would require vessels not normally inspected by the Coast Guard to retain garbage generated on board for later disposal ashore, unless it can discharge garbage at sea in accordance with 33 CFR Part 151.

Regulatory Evaluation

The Coast Guard considers the proposed regulations to be significant under DOT regulatory policies and procedures (44 FR 11034; February 26, 1979) and non-major under Executive Order 12291. A draft regulatory evaluation has been prepared and placed in the rulemaking docket. Copies of the evaluation may be inspected or copied as indicated in the first paragraph of **ADDRESSES** above.

The Coast Guard considerd several alternatives in this rulemaking: take no regulatory action except for determining the criteria of adequacy for reception facilities; develop a performance-based regulatory program requiring inspection of reception facilities at all ports and terminals before issuing COAs to those which meet standards; or develop a performance-based regulatory program requiring all ports and terminals to meet minimal reception facility standards and issue certain ports and terminals COAs after they have certified their compliance with the regulations.

The Coast Guard decided on the final option to implement the requirements of Pub. L. 100–200. The decision was based on several factors. A performance based regulatory program was selected as it was best suited for implementation of legislation prohibiting improper disposal of garbage. Performance standard regulatory programs are more conducive to compliance choices that are custom fitted to individual entities.

The Coast Guard considered the costs of the implementation of these regulations by considering six distinct industry sectors: merchant shipping, the fishing industry, recreational boating, offshore oil and gas operations, research and other miscellaneous classes of vessels, and ports and terminals.

Only those portions of each sector affected by implementation of Pub. L. 100–220 were considered. Vessels on the Great Lakes and internal waters of the United States were not considered as they must currently comply with the provisions of the Refuse Act. Ports and terminals were considered in all areas for the additional burden that provisions for additional waste collection would entail. Costs for each of these sectors were projected after an industry profile was constructed and current garbage disposal practices were analyzed to establish baseline costs. Estimates of cost compliance options were made for each sector except ports and terminals, which were based on a different set of compliance options. Estimates of which compliance options each industry sector would choose were made and the total costs were projected based on these compliance options. The total annual projected costs are approximately $41.7 million. This burden is apportioned among the sectors as follows: Merchant shipping, $2.9 million; commercial fishing, $33.9 million; recreational boating, $1.4 million; offshore oil and gas, $0.9 million; miscellaneous vessels, $.4 million; and ports $2.2 million.

Plastic in the ocean originates from several sources, not solely from the vessels regulated by these proposed rules. Combined with a paucity of data, the quantitative estimation of benefits of

compliance with the proposed regulations becomes problematic. The Coast Guard requests comments from state and local governments on the amount of marine debris in their jurisdiction, the cost associated with properly disposing of that debris, and estimates as to the amount of that debris originating from ships.

This section identifies quantifiable and non-quantifiable benefits from implementation of Pub. L. 100–220. Most quantifiable benefits result from savings due to events of pollution not occurring. One source of benefits would accrue from the reduction of damages to vessels from garbage entanglement in propellers, water intakes or other vessel equipment in contact with the water. Benefits could also be realized through avoidance of fishery losses due to "ghost fishing" by discarded nets and traps that continue to catch fish or mammals. Another large benefit would be the reduction of beach cleanup costs. Beach debris problems tend to be localized to specific areas that receive wastes carried on principal ocean currents or that are in proximity to heavily traveled shipping routes or fishing regions. The quantity of plastic, garbage and other debris discharged in the ocean will be reduced under this regulation. However, numerous other sources of plastic waste will not be affected by this regulation. It is uncertain whether beach areas will continue to require cleanup efforts, or if the cleanup efforts can be substantially reduced. Therefore, it is not possible to ascribe a quantitative estimate to reduction in beach cleanup costs. Another benefit closely tied to the reduction in beach cleanup costs is increased tourism and its associated spending in beach areas. Again it is difficult to quantify the change that these regulations will have on tourist spending in beach areas. Finally, one could consider increases in the values of beach properties. A net public gain occurs from improvement in ocean environmental conditions to the extent that beach property increases in value.

Environmental benefits are difficult to quantify but their effects can be considered. These benefits include a reduction in damages by plastic wastes to endangered species and the increased enjoyment of beach areas. Plastic garbage is believed to have deleterious effects on certain endangered species including Hawaiian monk seals and various species of sea turtles. This proposed regulation will limit one source of oceanic plastic garbage affecting these species. Persons visiting a beach will receive increased enjoyment of the resource to the extent that less debris is present.

The potential net benefits of the proposed regulations are estimated to be positive. The estimate results from an analysis that considered potential costs and benefits.

Regulatory Flexibility Act

A regulatory flexibility analysis was conducted to evaluate the impact of the proposal on small entities and it has been made part of the Draft Regulatory Evaluation in accordance with the Regulatory Flexibility Act. The Coast Guard is proposing to adopt the Small Business Administration's (SBA) definition of "small business" used when considering SBA loans to concerns engaging in transportation and warehousing (13 CFR 121.3 through 121.10) as a definition for small entities. A concern is considered small, under this definition, if its annual receipts do not exceed $1.5 million.

The Coast Guard does not have accurate information on how many vessels or ports and terminals grouped in the various sectors discussed in the "Potential Costs" portion would qualify as small entities. However, the Coast Guard currently estimates that this will effect 2,200 U.S. flag vessels of less than 1000 gross tons, 14,800 commercial fishing vessels, 600 offshore service vessels, and 4,400 ports and terminals, including recreational boating facilities. Any person affected by the proposed regulations who believes that they qualify as a small entity or has information concerning small entity impacts is requested to submit information on the basis for their qualification and the anticipated impact. Vessels which qualify as small entities will decide which option they will choose for compliance:

a. Garbage separation, with storage of plastic waste on board and final disposal ashore;

b. Storage of all garbage and final disposal ashore;

c. Garbage separation, with compaction and storage of plastic wastes on board and final disposal ashore;

d. Garbage incineration;

e. Product substitution.

Ports which qualify as small entities may have to invest in small-scale incineration equipment, equipment for garbage handling, or make contractual arrangements for reception facilities if they do not already have these.

These proposals contain minimal reporting or recordkeeping requirements for small entities. A small minority of all ports and terminals will also be required to complete an application "Form C" for a COA. Most vessels which are small entities would not have to comply with the reporting requirements for disposal of APHIS regulated garbage. Based on a worst case estimate of 4.2 percent of the combined income cost of compliance for small vessels, the Coast Guard certifies that if the proposed rules are adopted, they will not have a significant economic impact on a substantial number of small entities. As discussed throughout the **SUPPLEMENTARY INFORMATION,** some existing legislation may duplicate, conflict or overlap with the proposed rule. Some of these include the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act. The Clean Air Act and Resource Conservation and Recovery Act may restrict the use of incinerators as a compliance choice for vessels in U.S. waters. Specifically, the Clean Air Act may restrict emissions from incinerators and the Resource Conservation and Recovery Act may restrict the shore disposal of clinkers or ashes from vessel incinerators. The Clean Water Act also prohibits the discharge of pollutants, including garbage, in U.S. waters. There is a duplication of the proposed rule and regulations implementing the Clean Water Act for floating garbage and an inconsistency between them for non-floating solid wastes in that the proposed rule would prohibit the discharge of non-floating wastes from mobile offshore drilling units and platforms, while the Clean Water Act regulations would allow this type of discharge.

Environmental Impact

Under Annex V of MARPOL 73/78, the Act, and these proposed regulations, the discharge of plastic from vessels into the sea will be prohibited and the discharge of other ship-generated garbage within 25 nautical miles of land will be restricted. Ports and terminals where ships call would also be required to provide adequate facilities for receiving this garbage.

The reception facility rules in this document do not directly affect the marine environment, but they are an essential part of an overall scheme to limit pollution of the marine environment and substantially reduce the need to dispose of plastics and other ship-generated garbage at sea. The proposed facility regulations will affect the locations where ship-generated garbage is received by reception facilities, implementing the requirements of Regulation 7 of Annex V of MARPOL 73/78, that adequate reception facilities be available to meet the needs of ships without undue delay. If left unregulated,

ships would not be able to discharge garbage, especially APHIS regulated garbage, at all ports and terminals because reception facilities would not be readily available. Further, in those ports and terminals where reception facilities would be available, the demand for reception facilities would exceed the supply. This would drive up the cost of disposal, contribute to the delay of vessels, and adversely affect compliance with the discharge requirements of Annex V and the Act.

The regulations are expected to have a beneficial effect on the environment by contributing to the reduction of the occurrence of plastic in the marine environment as well as other ship-generated garbage. However, the impact of the proposed action involves two factors. First, is the source of the marine debris. The proposed regulations apply to U.S. vessels and foreign flag vessels when operating in U.S. waters. U.S. vessels account for less than 5% of the world fleet. Foreign flag vessels which operate in U.S. waters make up a much larger percentage of this fleet. Once outside U.S. waters, foreign flag vessels from a country not signatory to Annex V, are not required to comply with these regulations and may continue past disposal practices. Over 1,000 public vessels in noncommercial service, including naval vessels and other government owned or operated ships, have until five years after the effective date of these regulations to comply with regulations established by their own agencies to implement the requirements of Annex V. Further, these regulations do not apply to land based sources which, depending upon the predominant activity in the region, may account for more than half of the debris in the marine environment. Therefore, this action can influence only a rather limited portion of the overall marine debris problem.

The second factor is the marine environment. Several negative impacts from marine debris have been noted on marine wildlife including selected endangered species. The effect of this regulatory program on these impacts will be limited for several reasons. First, the proposed action will have limited influence on the overall marine debris problem. Second, there is little evidence to suggest that persistent marine debris has had a significant adverse impact on environmental populations. There is ample evidence that entanglement and ingestion of persistent marine debris have had an adverse affect on individual members of many species; however, scientists can identify adverse impacts on only a few wildlife populations, e.g., Northern fur seals and the endangered Hawaiian monk seals. Third, the proposed regulations do not affect accidental loss of fishing gear or active fishing operations, which are major contributors to the issue of entanglement. Fourth, plastics account for a small portion of the debris disposed of by ships. The bulk of ship-generated garbage is still permitted to be discharged further out at sea.

A draft environmental assessment of these regulations has been prepared and may be inspected or copied at the address indicated in paragraph of **ADDRESSES** above.

Paperwork Reduction Act

This proposal would change the information collection requirements at 33 CFR 151.65 and 33 CFR 158.40. Revisions to existing OMB paperwork approvals have been submitted to the Office of Management and Budget (OMB) for these proposed regulations. They have been assigned RCS/OMB Control Numbers 2115–0544 and 2115–0543 respectively. This proposal would make it mandatory for masters to give 24 hours notice of the need for an APHIS approved reception facility and for all ports and terminals which meet the requirements of 33 CFR 158.40 to apply for a COA for Garbage. This proposal is discussed in the preamble of this notice under "Supplementary Information." Persons desiring to comment on this information collection requirement should submit their comments to the Office of Management and Budget at the address listed in the fifth paragraph of **ADDRESSES** above. A copy of these comments should also be submitted to the Coast Guard at the address shown in the first paragraph of **ADDRESSES** above.

Federalism Statement

This notice of proposed rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the concepts discussed therein do not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Regulatory Information Number (RIN)

A regulatory information number has been assigned to this regulatory action and it is listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center (RISC) publishes the Unified Agenda in April and October of each year. The RIN number listed at the heading of this document can be used to cross reference this action with the Unified Agenda.

BILLING CODE 4910-14-M

APPENDIX A

WORKSHEET FOR ESTIMATING DEMAND FOR GARBAGE RECEPTION FACILITIES

NAME OF TERMINAL/PORT _____

ADDRESS _____

_____

_____

_____

telephone _____

telex _____

I. DOMESTIC WASTE- Complete those sections corresponding to the vessel types visiting your terminal or port.

1kg= 2.2 pounds
1 pound=.45 kg

1. HARBOR VESSEL SECTION:

Harbor vessels are considered vessels that do not leave the vicinity of the terminal /port and are, therefore, always in restricted waters.**

A. ENTER number of harbor vessels using the terminal/port during a peak seven-day period _____ vessels/week

B. ENTER average duration of harbor vessel activity at terminal/port with persons aboard. _____ days

C. ENTER average number of persons on board a typical harbor vessel. _____ persons/vessel

D. CALCULATE domestic garbage resulting from harbor vessels. [ ] kg/week

A x B x C x 1

(Note: average generation rate on harbor vessels is assumed to be 1.0 kg/person-day)

2. INLAND AND COASTAL WATERWAY VESSEL SECTION:

*Inland and coastal waterway vessels are considered vessels which do not travel beyond the offshore limits and are usually in restricted waters.***

E. ENTER number of inland/coastal vessels entering the terminal/port during a peak seven-day period. _____ vessels/week

F. ENTER average duration of inland/coastal vessel stay at terminal/port (with persons aboard) plus average duration of voyage to terminal/port through restricted waters.** _____ days

G. ENTER average number of persons on board a typical inland/coastal vessel. _____ persons/vessel

H. CALCULATE domestic garbage resulting from inland/coastal vessels. [ ] kg/week

E x F x G x 1.5

(Note: average generation rate on inland/coastal vessels is assumed to be 1.5 kg/person-day)

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* All formulae are based on the Marine Environmental Protection Committee paper 25/WP. 10 entitled, "DRAFT GUIDELINES FOR THE IMPLEMENTATION OF ANNEX V, REGULATIONS FOR THE PREVENTION OF POLLUTION BY GARBAGE FROM SHIPS."

** Restricted waters as used here means the "Navigable Waters of The U.S." as defined in 33 Code of Federal Regulations Part 2.05-25. [These waters include the Territorial seas (3 miles off shore), lakes, bays, sounds, rivers and intercoastal waterways.]

II. CARGO ASSOCIATED WASTE

Complete this section only if your facility unloads dry bulk, break bulk, or containerized cargo.

R. ENTER total amount of break bulk cargo received during a peak seven-day period. _____ kg/week

S. ENTER total amount of dry bulk cargo received during a peak seven-day period. _____ kg/week

T. ENTER total amount of containerized cargo received during a peak seven-day period. _____ kg/week

U. CALCULATE total cargo associated waste. [ ] kg/week

$$\frac{R}{123} + \frac{S}{10000} + \frac{T}{25000}$$

III ALL OTHER GARBAGE WASTE

V. ENTER average duration of a vessel stay (for all vessels in facility) at terminal/port plus average duration of transit through restricted waters**. _____ days

W. ENTER average quantity of all other garbage waste generated daily from typical vessel. [This should include such wastes as scraped paint, rust waste, sweeping waste and engine room maintenance waste.] _____ kg/vessel-day

X. CALCULATE all other waste per vessel. [ ] kg/vessel

V x W

Y. ENTER average number for vessels (all types) at terminal/port during peak seven-day period _____ vessels

Z. CALCULATE total of all other garbage waste for all vessels. [ ] kg/week

X x Y

AA. CALCULATE total garbage capacity demand from vessels visiting this facility. [ ] kg/week

Q + U + Z

WORKSHEET EXAMPLE:

Thrifty Services owns a waterfront terminal which offloads 3 oceangoing oil tankers per week. These vessels arrive from the far east every week and stay inport for three days and then depart once again for the far east. Two of the vessels have a crew complement of ten persons. The remaining vessel only has a crew of eight. There is an eight hour passage through restricted waters before arriving at the terminal. Besides the domestic waste, vessels usually generate about 20 kg of other garbage per day. This garbage consists of sweeping waste, scraped paint waste, rust waste and engineroom maintenance waste.

For this particular case, since the terminal only receives oceangoing vessels and those vessels only carry oil in bulk only sections I.3., I.5. and III. would be completed on the worksheet as shown below:

I. DOMESTIC WASTE (cont)

3. SEAGOING CARGO VESSEL SECTION:

I. ENTER number of seagoing cargo vessels entering terminal/port during a peak seven-day period.	3	vessels / week
J. ENTER average duration of seagoing cargo vessel stay in terminal/port plus average duration of voyage to terminal/port through restricted waters.**	3.3	days
K. ENTER average number of persons on board a typical seagoing cargo vessel.	9.3	persons / vessel
L. CALCULATE domestic garbage resulting from seagoing cargo vessels.	92.1 I x J x K x 2	kg / week

(Note: average generation rate on seagoing cargo vessels is assumed to be 2.0 kg/person-day)

5. TOTAL DOMESTIC GARBAGE

Q. CALCULATE combined domestic weight of garbage generated by all vessels.	92.1 D + H + L + P	kg / week

III. ALL OTHER GARBAGE WASTE

V. ENTER average duration of a vessel stay (for all vessels in facility) at terminal/port plus average duration of transit through restricted waters.**	3	days
W. ENTER average quantity of all other garbage waste generated daily from typical vessel. [This should include such wastes as scraped paint, rust waste, sweeping waste and engine room maintenance waste.]	20	kg / vessel-day
X. CALCULATE all other waste per vessel.	60 V x W	kg / vessel
Y. ENTER average number for vessels (all types) at terminal/port during peak seven-day period	3	vessels
Z. CALCULATE the total of all other garbage waste for all vessels.	180 X x Y	kg / week
AA. CALCULATE total garbage capacity demand from vessels visiting this facility.	272.1 Q + U + Z	kg / week

APPENDIX B:

APPLICATION FOR A RECEPTION FACILITY CERTIFICATE OF ADEQUACY FOR GARBAGE

FORM C

This form should take no longer than 15 Minutes to complete.

The Act to Prevent Pollution From Ships (33 USC 1901) authorizes the Department of Transportation to issue certificates to Terminals and Ports verifying their adequacy to receive operational garbage from ships. Regulations implementing this program are in 33 CFR Code of Federal Regulations Part 158. To continue to recieve ships at a port or terminal an applicant must hold a Certificate of Adequacy for Garbage if it recieves oceangoing tankers, or any other oceangoing ship of 400 gross tons or more, carrying residues and mixtures containing oil; or if it recieves oceangoing ships carrying Noxious Liquid substances. To recieve a Certificate of Adequacy for Garbage application is required on FORM C.

Definitions:

"Terminal": an onshore facility or an offshore structure located in the navigable waters of the United States or subject to the juristiction of the United States and used, or intended to be used, as facility for the transfer or other handling of a harmful substance. The definition of "navigable waters" for the purposes of this section may be found in 33 CFR 2.05-25.

"Port": (1) a group of terminals that combines to act as a unit and be considered a port for purposes of this part; or (2) A port authority or other organization that chooses to be considered a port for purposes of this part. For the purposes of Annex V of Marpol 73/78 Port also means a commercial fishing facility, recreational boating facility and a mineral and oil industry shorebase.

A. Terminal Section:

Complete this section if you are applying as a single terminal.

1.

Name of Terminal

Street Address

City State Zip

Name of Terminal Person in charge

Phone number ( ) -
area code

After completing this section go to Section C.

2. Check the following boxes if the terminal receives or discharges any of the following cargoes from vessels visiting the terminal:

☐ Oil	☐ Discharge	☐ Receive
☐ Oily wastes	☐ Discharge	☐ Receive
☐ Fuel	☐ Discharge	☐ Receive
☐ Bulk dry cargo	☐ Discharge	☐ Receive
☐ Explosives	☐ Discharge	☐ Receive
☐ Hazardous Substances	☐ Discharge	☐ Receive
☐ Fish	☐ Discharge	☐ Receive
☐ Other	☐ Discharge	☐ Receive

3. Check the following boxes if the terminal handles or services any of the following vessels:

- ☐ Vessels of Foreign registry
- ☐ U.S. Vessels in domestic trade
- ☐ U.S. Vessels in foreign trade
- ☐ Passenger vessels
- ☐ Vessels servicing the offshore Mineral and oil industry
- ☐ Unmanned Barges
- ☐ Chemical ships
- ☐ Container ships
- ☐ Break bulk ships
- ☐ Ferry boat ships
- ☐ Fishing ships

B. Port Section:

Complete this section if you are applying as a PORT.

1.

Name of Port

Street Address

City State Zip

Name of Port Person in charge

Phone number ( ) -
area code

Number of Terminals which will be members of this Port?_____

B. Port Section (cont) Individual terminal data:

Ports are to complete the following entries for each individual terminal which is a member of the port.

2.

Name of Terminal

Street Address

City State Zip

Name of Terminal Person in charge

Phone number ( ) -
area code

Signature of Person in Charge of Terminal
Signature indicates Terminal Acknowledges that terminal agrees and consents to being considered as a member of the port, described in Section B.

3. Check the following boxes if the terminal receives or discharges any of the following cargoes from vessels visiting the terminal:

☐Oil ☐Discharge ☐Receive
☐Oily wastes ☐Discharge ☐Receive
☐Fuel ☐Discharge ☐Receive
☐Bulk dry cargo ☐Discharge ☐Receive
☐Explosives ☐Discharge ☐Receive
☐Hazardous Substances ☐Discharge ☐Receive
☐Fish ☐Discharge ☐Receive
☐Other ☐Discharge ☐Receive

4. Check the following boxes if the terminal handles or services any of the following vessels:

☐Vessels of Foreign registry
☐U.S. Vessels in domestic trade
☐U.S. Vessels in foreign trade
☐Passenger vessels
☐Vessels servicing the offshore Mineral and oil industry
☐Unmanned Barges
☐Chemical ships
☐Container ships
☐Break bulk ships
☐Ferry boat ships
☐Fishing ships

2.

Name of Terminal

Street Address

City State Zip

Name of Terminal Person in charge

Phone number ( ) -
area code

Signature of Person in Charge of Terminal
Signature indicates Terminal Acknowledges that terminal agrees and consents to being considered as a member of the port, described in Section B.

3. Check the following boxes if the terminal receives or discharges any of the following cargoes from vessels visiting the terminal:

☐Oil ☐Discharge ☐Receive
☐Oily wastes ☐Discharge ☐Receive
☐Fuel ☐Discharge ☐Receive
☐Bulk dry cargo ☐Discharge ☐Receive
☐Explosives ☐Discharge ☐Receive
☐Hazardous Substances ☐Discharge ☐Receive
☐Fish ☐Discharge ☐Receive
☐Other ☐Discharge ☐Receive

4. Check the following boxes if the terminal handles or services any of the following vessels:

☐Vessels of Foreign registry
☐U.S. Vessels in domestic trade
☐U.S. Vessels in foreign trade
☐Passenger vessels
☐Vessels servicing the offshore Mineral and oil industry
☐Unmanned Barges
☐Chemical ships
☐Container ships
☐Break bulk ships
☐Ferry boat ships
☐Fishing ships

2.

Name of Terminal

Street Address

City State Zip

Name of Terminal Person in charge

Phone number ( ) -
area code

Signature of Person in Charge of Terminal
Signature indicates Terminal Acknowledges that terminal agrees and consents to being considered as a member of the port, described in Section B.

3. Check the following boxes if the terminal receives or discharges any of the following cargoes from vessels visiting the terminal:

☐Oil ☐Discharge ☐Receive
☐Oily wastes ☐Discharge ☐Receive
☐Fuel ☐Discharge ☐Receive
☐Bulk dry cargo ☐Discharge ☐Receive
☐Explosives ☐Discharge ☐Receive
☐Hazardous Substances ☐Discharge ☐Receive
☐Fish ☐Discharge ☐Receive
☐Other ☐Discharge ☐Receive

4. Check the following boxes if the terminal handles or services any of the following vessels:

☐Vessels of Foreign registry
☐U.S. Vessels in domestic trade
☐U.S. Vessels in foreign trade
☐Passenger vessels
☐Vessels servicing the offshore Mineral and oil industry
☐Unmanned Barges
☐Chemical ships
☐Container ships
☐Break bulk ships
☐Ferry boat ships
☐Fishing ships

This page may be locally reproduced to accomodate larger Ports

Section C.

1. Does the terminal or port receive more than 25 visits from vessels arriving from foreign ports (except Canada), Hawaii or any territories or possessions of the United States?

☐ Yes

☐ No *If the answer is "NO" go to question No. 3*

2. Does the terminal or port have facilities approved by the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, for the disposal of garbage from foreign ports (except Canada), Hawaii or any Territories or Possessions of the United States in accordance with Title 9 Code of Federal Regulations Part 94.

☐ Yes

☐ No *(If the answer is "No" you may attach a waiver request in accordance with 33 CFR 158 on a separate attached sheet.)*

NAME OF APHIS APPROVED FACILITY TYPE (INCINERATOR, STERILIZER, AUTOCLAVE, ETC.)

City State Phone Number

3. For those terminal(s)/port(s) requiring the services of an Animal and Plant Health Inspection Service approved facility, would the terminal or port receive all garbage from these ships visiting the terminal/port within 24 hours of vessel after notification of need for such services is given?

☐ Yes

☐ No *(If the answer is "No" you may attach a waiver request in accordance with 33 CFR 158 on a separate attached sheet.)*

4. Is the terminal or port able to receive all garbage as defined in 33 CFR 158.120 which the master or person in charge of a ship desires to discharge, except:

(1) large quantities of spoiled or damaged cargoes not normally expected to be discharged by a ship; or

(2) garbage from ships not having commercial transactions with that terminal or port?

☐ Yes

☐ No *(If the answer is "No" you may attach a waiver request in accordance with 33 CFR 158 on a separate attached sheet.)*

The terminal/port person in charge identified in the Application shall notify the U. S. Coast Guard Captain of the Port (COTP) in writing 30 days after any of the terminal/port information supplied under 33 CFR 158.165(b)(3) changes.

Civil Penalties. A person who after notice and an opportunity for a hearing, is found:

a. to have made a false, fictitious or fraudulent statement or representation in any matter in which a statement or representation is required to be made under the Act to Prevent Pollution from Ships, or the regulations thereunder, shall be liable to the United States for a civil penalty, not to exceed $5,000 for each statement or representation; or

b. to have violated the Act to Prevent Pollution from Ships, or the regulations issued therunder, shall liable to the United States for a civil penalty, not to exceed $25,000 for each violation.

CERTIFICATION

I HEREBY CERTIFY THAT THE INFORMATION PROVIDED IN THIS APPLICATION FOR A GARBAGE RECEPTION FACILITY CERTIFICATE OF ADEQUACY FOR RECEPTION FACILITIES RECEIVING GARBAGE IS COMPLETE, TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

SIGNATURE OF TERMINAL/PORT PERSON IN CHARGE _____

PRINTED OR TYPED NAME OF PERSON IN CHARGE _____

DATE SIGNED _____

Section D:

Circle the location of the USCG Captain of the Port Office which has authority in your area

Commanding Officer	USCG Marine Safety Office	Guam	1
Commanding Officer	USCG Marine Safety Office	Boston, MA	2
Commanding Officer	USCG Marine Safety Office	Portland, ME	3
Commanding Officer	USCG Marine Safety Office	Providence, RI	4
Commanding Officer	USCG Marine Safety Office	Huntington, WV	5
Commanding Officer	USCG Marine Safety Office	Louisville, KY	6
Commanding Officer	USCG Marine Safety Office	Memphis, TN	7
Commanding Officer	USCG Marine Safety Office	Paducah, KY	8
Commanding Officer	USCG Marine Safety Office	Pittsburgh, PA	9
Commanding Officer	USCG Marine Safety Office	St. Louis, MO	10
Commanding Officer	USCG Marine Safety Office	Baltimore, MD	11
Commanding Officer	USCG Marine Safety Office	Hampton Roads, VA	12
Commanding Officer	USCG Marine Safety Office	Wilmington, NC	13
Commanding Officer	USCG Marine Safety Office	Charleston, SC	14
Commanding Officer	USCG Marine Safety Office	Jacksonville, FL	15
Commanding Officer	USCG Marine Safety Office	San Juan, PR	16
Commanding Officer	USCG Marine Safety Office	Savannah, GA	17
Commanding Officer	USCG Marine Safety Office	Tampa, FL	18
Commanding Officer	USCG Marine Safety Office	Chicago, IL	19
Commanding Officer	USCG Marine Safety Office	Corpus Christi, TX	20
Commanding Officer	USCG Marine Safety Office	Galveston, TX	21
Commanding Officer	USCG Marine Safety Office	Port Arthur, TX	22
Commanding Officer	USCG Marine Safety Office	Mobile, AL	23
Commanding Officer	USCG Marine Safety Office	Buffalo, NY	24
Commanding Officer	USCG Marine Safety Office	Cleveland, OH	25
Commanding Officer	USCG Marine Safety Office	Detroit, MI.	26
Commanding Officer	USCG Marine Safety Office	Duluth, MN	27
Commanding Officer	USCG Marine Safety Office	Milwaukee, WI	28
Commanding Officer	USCG Marine Safety Office	Toledo, OH	29
Commanding Officer	USCG Marine Safety Office	Long Beach, CA	30
Commanding Officer	USCG Marine Safety Office	San Diego, CA	31
Commanding Officer	USCG Marine Safety Office	San Francisco, CA	32
Commanding Officer	USCG Marine Safety Office	Portland, OR	33
Commanding Officer	USCG Marine Safety Office	Honolulu, HI	34
Commanding Officer	USCG Marine Safety Office	Anchorage, AK	35
Commanding Officer	USCG Marine Safety Office	Juneau, AK	36
Commanding Officer	USCG Marine Safety Office	Valdez, AK	37
Commanding Officer	USCG Marine Safety Office	Puget Sound, WA	38
Commanding Officer	USCG Marine Safety Office	Morgan City, LA	39
Commanding Officer	USCG Marine Safety Office	Miami, Fl	40
Commanding Officer	USCG Marine Safety Office	Philadelphia, PA	41
Commanding Officer	USCG Marine Safety Office	New Orleans, LA	42
Captain of the Port, New Haven	USCG Group Long Island Sound	New Haven, CT	43
Captain of the Port, New York	USCG Group New York	New York, NY	44
Captain of the Port, Houston	Port Safety Station Houston	Houston, TX	45
Captain of the Port, Muskegon	USCG Group Muskegon	Muskegon, MI	46
Captain of the Port, Sault Ste. Marie	USCG Group Sault Ste. Marie	Sault Ste. Marie, MI	47

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List of Subjects

33 CFR Part 151

Oil pollution, Reporting and recordkeeping requirements, Water pollution control.

33 CFR Part 155

Oil pollution, Reporting and recordkeeping requirements.

33 CFR Part 158

Administrative practice and procedure, Harbors, Oil pollution, Penalties, Reporting and recordkeeping requirements, water pollution control.

46 CFR Part 25

Fire prevention, Marine safety.

In consideration of the preceding, it is proposed to amend Parts 151, 155 and 158 of Title 33, Code of Federal Regulations and Part 25 of Title 46, Code of Federal Regulations as follows:

1. The heading of Part 151 is revised to read as follows:

PART 151—OIL, NOXIOUS LIQUID SUBSTANCE AND GARBAGE REGULATIONS

2. The authority citation for Part 151 is revised to read as follows:

Authority: 33 U.S.C. 1321(j)(1)(C) and 1903(b), E.O. 11735, 49 CFR 1.46.

3. Section 151.01 is revised to read as follows:

§ 151.01 Purpose.

The purpose of this part is to implement the Act to Prevent Pollution from Ships, 1980, as amended (33 U.S.C. 1901–1911) and Annexes I (Oil), II (Noxious Liquid Substances) and V (Garbage) of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), done at London on February 17, 1978.

Note.—MARPOL 73/78 is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. Please include reference number "ADA 168 505" in your request.

4. Section 151.03 is revised to read as follows:

§ 151.03 Applicability.

This part applies to each ship that must comply with Annex I, II or V of MARPOL 73/78.

5. Section 151.05 is amended by adding the definitions for the terms "Dishwater", "Garbage", "Graywater", "Harmful substance", "Plastic", "Victual waste", in the proper alphabetical sequence and by revising the definitions of "Discharge", "Port", and "Special Area" to read as follows:

§ 151.05 Definitions.

* * * * *

"Discharge", as defined by MARPOL 73/78 in relation to harmful substances or effluent containing such substances, means any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying. It does not include—

(1) Dumping within the meaning of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done at London on November 13, 1972; or

(2) Release of harmful substances directly arising from the exploration, exploitation, and associated off-shore processing of seabed mineral resources; or

(3) Release of harmful substances for purposes of legitimate scientific research relating to pollution abatement or control. "Dishwater" means the liquid residue from the manual or automatic washing of dishes and cooking utensils which have been pre-cleaned to the extent that any food particles adhering to them would not normally interfere with the operation of automatic dishwashers.

* * * * *

"Garbage" means all kinds of victual, domestic and operational waste excluding fresh fish and parts thereof, generated during the normal operation of the ship and liable to be disposed of continuously or periodically, except dishwater, graywater and those substances that are defined or listed in other Annexes to MARPOL 73/78.

"Graywater" means drainage from dishwasher, shower, laundry, bath, and washbasin drains and does not include drainage from toilets, urinals, hospitals, and drainage from cargo spaces.

"Harmful substance" means any substance which, if introduced into the sea, is liable to create hazards to human health, harm living resources and marine life, damage amenities or interfere with other legitimate uses of the sea, and includes any substance subject to control by MARPOL 73/78.

* * * * *

"Plastic" means any garbage that is solid material that contains as an essential ingredient one or more synthetic organic high polymers and is formed or shaped during either manufacture of the polymer or fabrication into a finished product by heat or pressure or both.

Note.—Plastics possess material properties ranging from hard and brittle to soft and elastic. Plastics are used for a variety of marine applications including, but not limited to: Packing (vaporproof barriers, bottles, containers, liners), ship construction (fiberglass and laminated structures, siding, piping insulation, flooring, carpets, fabrics, adhesives, electrical and electronic components), disposable eating utensils and cups (including foamed products), bags, sheeting, floats, synthetic fishing nets, monofilament fishing line, strapping bands, hardhats, synthetic ropes and lines.

"Port" means:

(1) A group of terminals that combines to act as a unit and be considered a port for the purposes of this part;

(2) A port authoarity or other organization that chooses to be considered a port for the purposes of this part;

(3) A place or facility that has been specifically designated as a port by the Captain of the Port (COTP); or

(4) For the purposes of Annex V or MARPOL 73/78, terminals or facilities which provide wharfage or other services to ships, including but not limited to commercial fishing facilities, recreational boating facilities, or mineral and oil industry shorebases.

* * * * *

"Special area" means a sea area, where for recognized technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil, NLS, or garbage is required. Special areas for the purposes of Annex I of MARPOL 73/78 include those listed in § 151.13 and for the purposes of Annex V of MARPOL 73/78 include those listed in § 151.53.

* * * * *

"Victual waste" means any spoiled or unspoiled food waste.

6. Section 151.07 is revised to read as follows:

§ 151.07 Delegations.

Each Coast Guard official designated as a Captain of the Port (COTP) or Officer in Charge, Marine Inspection (OCMI) Or Commanding Officer, Marine Safety Office (MSO), is delegated the authority to:

(a) Issue International Oil Pollution Prevention (IOPP) Certificates;

(b) Detain or deny entry to ships not in substantial compliance with MARPOL 73/78 or not having an IOPP Certificate or evidence of compliance with MARPOL 73/78 on board;

(c) Receive and investigate reports under § 151.15; and

(d) Issue subpoenas to require the attendance of any witness and the production of documents and other evidence, in the course of investigations of potential violations of the Act to

Prevent Pollution from Ships, as amended (33 U.S.C. 1901–1911), this part, or MARPOL 73/78.

7. Section 151.08 is revised to read as follows:

§ 151.08 Denial of entry.

(a) Unless a ship is entering under force majeure, no oceangoing tanker or any other oceangoing ship of 400 gross tons or more required by § 151.10 to retain oil or oily residues and mixtures on board while at sea, and no oceangoing ship carrying a Category A, B or C NLS cargo or NLS residue in cargo tanks that are required to be prewashed under 46 CFR Part 153, may enter any port or terminal under § 158.110(a) of this chapter unless the port or terminal has a Certificate of Adequacy, as defined in § 158.120 of this chapter.

(b) A COTP may deny the entry of a ship to a port or terminal under § 158.110(b) if:

(1) The port or terminal does not have a Certificate of Adequacy, as required in § 158.135 of this chapter; or

(2) The port or terminal is not in compliance with the requirements of Subpart D of Part 158.

§ 151.10 [Redesignated from § 151.09]

8. Section 151.09 is redesignated as § 151.10.

9. A new § 151.09 is added to Subpart B to read as follows:

§ 151.09 Applicability.

(a) Except as provided in paragraph (b) of this section this subpart applies to each ship that:

(1) Is operated under the authority of the United States and engages in international voyages;

(2) Is operated under the authority of the United States and is certified for ocean service;

(3) Is operated under the authority of the United States and is certificated for coastwise service beyond three nautical miles from land;

(4) Is operated under the authority of the United States and operates at any time seaward of the outermost boundary of the territorial sea of the United States as defined in § 2.05–10 of this chapter; or

(5) Is operated under the authority of a country other than the United States while in the navigable waters of the United States, or while at a port or terminal under the jurisdiction of the United States.

(b) This subpart does not apply to:

(1) A warship, naval auxiliary, or other ship owned or operated by a country when engaged in noncommercial service;

(2) A Canadian or U.S. ship being operated exclusively on the Great Lakes of North America or their connecting and tributary waters;

(3) A Canadian or U.S. ship being operated exclusively on the internal waters of the United States and Canada (as defined in § 2.05–20 of this chapter); or

(4) Any other ship specifically excluded by MARPOL 73/78.

10. Section 151.11 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 151.11 Exceptions for emergencies.

(a) Sections 151.10 and 151.13 do not apply to:

* * * * *

11. Paragraphs (a) and (g) of § 151.13 are revised to read as follows:

§ 151.13 Special areas for Annex I of MARPOL 73/78.

(a) For the purposes of this subpart the special areas are the Mediterranean Sea area, the Baltic Sea area, the Black Sea area, the Red Sea area, and the "Gulfs Area" that are defined as follows:

(1) The Mediterranean Sea area means the Mediterranean Sea proper including the gulfs and seas therein, with the boundary between the Mediterranean and the Black Sea constituted by the 41° N parallel and bounded to the west by the Straits of Gibraltar at the meridian of 5°36′ W.

(2) The Baltic Sea area means the Baltic Sea proper with the Gulf of Bothnia, the Gulf of Finland and the entrance to the Baltic Sea bounded by the parallel of the Skaw in the Skagerrak at 57°44.8′ N.

(3) The Black Sea area means the Black Sea proper with the boundary between the Mediterranean Sea and the Black Sea constituted by the parallel 41° N.

(4) The Red Sea area means the Red Sea proper including the Gulfs of Suez and Aqaba bounded at the south by the rhumb line between Ras si Ane (12°8.5′ N, 43°19.6′ E) and Husn Murad (12°40.4′ N, 43°30.2′ E).

(5) The Gulfs area means the sea area located northwest of the rhumb line between Ras al Hadd (22°30′N, 59°48′ E) and Ras al Fasteh (25°04′ N, 61°25′ E).

* * * * *

(g) Nothing in this section prohibits a ship on a voyage, only part of which is in a special area, from discharging outside the special area in accordance with § 151.10

12. By revising § 151.30 to read as follows:

§ 151.30 Applicability.

(a) Except as provided in paragraph (b) of this section subpart applies to each ship that:

(1) Is operated under the authority of the United States and engages in international voyages;

(2) Is operated under the authority of the United States and is certificated for ocean service;

(3) Is operated under the authority of the United States and is certificated for coastwise service beyond three nautical miles from land;

(4) Is operated under the authority of the United States and operates at any time seaward of the outermost boundary of the territorial sea of the United States as defined in § 2.05–10 of this chapter; or

(5) Is operated under the authority of a country other than the United States while in the navigable waters of the United States, or while at a port or terminal under the jurisdiction of the United States.

(b) This subpart does not apply to:

(1) A tank barge whose certificate is endorsed by the Coast Guard for a limited short protected coastwise route if the barge is constructed and certificated primarily for service on an inland route;

(2) A warship, naval auxiliary, or other ship owned or operated by a country when engaged in noncommercial service;

(3) A Canadian or U.S. ship being operated exclusively on the Great Lakes of North America or their connecting and tributary waters;

(4) A Canadian or U.S. ship being operated exclusively on the internal waters of the of the United States and Canada as defined in § 2.05–20 of this chapter; or

(5) Any other ship specifically excluded by MARPOL 73/78.

13. Part 151 is amended by adding a new Subpart D to read as follows:

Subpart D—Garbage Pollution

Sec.

Sec.

Subpart D—Garbage Pollution

§ 151.51 Applicability.

(a) Except as provided by paragraph (b) of this section, this subpart applies to:

(1) Each ship that is of United States registry or nationality, or one operated under the authority of the United States, wherever located; and

(2) Each ship, other than a ship referred to in paragraph (a)(1) of this section, while in the navigable waters or the Exclusive Economic Zone of the United States.

Note to paragraph (a)(2).—The Exclusive Economic Zone extends from the baseline of the territorial sea seaward 200 miles as defined in the Presidential Proclamation 5030 of March 10, 1983 (3 CFR, 1983 COMP. p. 22).

(b) This subpart does not apply to:

(1) A warship, naval auxiliary, or other ship owned or operated by the United States when engaged in noncommercial service; or

(2) Any other ship specifically excluded by MARPOL 73/78.

§ 151.53 Special areas for Annex V of MARPOL 73/78.

For the purposes of this subpart the special areas are the Mediterranean Sea area, the Baltic Sea area, the Black Sea area, the Red Sea area, and the "Gulfs Area" that are defined as follows:

(a) The Mediterranean Sea area means the Mediterranean Sea proper including the gulfs and seas therein, with the boundary between the Mediterranean and the Black Sea constituted by 41° N parallel and bounded to the west by the Straits of Gibraltar at the meridian of 5°36′ W.

(b) The Baltic Sea area means the Baltic Sea proper with the Gulf of Bothnia, the Gulf of Finland and the entrance to the Baltic sea bounded by the parallel of the Skaw in the Skagerrak at 57°44.8′ N.

(c) The Black Sea area means the Black Sea proper with the boundary between the Mediterranean Sea and the Black Sea constituted by the parallel 41° N.

(d) The Red Sea area means the Red Sea proper including the Gulfs of Suez and Aqaba bounded at the south by the rhumb line between Ras si Ane (12°8.5′ N, 43°19.6′ E) and Husn Murad (12°40.4′ N, 43°30.2′ E).

(e) The Gulfs area means the sea area located northwest of the rhumb line between Ras al Hadd (22°30′ N, 59°48′ E) and Ras al Fasteh (25°04′ N, 61°25′ E).

Note to § 151.53.—In accordance with paragraph (4)(b) of Regulation 5 of Annex V of MARPOL 73/78, the discharge restrictions for special areas in § 151.71 will go into effect when the government of each party country whose coastline borders a special area has notified IMO that reception facilities are available at all of its ports within the special area and IMO has then established an effective date for the special area and notified all party states no less than 12 months before the effective date. Notice of these effective dates will be published in the Federal Register and added to this note.

§ 151.55 Recordkeeping requirements. [Reserved]

§ 151.57 Waste management plans. [Reserved]

§ 151.59 Placards. [Reserved]

§ 151.61 Inspection for compliance and enforcement.

While within the navigable waters of the United States or the Exclusive Economic Zone, a ship to which this subpart applies is subject to inspection by the Coast Guard or other authorized federal agency to determine if:

(a) The ship has been operating in accordance with these regulations and has not discharged plastics or other garbage in violation of the provisions of Annex V of MARPOL 73/78;

(b) Grinders or comminuters used for discharge of garbage between 3 and 12 nautical miles from nearest land are capable of reducing the size of garbage so that it will pass through a screen with openings no greater than 25 millimeters (one inch);

(c) Information for recordkeeping requirements, when required under section § 151.55, is properly and accurately logged;

(d) A waste management plan, when required under § 151.57, is on board and that the condition of the ship, equipment and operational procedures of the ship meet the plan; and

(e) Placards, when required by § 151.59, are posted on board.

§ 151.63 Control of discharge of plastic or garbage.

(a) Unless the master, operator, or person who is in charge of a ship can show that plastic requiring disposal is not generated aboard the ship, that person shall meet either paragraph (a)(1) or (a)(2) of this section:

(1) Where plastic is separated throughout the ship for shoreside disposal or for incineration on board ship, all remaining garbage must be:

(i) Incinerated on board the ship;

(ii) Discharged in accordance with § 151.69, § 151.71 or § 151.73; or

(iii) Retained on board for disposal ashore to a reception facility; or

(2) Where plastic is not separated from other types of garbage throughout the ship:

(i) All mixed garbage generated on the ship must be incinerated on board ship or retained for disposal ashore at a reception facility;

(ii) Any garbage that does not contain plastic, may be incinerated on board the ship, discharged in accordance with § 151.69, § 151.71 or § 151.73, or retained on board for disposal ashore to a reception facility.

(b) If the master, operator, or person who is in charge of a ship is unable to show that plastic for disposal is not generated aboard the ship, or show compliance with paragraph (a)(1) or (a)(2) of this section, it will be presumed that Annex V of MARPOL 73/78 has been violated.

§ 151.65 Reporting requirements for garbage regulated by USDA.

If garbage regulated by the Animal and Plant Health Inspection Service (APHIS) of USDA is to be disposed of at a port or terminal located in the United States, or under the jurisdiction of the United States, the master or person who is in charge of each oceangoing ship shall notify the port or terminal at least 24 hours before entering the port or terminal of:

(a) The name of the ship; and

(b) The estimated volume of garbage requiring disposal at an approved APHIS facility.

§ 151.67 Operating requirements: Discharge of plastic.

No person on board any ship to which this subpart applies may discharge at sea, plastic or garbage mixed with plastic, including, but not limited to, synthetic ropes, synthetic fishing nets, and plastic garbage bags. All plastic must be incinerated or disposed of ashore.

§ 151.69 Operating requirements: Discharge of garbage outside special areas.

(a) When operating outside of a special area specified in § 151.53, any person who does not retain garbage on board for later shoreside disposal may discharge garbage that is separated from plastic, if the distance from nearest land is more than:

(1) 25 nautical miles for dunnage, lining and packing materials that float; or

(2) 12 nautical miles for victual wastes and all other garbage including paper products, rags, glass, metal, bottles,

crockery and similar refuse, except that, such garbage may be discharged outside of three nautical miles from nearest land after it has been passed through a grinder or comminuter specified in § 151.75.

(b) Mixtures of garbage having different discharge requirements under paragraph (a)(1) or (a)(2) of this section must be:

(1) Retained on board for later disposal ashore; or

(2) Discharged in accordance with the more stringent requirement prescribed by paragraph (a)(1) or (a)(2) of this section.

§ 151.71 Operating requirements: Discharge of garbage within special areas.

When a ship is located in a special area listed in § 151.53, no person may discharge garbage, except victual waste may be discharged beyond 12 nautical miles from nearest land.

§ 151.73 Operating requirements: Discharge of garbage from fixed or floating platforms.

(a) Except as allowed in paragraph (b) of this section, no person may discharge garbage from:

(1) A fixed or floating platform engaged in the exploration, exploitation or associated offshore processing of seabed mineral resources; or

(2) Any ship within 500 meters (1650 feet) of such platforms.

(b) Victual waste may be discharged into the sea from a ship or fixed or floating platform regulated by paragraph (a) of this section if:

(1) It passes through a comminuter or grinder meeting § 151.75; and

(2) That ship or fixed or floating platform is beyond 12 nautical miles from nearest land.

§ 151.75 Grinders or comminuters.

Each grinder or comminuter used to discharge garbage in accordance with § 151.69(a)(2) or § 151.73(b) of this part, must be capable of processing garbage so that it passes through a screen with openings no greater than 25 millimeters (one inch).

§ 151.77 Exceptions for emergencies.

Sections 151.67, 151.69 and 151.71 of this subpart do not apply to the following:

(a) Discharges of garbage from a ship for the purpose of securing the safety of a ship and those on board or saving life at sea.

(b) The escape of garbage resulting from damage to a ship or its equipment, if all reasonable precautions have been taken before and after the occurrence of the damage, to prevent or minimize the escape.

(c) The accidental loss of synthetic fishing nets or the loss of synthetic material during repair of nets, provided all reasonable precautions have been taken to prevent such losses.

§ 151.81 Penalties for violation.

(a) A person who violates MARPOL 73/78 or the regulations of this part is liable for a civil penalty not to exceed $25,000 for each violation, as provided by 33 U.S.C. 1908(b)(1). Each day of a continuing violation constitutes a separate violation.

(b) A person who knowingly violates MARPOL 73/78 or the regulations of this part is subject to a fine for each violation, of not more than $50,000 dollars or imprisonment for not more than 5 years, or both, as provided by 33 U.S.C. 1908(a).

(c) A ship operated in violation of MARPOL 73/78 or the regulations of this part is liable in rem for any fine imposed under paragraph (a) of this section or civil penalty assessed pursuant to paragraph (b) of this section, and may be proceeded against in the United States district court of any district in which the ship may be found.

PART 155—[AMENDED]

14. The authority citation to Part 155 is revised to read as follows and the authority citations following the sections are removed:

Authority: 33 U.S.C. 1231; 49 CFR 1.46 except 155.450, 155.700, and 155.710 which are issued under 33 U.S.C. 1321(j)(i)(C), E.O. 11735, as amended, 3 CFR, 1971–1975 COMP. p. 793, 49 CFR 1.46. Sections 155.100, 155.110, 155.120, 155.130, 155.350, 155.360, 155.370, 155.380, 155.390, 155.400, 155.430, 155.440, and 155.470 are also issued under 33 U.S.C. 1903(b); 49 CFR 1.46.

15. Section 155.350(a)(2) is revised to read as follows:

§ 155.350 Bilge slops/fuel oil tank ballast water discharges on oceangoing ships of less than 400 gross tons.

(a) * * *

(2) Has approved oily-water separating equipment for the processing of oily bilge slops or oily fuel oil tank ballast and discharges into the sea in accordance with § 151.10.

* * * * *

16. Section 155.400(b)(2) is revised to read as follows:

§ 155.400 Platform machinery space drainage on oceangoing fixed and floating drilling rigs and other platforms.

* * * * *

(b) * * *

(2) Discharge in accordance with § 151.10(b)(3), (b)(4) and (b)(5) of this chapter.

* * * * *

17. The authority citation for Part 158 is revised to read as follows:

Authority: 33 U.S.C. 1903(b); 49 CFR 1.46.

18. The heading of Part 158 is revised to read as follows:

PART 158—RECEPTION FACILITIES FOR OIL, NOXIOUS LIQUID SUBSTANCES, AND GARBAGE

19. The heading of Subpart A is revised to read as follows:

Subpart A—General

20. The undesignated center heading for §§ 158.100—158.165, "General" is removed.

21. Section 158.100(b) is revised to read as follows:

§ 158.100 Purpose.

* * * * *

(b) Procedures for certifying that reception facilities are adequate for receiving:

(1) Residues and mixtures containing oil from oceangoing tankers and any other oceangoing ships of 400 gross tons or more;

(2) NLS residue from oceangoing ships; or

(3) Garbage from ships.

* * * * *

22. Section 158.110 is revised to read as follows:

§ 158.110 Applicability.

(a) Subparts B, C, and E apply to each port and each terminal located in the United States or subject to the jurisdiction of the United States that is:

(1) Used by oceangoing tankers, or any other oceangoing ships of 400 gross tons or more, carrying residues and mixtures containing oil, or by oceangoing ships to transfer NLSs, except those ports and terminals that are used only by:

(i) Non-self-propelled tank barges that are not configured and are not equipped to ballast or wash cargo tanks while proceeding enroute;

(ii) Ships carrying NLS operating under waivers under 46 CFR 153.491(b); or

(iii) A ship repair yard that services oceangoing ships carrying oil or NLS residue.

(b) Subpart D applies to each port and terminal located in the United States or subject to the jurisdiction of the United States, including but not limited to deepwater ports, commercial fishing facilities, mineral and oil industry shorebases, and recreational boating facilities.

23. Section 158.120 is amended by adding definitions for the terms "Commercial fishing facility", "Form C", "Garbage", "Harmful substance",

"Mineral and oil industry shorebase", "Recreational boating facility", in the proper alphabetical sequence and by revising the definitions of "Certificate of Adequacy", "Port", "Reception facility" and "The Act", to read as follows:

§ 158.120 Definitions and acronyms.

* * * * *

"Certificate of Adequacy (COA)" means a document issued by the Coast Guard or other authorized agency that certifies a port or terminal meets the requirements of this part with respect to reception facilities required under MARPOL 73/78, and has Form A, Form B, or Form C attached.

* * * * *

"Commercial fishing facility" means a port that includes docks or other facilities where commercial fishing vessels offload their catch. "Form C" means the application for a reception facility Certificate of Adequacy for Garbage, Coast Guard form USCG–CG–5401C.

"Garbage" means all kinds of victual, domestic and operational waste, excluding fresh fish and parts thereof, generated during the normal operation of the ship and liable to be disposed of continuously or periodically, except those substances that are defined or listed in other Annexes to MARPOL 73.78.

"Harmful substance" means any substance which, if introduced into the sea, is liable to create hazards to human health, harm living resources and marine life, damage amenities or interfere with other legitimate uses of the sea, and includes any substance subject to control by MARPOL 73/78.

* * * * *

"Mineral and oil industry shorebase" means a port which is primarily a base of operation for ships serving the mineral and oil industry.

* * * * *

"Port" means:

(1) A group of terminals that combines to act as a unit and be considered a port for the purposes of this part;

(2) A port authority or other organization that chooses to be considered a port for the purposes of this part;

(3) A place or facility that has been specifically designated as a port by the Captain of the Port (COTP); or

(4) For the purposes of Annex V of MARPOL 73/78, facilities which provide wharfage or other services to ships, including but not limited to commercial fishing facilities, recreational boating facilities, or mineral and oil industry shorebases. "Reception facility" means anything capable of receiving shipboard residues and mixtures containing oil or NLS residue, or receiving garbage, including, but not limited to:

(1) Fixed piping that conveys residues and mixtures for the ship to a storage or treatment system;

(2) Tank barges, railroad cars, tank trucks, or other mobile facilities;

(3) Containers or other receptacles that are used as temporary storage for garbage; or

(4) Any combination of fixed and mobile facilities. "Recreational boating facility" means recreational vessels. It includes but is not limited to marinas, boatyards, and yacht clubs. It does not include a place or facility containing only an unattended launching ramp.

* * * * *

"The Act" means the Act to Prevent Pollution from Ships, as amended, (33 U.S.C. 1901–1911).

24. Section 158.130 is revised to read as follows:

§ 158.130 Delegations.

Each COTP is delegated the authority to:

(a) Conduct inspections at ports and terminals required to have reception facilities under this part;

(b) Issue Certificates of Adequacy;

(c) Grant waivers under § 158.150;

(d) Designate ports; and

(e) Deny entry of ships to any port or terminal, except when a ship is entering under force majeure, that does not have—

(1) A COA if required under § 158.135; or

(2) Garbage reception facilities required under Subpart D of this part.

25. Part 158 is amended adding § 158.135 to read as follows:

§ 158.135 Who must have Certificates of Adequacy?

To continue to receive ships, a port or terminal must hold one or more of the following

(a) A COA for oil if it receives oceangoing tankers, or any other oceangoing ship of 400 gross tons or more, carrying residues and mixtures containing oil;

(b) A COA for NLS residue if it receives oceangoing ships carrying NLSs; or

(c) A COA for garbage if it receives the ships under paragraph (a) or (b) of this section.

26. Section 158.140 is revised to read as follows:

§ 158.140 Applying for a Certificate of Adequacy.

(a) To continue to receive ships, a port or terminal required by § 158.135 to have a COA for its reception facilities, the person in charge must apply to the Coast Guard for a certificate as follows:

(1) Applicants for a COA required by § 158.135 (a) or (b) must apply to the COTP of the Zone in which the port or terminal is located using Form A or Form B, respectively.

(2) Before June 30, 1989, an applicant for a COA required by § 158.135(c) must apply on Form C to: Commandant (G–MPS–1), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001, Attention: Annex V Reception Facility Desk. On or after June 30, 1989 applicants must apply on Form C to the COTP of the Zone in which the port or terminal is located.

(b) Applications for Certificates of Adequacy (Forms A, B, and C) may be obtained from the local Coast Guard COTP.

27. Section 158.160 is revised to read as follows:

§ 158.160 Issuance and termination of a Certificate of Adequacy.

(a) After reviewing an application made under § 158.140(a)(1), the COPT determines by inspection the following:

(1) When the application is made on Form A, whether or not the reception facility meets Subpart B of this part.

(2) When the application is made on Form B, whether or not the reception facility and the port, or the reception facility and the terminal, meet Subpart C of this part.

Note to paragraph (a).—If in the instruction manual required by § 158.330(b) there is a certification by a registered professional engineer licensed by a state or the District of Columbia that the backpressure requirements under § 158.330(a) are met, the COTP determines whether or not to accept this finding.

(b) After the inspections under paragraph (a) of this section are conducted, and after consulting with the Administrator of the Environmental Protection Agency (EPA) or his or her designee, the COTP:

(1) Issues a Certificate of Adequacy of the person in charge for the port or terminal; or

(2) Denies the application and informs the person in charge in writing of the reasons; for the denial.

(c) After reviewing an application made under § 158.140(a)(2), Commandant (G–MPS–1) or the COTP:

(1) Issues a COA to the person in charge for the port or terminal; or

(2) Denies the application and informs the person in charge in writing of the reasons for the denial.

(d) The COA has attached to it any waivers that are granted under § 158.150 when the COA is issued.

(e) Each COA remains valid until:
(1) Suspended;
(2) Revoked; or
(3) This part no longer applies to the port or terminal.

28. Section 158.163(b)(2) is revised to read as follows:

§ 158.163 Reception facility operations.

* * * * *

(b) * * *

(2) Available for inspection by the COTP and the master, operator, person who is in charge of a ship, or agent for a ship.

* * * * *

29. Section 158.165(b) is revised to read as follows:

§ 158.165 Certificate of Adequacy: Change of information.

* * * * *

(b) The person in charge shall notify the COTP in writing within 30 days after any information required in the following is changed:

(1) Form A, sections 1, 3B, 3C, 3E, 3F, 3I, or 3J.

(2) Form B, sections 1, 3, 4, 5B, 5D, 5E, 5F, or 5G.

(3) Form C, sections A1, B1, B2, or C3.

* * * * *

30. Part 158 is amended by adding § 158.167 to read as follows:

§ 158.167 Penalties for violation.

(a) A person who violates MARPOL 73/78 or the regulations of this part is liable for a civil penalty not to exceed $25,000 for each violation, as provided by 33 U.S.C. 1908(b)(1). Each day of a continuing violation constitutes a separate violation.

(b) A person who knowingly violates MARPOL 73/78 or the regulations of this part is subject to a fine for each violation, of not more than $50,000 dollars or imprisonment for not more than 5 years, or both, as provided by 33 U.S.C. 1908(a).

(c) A ship operated in violation of MARPOL 73/78 or the regulations of this part is liable in rem for any fine imposed under paragraph (a) of this section or civil penalty assessed pursuant to paragraph (b) of this section, and may be proceeded against in the United States district court of any district in which the ship may be found.

Subpart D—[Redesignated as Subpart E]

31. Subpart D of Part 158 is redesignated as Subpart E.

§ 158.400 [Redesignated as § 158.500]

32. Section 158.400 is redesignated § 158.500.

§ 158.420 [Redesignated as § 158.520]

33. Section 158.420 is redesignated § 158.520.

34. Part 158 is amended by adding a new Subpart D to read as follows:

Subpart D—Criteria for Adequacy of Reception Facilities: Garbage

Sec.
§ 158.400 Purpose.
§ 158.410 Reception facilities: General.
§ 158.420 Reception facilities: Capacity and exceptions.

Subpart D—Criteria for Adequacy of Reception Facilities: Garbage

§ 158.400 Purpose.

The purpose of this subpart is to supply the criteria for adequacy of reception facilities at ports and terminals that receive ships in order to comply with Regulation 7 of Annex V to MARPOL 73/78.

§ 158.410 Reception facilities: General.

(a) Except as allowed in paragraph (b) of this section, the person in charge of a port or terminal shall ensure that the port or terminal's reception facility:

(1) Is capable of receiving APHIS regulated garbage at the port or terminal no later than 24 hours after notice under § 151.65 of this chapter is given to the port or terminal;

(2) Is arranged so that it does not interfere with port or terminal operations and so that garbage that has been discharged from ships to it cannot readily enter the water; and

(3) Holds each federal, state, and local permit or license required by environmental and public health laws and regulations concerning garbage handling.

Note to paragraph (a)—The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) requires vessels disposing of victual wastes or garbage contaminated by victual wastes, except for vessels that operate only between the continental United States and Canadian ports, to incinerate or sterilize these victual wastes in accordance with their regulations in 7 CFR 330.400 and 9 CFR 94.5.

(b) A reception facility for a ship repair yard does not have to meet the requirements of paragraph (a)(1) of this section if it is capable of completing the transfer of garbage from a ship before the ship departs from the yard.

§ 158.420 Reception facilities: Capacity and exceptions.

Each day the port or terminal is in operation, the person in charge of a port or terminal must provide, or ensure the availability of, a reception facility that is capable of receiving all garbage that the master or person who is in charge of a ship desires to discharge, except:

(a) Large quantities of spoiled or damaged cargoes not usually discharged by a ship; or

(b) Garbage from ships not having commercial transactions with that port or terminal.

Chapter I of Title 46 Code of Federal Regulations is amended as follows:

35. The authority citation to Part 25 is revised to read as follows:

Authority: 33 U.S.C. 1903(b), 46 U.S.C. 3306, 4104, and 4302; 49 CFR 1.46.

36. Part 25 is amended by adding Subpart 25.50 to read as follows:

Subpart 25.50—Garbage Retention

Sec.
25.50–1 Criteria.

§ 25.50–1 Criteria.

Each vessel must retain all garbage generated on board the vessel for later shoreside disposal, unless it is discharged at sea as specified under 33 CFR Part 151.

Note: The Act to Prevent Pollution from Ships, as amended (33 U.S.C. 1901–1911), prohibits the discharge of all plastics into the navigable waters and the Exclusive Economic Zone of the United States and limits discharges of other types of garbage in these waters. See 33 CFR 151.05 for definitions of "Plastic" and "garbage."

Dated: August 29, 1988.

P.A. Yost,

Admiral, Commandant, U.S. Coast Guard.

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Part VI

Department of Housing and Urban Development

Assistant Secretary for Public and Indian Housing

24 CFR Part 968

Public Housing CIAP and Comprehensive Grant Programs; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Assistant Secretary for Public and Indian Housing

24 CFR Part 968

[Docket No. R-88-1423; FR-2488]

Public Housing CIAP and Comprehensive Grant Programs

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: The proposed rule would simplify the current CIAP program and establish the new Comprehensive Grant program, which would fund the modernization of public housing in a more flexible way for public housing agencies (PHAs) that own or operate a total of 500 or more public housing units. The new program will not become operational until Congress enacts a law revising the method for allocating assistance. The current CIAP program would be limited to PHAs with fewer than 500 units.

DATE: Comments must be received by December 27, 1988 to assure their consideration.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Office of the General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying during regular business hours in room 10276.

FOR FURTHER INFORMATION CONTACT: Nancy S. Chisholm, Director, Policy Staff, Public and Indian Housing, Department of Housing and Urban Development, Room 4118, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 755-6713. Hearing or speech impaired individuals may call HUD's TDD number (202) 426-0015. (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

I. PAPERWORK REDUCTION ACT OF 1980

The information collection requirements contained in this rule have been submitted to OMB for review under the Paperwork Reduction Act of 1980. No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the Federal Register. Public reporting burden for the collection of information requirements contained in this rule are estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the Preamble heading, *Findings and Certifications.* Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street SW., Room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

II. BACKGROUND

Part 968 now contains the regulations for the Public Housing Comprehensive Improvement Assistance program (CIAP program), which applies to all public housing, including housing owned or operated by Indian housing authorities (IHAs). The proposed rule would rename Part 968 as "Public Housing Modernization," and reorganize it by establishing a Subpart A, containing generally applicable provisions; Subpart B, setting forth the current CIAP program contained in Part 968, as revised by this proposed rule, but limiting its applicability to PHAs that own or operate fewer than 500 units; and Subpart C, setting forth the new Comprehensive Grant program for the larger PHAs. Part 968 would apply to all PHAs, except for IHAs. By separate rulemaking, HUD intends to consolidate all public housing regulations applicable to IHA housing in 24 CFR Part 905. In connection with publication of the final regulation, HUD will make conforming changes to cross references to Part 968 that are contained in other regulations in Chapter IX of Title 24.

A number of other regulations for the public housing program that may affect this part are at various stages of development. When this rule is published for effect, it will include appropriate amendments based on these other rulemakings.

III. PROGRAM DESCRIPTION

A. Subpart A—General Provisions Applicable to Part 968

1. Purpose and Applicability

Section 968.101 would set forth general statements of purpose and applicability for the revised Part 968. The purpose of the Public Housing Modernization program is to provide financial assistance to PHAs to improve the physical condition and upgrade the management and operation of public housing projects, to assure they continue to serve lower income families. Subpart A applies to all modernization under Part 968. Subpart B sets forth the requirements and procedures for the CIAP program for PHAs that own or operate fewer than 500 public housing units. Subpart C sets forth the requirements and procedures for the new Comprehensive Grant program for PHAs that own or operate 500 or more public housing units. For purposes of the 500 unit threshold, units under the Turnkey III and Mutual Help Homeownership Opportunities programs would be excluded, and nonviable units approved by HUD for use because no alternative housing is available would be included.

Part 968 applies to PHA-owned public housing (including Lanham Act and Public Works Administration projects) and to Section 23 Leased Housing Bond-Financed projects. It does not apply to projects under the Section 23 Leased Housing Non-Bond Financed or Section 10(c) Leased Housing programs, or to Section 23 or Section 8 Housing Assistance Payments program projects, which do not qualify as public housing and contain alternative means to fund necessary maintenance and capital improvements.

2. Indian Housing

The Department is planning to consolidate all public housing regulations for Indian Housing in Part 905 (see proposed rule, 53 FR 24554, published June 29, 1988). Accordingly, Part 968 would not apply to Indian housing. If the plan to consolidate the regulations in Part 905 does not go forward before the amendments proposed in this rule to Part 968 take effect, Indian housing will be made subject to this Part, which would be amended to take into account features unique to Indians, such as the Indian preference. Accordingly, persons interested in Indian Housing should comment on this proposed regulation as well as Part 905, since comments on both will be the basis for a Comprehensive Grant program for IHAs

that own or operate a total of 500 or more public housing units under either Part 905 or Part 968. HUD does not anticipate having to publish a separate proposed regulation to amend Part 905 or Part 968 for this purpose.

3. Definitions

Section 968.105 would contain certain key definitions necessary for an understanding of Subparts A, B, and C, including definitions of the U.S. Housing Act of 1937, ACC, CIAP program, Federal Fiscal Year, HUD, IHA, and PHA. Subparts B and C would contain their own definitions sections, and include some identical definitions to minimize the need to refer outside of the CIAP or Comprehensive Grant Program Subpart.

4. Miscellaneous Federal Requirements

Section 968.110 would contain a catalog of the principal Federal statutory and regulatory requirements that apply to this Part, including civil rights, environmental, wage rate, and lead-based paint requirements. The lead-based paint requirements have been extensively revised, consistent with the final rule published on June 6, 1988 (53 FR 20790). Paragraph (g) provides that, beginning on April 2, 1989, modernization under Part 968 will be subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Uniform Relocation Act Amendments of 1987, and implementing regulations. The Department of Transportation has the responsibility for issuing government-wide regulations implementing the 1987 amendments. While it is too early to say what these requirements will be, they will represent a change in relocation policies applicable to the modernization of public housing.

5. Modernization and Energy Conservation Standards

Section 968.115 would require all modernization under Part 968 to meet HUD's modernization standards and HUD's energy conservation standards for cost-effective conservation measures.

6. Preemption of State Prevailing Wage Requirements

Section 968.120 would contain the provisions preempting State prevailing wage requirements that were recently published for effect. (See 53 FR 30206, August 10, 1988.) Comparable provisions for tribal law would be added to Part 905.

B. Subpart B—CIAP Program Simplifications

Subpart B would set forth the regulations specifically applicable to the CIAP program. This Subpart is largely based on the existing Part 968. However, it would make a number of changes designed to simplify program administration, as described below. References are to the proposed new section designations, which are based on the numbering system in the proposed Indian rule, so that comparable sections share the last two digits of their section number (for example, proposed § 905.605, Eligible Costs, is § 968.205 in this proposed regulation). The following chart shows both the current and proposed section numbers for the various provisions.

Proposed	Proposed section heading	Current
968.201	Purpose and applicability.	968.1 and .2.
968.203	Definitions	968.3.
968.205	Eligible costs	968.4.
968.210	Procedures for obtaining approval of a modernization program.	968.5.
968.215	Modernization project	968.6.
968.220	Tenant participation	968.7.
968.225	Homebuyer participation.	968.8.
968.230	Special requirements for homeownership projects.	968.10.
968.235	Special requirements for section 23 leased housing bond-financed projects.	968.11.
968.240	Contracting requirements.	968.12.
968.245	Fund requisitions	968.13.
968.250	Budget revisions	968.15.
968.255	Fiscal closeout of a modernization program.	968.17.

1. One-Stage Application Process

Section 968.210 would be amended to expedite and simplify the current application process by eliminating the two-part (preliminary and final) application process and requiring only one application. The Department also intends to propose legislation to eliminate certain burdensome requirements described below. Information which is now submitted with the final application would be either submitted at the front-end with the application or at the time of joint review by HUD and the PHA or eliminated as a submission requirement. These changes would streamline the modernization application and approval process for smaller PHAs.

While PHAs would be required to submit a more complete application upfront, the selected applications would be able to reach the implementation stage faster. The Department invites comments on whether PHAs favor one-stage or two-stage processing. The Department also welcomes suggestions on any other ways these regulations could be shortened and simplified.

The application (§ 968.210(c)) would be required to contain:

a. A 5-year funding request plan, which is the PHA's estimate of the comprehensive modernization funds to be requested over a 5-year period to meet the total physical and management improvements needs of its projects;

b. A preliminary assessment of the physical and management improvement needs and the estimated costs of the project(s) for which the PHA is requesting modernization in the current year;

c. For each project proposed for comprehensive modernization, an identification of and an estimate of the total costs of replacement of equipment, systems, or structural elements that would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the application, whichever period is longer (the Department intends to propose legislation to drop this requirement since it is not possible for PHAs to project replacement needs over a 30-year period with sufficient accuracy to make this a useful planning tool);

d. A resolution by the PHA Board of Commissioners approving the application and containing various certifications.

e. Other information required by HUD. The proposed regulation would set forth the required contents of the PHA application with less specificity in order to make it easier to make changes to these requirements by handbook. The Department intends to continue to require PHAs to submit an organization and staffing plan and a statement on the locality's compliance with cooperation agreement.

If a PHA is selected for a joint HUD/PHA review (§ 968.210(e)), the PHA would conduct a comprehensive assessment for each project proposed for comprehensive modernization. The assessment would include: The current physical condition and the physical improvements necessary to meet the standards, and an identification of management needs and the improvements needed to upgrade the management and operation of each

project. The comprehensive assessment would include a plan for making the improvements and replacements and for meeting the needs including: (a) A project operating budget for each 12-month period covered by the plan, excluding modernization costs; and (b) an estimate of the financial resources to be available from all sources and the amount of modernization funds to be requested for each 12-month period covered by the plan. (The Department intends to propose legislation to drop the requirements to prepare an operating budget and an estimate of available resources for each 12-month period covered by the plan. It is not feasible for PHAs to project with sufficient accuracy to make these useful planning tools.)

After HUD funding decisions, the PHA would submit an implementation schedule (§ 968.210(j)) for each project in the approved modernization program.

2. Current Two-Stage Application Process.

Currently the preliminary application contains:

a. A 5-year funding request plan, which is the PHA's initial comprehensive assessment of the modernization funds to be requested over a five-year period to meet the total physical and management improvements needs of its project; and

b. An explanation of the priority order of the projects for which modernization funding is requested.

For joint review, the PHA completes a detailed comprehensive assessment of the total physical and management improvement needs of the projects for which the PHA is requesting modernization. The assessment includes the current physical condition and the physical improvements necessary to meet the standards, the improvements needed to upgrade the management and operation of each project, and an identification of management needs.

Currently, the final application submission contains:

a. For each project, an identification of , and an estimate of the total cost of, replacement of equipment, systems, or structural elements that would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the application, whichever period is longer (the Department intends to propose legislation to drop this requirement since it is not possible for PHAs to project replacement needs over a 30-year period with sufficient accuracy to make this a useful planning tool);

b. As part of the comprehensive assessment, a plan for making the improvements and replacements and for meeting the needs. The plan contains: (i) A schedule of actions to be completed over a period of not greater than 5 years from the date of approval of the application, within each 12-month period covered by the plan, and which are necessary to make the physical improvements and to upgrade the management and operation; (ii) the estimated cost of each action; (iii) a project operating budget for each 12-month period covered by the plan, excluding modernization costs; and (iv) an estimate of the financial resources to be available from all sources and the amounts of modernization funds to be requested for each 12-month period covered by the plan (the Department intends to propose legislation to repeal the requirements to submit the information required by clauses (iii) and (iv), since it is not feasible for PHAs to project with sufficient accuracy to make these useful planning tools);

c. An organization and staffing plan;

d. A PHA report on compliance by the local governing body with the terms of the cooperation agreement;

e. An energy audit; and

f. A resolution by the PHA Board of Commissioners approving the final application and containing various certifications.

3 Simplification of Other Requirements

To continue the Department's efforts to reduce burdensome program requirements, §968.240(i), Management Improvements Contracts, and § 968.250, Budget Revisions, would be amended to permit PHA certification of compliance for PHAs with proven modernization capability.

Section 968.240(i), Management Improvement Contracts, would be modified to become consistent with § 968.240 (b), (e), and (g), which permit either prior HUD approval or PHA certification of compliance, depending on the modernization capability and past modernization performance of the PHA. Section 968.240(i) requires the PHA to comply with HUD requirements either to (a) submit for prior HUD approval contracts for management improvements, as well as contract changes, or (b) certify that the contracts accurately reflect HUD-approved work, do not exceed the HUD-approved budget amount, and have received HUD clearance under previous participation procedures.

Section 968.250, Budget Revisions, would be modified to become consistent with § 968.240 (b), (e), (g), and (i), which permit either prior HUD approval or PHA certification of compliance, depending on the modernization capability and past modernization performance of the PHA. Section 968.250 would permit a PHA to comply with HUD requirements either to (a) submit the proposed budget revision for prior HUD approval if the PHA plans to delete or substantially revise approved work items, add new work items, or incur modernization costs in excess of the approved budget amount for a work item, or (b) certify that the revisions are necessary to carry out the approved work and do not result in the approved budget amount for any project being exceeded.

Section 968.14, Progress Reporting, and § 958.16, On-Site Inspections, of the existing regulations are not included in the proposed rule. Section 968.9(i), Insurance, would also be omitted. Section 968.245, Fund Requisitions, would be made more general. HUD intends to cover these matters in program handbooks.

4. Special Purpose Modernization

The amendments made by section 120 of the Housing and Community Development Act of 1987, amending the provisions governing special purpose modernization, will be implemented by a separate rulemaking.

5. Declaration of Trust

Section 968.215(c) would require a PHA to execute and file for record a Declaration of Trust to protect the rights and interests of HUD. This is currently a handbook requirement that merits inclusion in the regulations as an important legal requirement.

C. Subpart C—Comprehensive Grant Program

1. Purpose—Section 968.301

Subpart C would set forth the policies and procedures for the new Comprehensive Grant program, authorized under section 14 of the U.S. Housing Act of 1937, as amended by section 119 of the Housing and Community Development Act of 1987. Under this program, PHAs that own or operate a total of 500 or more public housing units would receive financial assistance for the modernization of their public housing based on a formula (see paragraph C.4). Units under the Turnkey III and Mutual Help Homeownership Opportunities programs would not be counted, since homeownership units are eligible only for limited physical improvements.

Under this program, PHAs would have much greater discretion to plan and carry out modernization of their public

housing projects. Unlike the CIAP program, which is a competitive application program, PHAs would receive a share of each year's available funding in accordance with an application formula. As a condition of receiving funding, PHAs would be required to submit for HUD approval a comprehensive plan setting forth all necessary physical and management improvements. Included in the comprehensive plan would be a five-year action plan specifying the particular activities the PHA proposes to carry out to reasonably ensure the long-term viability of each project at a reasonable cost. After HUD notified a PHA of the amount of funds it would be allocated for any fiscal year, the PHA would submit an annual statement of activities and expenditures, describing its plans for the year. Thirty days after the end of each PHA's fiscal year, the PHA would submit a performance and evaluation report describing its use of assistance during the year.

In administering the program, HUD is required, under section 14(e)(4)(D) of the 1937 Act, to respect the professional judgment of the administrators of the PHA, to the greatest extent possible. Accordingly, in its review of the PHA's comprehensive plan, annual statement, and performance and evaluation report, HUD would generally defer to the judgment of the PHA.

2. Definitions—Section 968.305

Section 968.305 would set forth the definitions that would apply to the Comprehensive Grant program.

3. Eligible Costs—Section 968.310

Section 968.310(a) would set forth the purposes for which assistance under this program could be used, as follows:

a. Activities described in the HUD-approved comprehensive plan and its annual statement of activities and expenditures. Included in these activities as eligible costs are the costs of physical and management improvements, tenant moving costs, administrative costs, lead-based paint testing and abatement costs, and assistance for tenant management corporations, all of which are also eligible under the CIAP program (see § 968.205). Unlike the CIAP program, management improvements undertaken under the Comprehensive Grant program do not have to be tied to a program of planned physical improvements. A PHA may not spend more than 15 percent of its annual grant on "soft costs": Management improvements, administration, fees and costs, and relocation expenses (see § 968.310(c)).

b. Emergency work. This category of work need not be contained in the PHA's comprehensive plan, since by its nature it is unanticipated and it does not make sense to require a PHA to amend its comprehensive plan or annual statement before it can carry out emergency work to correct conditions that pose an immediate threat to tenant life, health, or safety or that is related to fire safety. However, where a PHA is aware of necessary emergency work, it should describe it in its comprehensive plan, action plan, and annual statement.

c. Funding of reserve accounts. A PHA will be responsible for planning their use of assistance so that they can meet future replacement and unanticipated emergency needs. The PHA may establish reserve accounts for this purpose if it chooses. Amounts that the PHA plans to allocate to these reserve accounts will be specified in the PHA's action plan and annual statements. HUD is still considering how best to provide for funding of these reserves. Whether they are actually funded or maintained as unfunded accounts until the PHA needs to draw down amounts, HUD intends to apply earned or imputed interest to the balance so the value of the account keeps pace with cost increases.

d. Preparation of the PHA's comprehensive plan (including the action plan and costs related to assisting tenants to participate in the planning process); annual statement; and annual performance and evaluation report.

For homeownership programs under Subpart C, as under the CIAP program under Subpart B, only work items that are not the responsibility of the homebuyer families and that are related to health and safety, correction of development deficiencies, physical accessibility, cost-effective energy conservation, and lead-based paint testing and abatement would be eligible for assistance. (See § 968.310(b).)

A PHA could not make luxury improvements to its projects, as specified by HUD, because of the adverse effect such improvements would have on the PHA's ability to modernize its units within a reasonable time period and because of long-term increased operating and maintenance costs. HUD intends to specify in the program handbook prohibited improvements, such as pools, dwelling unit trash compactors, garbage disposals, and dishwashers, as it now does for the CIAP program. (See § 968.310(d).)

Section 14(f)(2)(B) of the 1987 Act provides that a PHA could use Comprehensive Grant program assistance for special purpose needs, even if the needs are not indicated in the PHA's comprehensive plan or annual statement. The proposed rule would not implement this provision, since the Department intends to propose legislation to repeal it. Under this program, since a PHA has even more flexibility than it would have under special purpose modernization, there is no need for this separate category of modernization.

4. Allocation of Assistance—Section 968.315

Section 14(k) of the 1937 Act provides that assistance shall be allocated under section 14 in substantial accord with the current allocation system under the CIAP program, until Congress establishes, by law, a revised method for allocating assistance under this program. HUD is required to submit a report to Congress by February 5, 1989 on the need for modernization assistance, proposed allocation alternatives, and related information. After Congress enacts a legislative formula, HUD will publish regulations in the **Federal Register** for public comment.

Pending enactment of an allocation method for the Comprehensive Grant program, § 968.315(a) would be reserved. For purposes of this proposed rule, HUD is assuming that funds will be allocated to PHAs through a formula based on objective factors. A full discussion of alternative methods for allocating modernizations funds under the comprehensive grant program, and HUD's recommendation for a funding method, will be included in the report to Congress. Several provisions of section 14 of the 1937 Act are inconsistent with a formula allocation system. Therefore, they are not included in this proposed regulation, and, depending on the analysis and recommendations in the report to Congress, HUD may propose amendments to delete them in connection with enactment of the funding method. These provisions are:

(a) The second sentence of section 14(e)(3)(A), which provides that the Secretary shall review the relative needs for restoring public housing shown by comprehensive plans in HUD's regional or field offices; and

(b) Section 14(h), which provides that, in making assistance available under either the CIAP or Comprehensive Grant program, HUD shall give preference to PHAs that have emergency needs or have a significant number of vacant units and that have demonstrated a capability to carry out activities proposed in their comprehensive plans. HUD intends to propose an amendment

to limit the preference to the CIAP program.

PHAs should be aware, in developing their comprehensive plans and action plans, that, while they are required to modernize to the level of the modernization standards required by law, and may undertake major redesign or significant project additions, HUD does not plan to seek funding from Congress for funds beyond those necessary to address the backlog of mandatory modernization needs and the accrual of mandatory modernization needs over time. Therefore, in the planning process, PHAs should be exploring with their State and local governments sources of funding to enable them to undertake that work which they have identified as desirable at their projects which is beyond the mandatory modernization standards.

No financial assistance would be allocated to a PHA from the annual appropriation for modernization unless HUD has approved its comprehensive plan, except in the case of emergency work. Where a PHA needs funds to address emergency work and does not have an appproved comprehensive plan, it would submit an annual statement and any other supporting documentation required by HUD, describing its proposed emergency work and requesting funding to carry it out. For purposes of the proposed rule, HUD expects PHAs to be able to meet emergency needs out of their regular grant allocation, assuming a reasonable level of appropriations for the Modernization program. HUD will address the issue of how best to fund emergency needs in the report it will submit to Congress next year.

5. Comprehensive Plans—Section 968.320

HUD must approve a comprehensive plan submitted by a PHA, as a condition for receiving Comprehensive Grant program funding, except funding for emergencies. The plan would identify the physical and management improvements needed for each of the PHA's projects, including estimates of the costs. It would include general strategies for addressing these needs and also highlight any special strategies, such as major redesign or partial demolition, that are necessary to ensure the long-term viability of the projects. Accordingly, each plan would contain the following elements.

a. A comprehensive assessment of the physical needs of the PHA's projects that are necessary to permit them to be rehabilitated to a level at least equal to the modernization and life-cycle cost-effective energy conservation standards, as required in § 968.115. The plan must also identify the replacement needs the PHA anticipates over the five-year term of the action plan.

b. A comprehensive assessment of management needs, so decent, safe, and sanitary living conditions will be provided.

c. A demonstration that completion of the physical and management improvements will reasonably ensure the long-term physical and social viability of each project at a reasonable cost. With respect to social viability, the PHA shall demonstrate that there is a realistic potential to eliminate or modify neighborhood or environmental conditions that jeopardize the long-term social viability of the project or to alter the project to cope effectively with these conditions. The PHA shall assess problems such as high density in the project, a concentration of assisted housing, or physical deterioration of, the neighborhood, industrial or commercial development which jeopardizes the suitability of the site for residential use, air pollution, and high rates of crime and vandalism. Under this viability review, reasonable cost would be defined in § 968.305 as the cost (excluding the cost of management improvements, administration, architectural and engineering fees, and other fees) of the modernization program that does not exceed 62.5 percent (for a nonelevator structure) or 69 percent (for an elevator structure) of the total cost guidelines for a new project with the same structure type and number and size of units in the market area. This is the same standard used to determine whether a CIAP project is financially feasible. A PHA may not use its grant for improvements to a project unless completion of the improvements would reasonably ensure long-term viability at a reasonable cost, except in the case of emergency work. In addition, if a PHA had received assistance under Part 968 within the preceding five-year period (other than for emergency work), it would demonstrate that the proposed improvements and replacements would not duplicate work funded during that period.

The Department invites comments specifically on whether PHAs should have the flexibility to spend more on a particular project than is needed to ensure viability (so long as viability can be achieved within the reasonable cost limit). In other words, should a PHA have the discretion to make more improvements to a project than are strictly necessary to achieve viability? The proposed rule does not address this point.

d. An action plan to carry out the physical and management improvements that the PHA determines will reasonably ensure long-term project viability, and will reasonably ensure that the PHA will meet, or make reasonable progress towards meeting, the performance standards in § 968.345 (see section C.10., below). The PHA develops the action plan based on estimates provided by HUD of the amount of assistance the PHA can reasonably expect to receive over its five-year term and on PHA estimates of funds that will be available from other sources, such as State and local governments. The action plan specifies, for each project, a schedule of the improvements to be completed over a period of up to five years. The action plan also includes a preliminary estimate of the total cost of the items for each year covered by the action plan. If all the improvements contained in the comprehensive plan cannot reasonably be scheduled to be completed in five years, the PHA must amend its action plan annually to add an additional year until all improvements are addressed.

The Department invites comments on whether PHAs should be required to amend their action plans annually until all work is covered, or whether the action plan should stay in effect (if the work specified in it is carried out on schedule) for five years, at which point a new action plan covering an additional five years of work would be prepared by the PHA and submitted to HUD for approval.

PHAs are not required to address all needs identified in their comprehensive plans within the five-year period before funding their reserve accounts. A PHA could choose, for example, to address only emergency needs at a particular project, while discussing with the local government that actions to take with respect to the project. In the meantime, the PHA could increase funding of its reserve.

e. A local government statement, signed by the chief executive officer of the unit of general local government, certifying that the PHA developed the comprehensive plan in consultation with local government officials and tenants, including at least one public hearing, that the plan is consistent with the local government's assessment of its lower income housing needs, and that the local government will cooperate in providing tenant programs and services.

f. A statement signed by the PHA director that the PHA will carry out its comprehensive plan in accordance with title VI of the Civil Rights Act of 1964, title VIII of the Civil Rights Act of 1968,

and section 504 of the Rehabilitation Act of 1973.

g. A PHA resolution, adopted by its Board of Commissioners, approving the plan and certifying that the PHA will comply with all requirements that apply to the program, including certain listed requirements.

If a PHA had submitted a comprehensive plan for modernization (CPM) under the CIAP program, it could convert it to a Comprehensive Grant comprehensive plan by submitting only the changes necessary to reflect the results of consultations with local government officials and tenants, and to include the additional items required by the regulations.

A PHA would be required to amend its comprehensive plan (including the action plan) as part of its annual statement or at any other time, when the bases for the needs assessment or other feature of the plans had substantially changed. As required by section 14(e)(3)(B), a PHA would have the right to amend its comprehensive plan to extend the time for performance if HUD is unable to provide the amount of assistance set forth in the plan or has not provided the assistance in a timely manner.

6. HUD Review and Approval of Comprehensive Plan—§ 968.325

Upon submission of a complete comprehensive plan, it would be considered to be approved unless HUD notified the PHA in writing within 75 calendar days that it has disapproved the plan, indicating the reasons for disapproval and the necessary modifications. As noted above, HUD is required to defer to the professional judgment of the PHA, to the maximum extent possible. Accordingly, it would approve the plan except as follows:

a. HUD determines the PHA's identification of physical and management needs is plainly inconsistent with available significant facts and data. For example, HUD would disapprove a plan if it determined that (i) the proposed improvements and replacements would not bring all of the PHA's projects up to the modernization and energy conservation standards in § 968.115; (ii) the management and operational improvements would not address all of the PHA's areas of deficiency; or (iii) the proposed improvements are not related to the needs identified, such as where vacancy problems are not addressed.

b. HUD determines the action plan is plainly inappropriate to meeting the needs identified in the comprehensive plan.

c. HUD determines that the PHA has not demonstrated that completion of the improvements and replacements would reasonably ensure the long-term viability of one or more projects at a reasonable cost.

d. HUD has evidence which tends to challenge, in a substantial manner, the local government statement or the PHA resolution.

Where the PHA and HUD disagreed over a viability determination under § 968.325(b)(3) or other substantive matters, HUD could approve a comprehensive plan subject to resolution of the disagreement between HUD and the PHA.

7. Annual Statement of Activities and Expenditures—Section 968.330

After HUD notified the PHA of the estimated amount of assistance it would receive under the formula for a particular fiscal year and the PHA estimated how much funding will be available from other sources, such as the State and local governments, the PHA would be required to submit an annual statement of activities, obligations, and expenditures. The annual statement would describe the activities the PHA intends to carry out for the coming year, consistent with its comprehensive plan, including its action plan. Included in the statement would be PHA certifications that it has given tenants affected by it and local government officials an opportunity to review the draft statement and submit comments, and that the PHA has taken tenant and local government comments into account. The annual statement would also include a proposed amendment to its action plan, if necessary to maintain a current five-year plan, where not all improvements specified in the comprehensive plan are covered by the current five-year action plan. In addition, where the bases for the needs assessment or other features of the comprehensive plan substantially change, the PHA would have to propose an amendment to its comprehensive plan. The annual statement would also include a PHA resolution approving the annual statement and stating that the resolution and statements submitted with the comprehensive plan are still current.

Like the comprehensive plan, an annual statement would be considered to be aprroved unless HUD notified the PHA of disapproval within 75 calendar days. HUD would approve an annual statement, except where it is determined to be plainly inconsistent with the comprehensive plan; HUD has evidence to challenge, in a substantial manner, the certifications in the statement; or the proposed amendments to the comprehensive plan are not acceptable in accordance with the review standards that apply to the review of a comprehensive plan. HUD could approve a statement with conditions.

A PHA would be required to submit major changes in its annual statement to HUD for approval, except in the case of changes due to emergencies or unanticipated work discovered during rehabilitation.

After HUD approved each year's annual statement, HUD and the PHA would enter into an ACC amendment covering that year's grant amount.

8. Conduct of Modernization Activities—Section 968.335

After ACC execution, the PHA would carry out its modernization program in accordance with its approved annual statement. The PHA could requisition modernization funds to pay for management and physical improvements and to fund its replacement reserve. The contracting requirements in Part 85, Administrative Requirements for Grants and Cooperative Agreements to State, Local, and Federally Recognized Tribal Governments (see § 968.115(j)) would apply. At the completion of activities funded by each annual grant, the PHA would be required to comply with certain closeout requirements.

9. PHA Performance and Evaluation Report—Section 968.340

Within 30 days after the end of each PHA fiscal year, the PHA would submit a performance and evaluation report, in the form prescribed by HUD, describing its actual use of assistance for the previous year. The report would contain an assessment of the relationship of the use of funds provided under the Comprehensive Grant program, as well as the use of any other funds (such as Community Development Block Grant program assistance, State assistance, and private funding), to the needs identified in the PHA's comprehensive plan and to the program purposes specified in § 968.301(a)(1). The report would include a PHA certification that it made the draft report available for review and comment by affected tenants before submission to HUD.

10. HUD Review of PHA Performance—Section 968.345

a. *HUD determination.* At least annually, HUD would carry out such reviews of PHA performance as may be necessary or appropriate to make the determinations required by this

paragraph, taking into consideration all available evidence.

i. *Conformity with comprehensive plan.* HUD would determine whether the PHA had carried out its activities under this Subpart in a timely manner and in accordance with its comprehensive plan.

(a) In making this determination, HUD would review the PHA's performance to determine whether the modernization activities undertaken during the period under review conform substantially to the activities specified in the approved annual statement, consistent with the approved comprehensive plan. The review could include whether any activities that were undertaken which were not included in the approved annual statement are eligible under § 968.310, are specified in the action plan, or are due to emergencies or unanticipated work discovered during rehabilitation. HUD would also consider whether the PHA received more or less funding than anticipated when it developed its annual statement.

(b) HUD would review a PHA's performance to determine whether the activities carried out comply with the requirements of the Act, including the requirement that the work carried out meets the modernization and energy conservation standards in § 968.115, this part, and other applicable laws and regulations.

ii. *Continuing capacity.* HUD would determine whether the PHA has a continuing capacity to carry out its comprehensive plan in a timely manner.

(a) The primary factors to be considered in arriving at a determination that a recipient has a continuing capacity would be those described in i. and iii., as they relate to carrying out the comprehensive plan. If HUD determined that the PHA has carried out its activities under this Subpart in a timely manner, taking into account the level of funding available, and in accordance with its comprehensive plan and that the PHA has satisifed, or has made reasonable progress towards satisfying, the performance standards prescribed in subparagraph (3) as they relate to activities under this Subpart, HUD would generally consider the PHA to have a continuing capacity.

(b) HUD would give particular attention to PHA efforts to accelerate the progress of the program and to prevent the recurrence of past deficiencies or noncompliance with applicable laws and regulations.

iii. *Reasonable progress.* HUD would determine whether the PHA has satisfied, or has made reasonable progress towards satisfying, the following performance standards:

(a) With respect to the physical condition of each project, whether the projects are in substantial compliance with the housing quality standards in 24 CFR 882.109; and

(b) With respect to the management condition of the PHA, whether:

(i) Operating reserves, exclusive of tenants accounts receivable, exceed a reasonable percentage of maximum operating reserves, in accordance with HUD guidelines (30 percent is the current requirement);

(ii) Operating expenses are less than or equal to income, or do not exceed income by more than a reasonable amount, in accordance with HUD guidelines (the current requirement is that expenses must not exceed income);

(iii) Annual utility consumption, as compared to the average of the previous three years' rolling base consumption, adjusted for variances in heating degree days, has not increased more than a reasonable amount, in accordance with HUD guidelines, has not changed, or has decreased (5 percent is the current cap on utility increases);

(iv) The PHA is a "high occupancy" PHA, as determined by HUD, or is meeting the occupancy goals of a comprehensive occupancy plan approved by HUD, in accordance with § 990.118 of this chapter (this is the current requirement);

(v) Annual rent collections equal or exceed a percentage, as specified by HUD, of annual rents chargeable by the PHA plus rental accounts receivable as of the end of the PHA's fiscal year (90 percent is the current requirement);

(vi) The annual average number of vacancy days between tenants is not more than a reasonable number of days, as specified by HUD (30 calendar days is the current requirement); and

(vii) The PHA has inspected all of its dwelling units annually, or more or less often, as specified by HUD, using housing quality standards as a minimum standard (the current requirement is for inspection of 100 percent of the units).

In setting the management standards and making the determination of PHA performance as measured against the standards, HUD would take into account what is reasonable to expect a PHA to achieve, based on the experience of PHAs in similar circumstances, as determined by HUD. The current standards were developed in consultation with PHA organizations as indicators of overall good management performance in key aspects of PHA operations.

(c) HUD would propose changes to these standards only after consultation with PHAs and PHA organizations.

b. *Condition for receipt of assistance.* As required by section 14(g) of the 1937 Act, no financial assistance could be made available under this subpart unless HUD determines that the PHA has made substantial efforts to meet the objectives of the preceding year under the PHA's comprehensive plan, or, for the first year a PHA receives assistance under this subpart, under the PHA's approved CIAP modernization program. In making this determination, HUD would take into account its determinations under 10.a., described above.

c. *Corrective action.*

i. HUD could order a PHA to take corrective action only if HUD determines:

(a) The PHA has not submitted a performance and evaluation report, in accordance with § 968.340;

(b) The PHA has not carried out its activities under Subpart C in a timely manner and in accordance with its comprehensive plan;

(c) The PHA does not have a continuing capacity to carry out its comprehensive plan in a timely manner;

(d) The PHA has not satisfied, or has not made reasonable progress towards satisfying, the performance standards specified in paragraph (a)(3).

(e) An audit conducted in accordance with 24 CFR Part 44 and § 968.110(i) reveals findings that HUD reasonably believes require corrective action.

Note: Determinations c.i. (b), (c), and (d) are closely based on sections 14(e)(4)(B) (i), (ii), and (iii) of the 1937 Act, with one exception. Section 14(e)(4)(B)(iii) (item c.i.(d), above) has a second part requiring HUD to determine whether a PHA "has made reasonable progress in carrying out modernization projects approved under this section." This concept appears to be included in clause (i) of that section: "[whether the PHA] has carried out its activities under this section in a timely manner and in accordance with its comprehensive plan * * *." HUD invites public comment on whether the second part of clause (iii) should be treated separately in the regulations.

ii. Where HUD determined that corrective action would be appropriate, it would design corrective actions to prevent continuation of the deficiency, mitigate adverse effects, and prevent recurrence of the same or similar deficiencies.

iii. HUD could direct a PHA to take one or more of the following corrective actions:

(a) Submit additional information concerning the operations of the PHA to determine the cause for PHA not

meeting the standards in 10. a.i., ii., and iii., above explaining steps the PHA is taking to correct the deficiencies, documenting that the activities were not inconsistent with program requirements, and demonstrating the PHA's continuing capacity to carry out the comprehensive plan;

(b) Submit schedules for completing the work and to report on its progress;

(c) Correct deficiencies specified in a letter advising the PHA if the deficiency and warning it that HUD will impose sanctions if the deficiency recurs or is not corrected;

(d) Submit supporting material to document one or more of the statements, resolutions, and certifications submitted by the PHA;

(e) Not to incur financial obligations, or to suspend payments for one or more activities;

(f) Reimburse, from non-HUD sources, one or more program accounts for any amounts improperly expended; and

(g) Take such other corrective actions HUD determines appropriate to correct PHA deficiencies.

d. *Conditioning.* HUD could condition approval of the next year's annual statement, or otherwise condition a PHA's program, based on substantial evidence, in accordance with paragraph a., HUD Determination.

PHAs determined by HUD to be troubled would be conditioned at the beginning of their participation in the Comprehensive Grant program. HUD will approve an annual statement on the condition that the PHA take one or more corrective actions, such as submitting a schedule for completion of the work and reporting on its progress. The conditions would vary depending on the particular circumstances of a troubled PHA. Troubled PHAs would continue to be conditioned until such time as they demonstrated compliance with program requirements.

e. *Withholding and Reallocating Grant Amounts.* HUD would withhold some or all of a PHA's annual grant where it has required the PHA to take corrective action and the PHA fails to correct the deficiency within a reasonable time.

In addition, where HUD has withheld a PHA's grant for two or more consecutive fiscal years, it could reallocate some or all of the amount HUD has withheld up to that time, as well as future allocations, to other PHAs in the next Federal fiscal year. However, HUD would reallocate grant amounts only if it has required the PHA to take corrective action and the PHA has failed to correct the deficiency within a reasonable time. Before HUD could reallocate a grant, it would notify the PHA and give it an opportunity to consult with HUD regarding the proposed action. Where a PHA's grant funds are reallocated, a PHA could receive higher amounts in future years, but only after correction of its deficiencies and demonstration of an ability to carry out a modernization program. The required report to Congress will discuss alternative approaches for the restoration of reallocated amounts.

Section 14 explicity authorizes HUD to withhold a PHA's grant but is silent regarding HUD's authority to reallocate withheld grant amounts. The regulations include reallocation provisions because the Department believes it has inherent authority to do so in order to make statutorily-authorized withholding a viable sanction.

11. *Transition.* The Department intends to proposes a legislative proposal to permit a PHA to use any amount that HUD has obligated for it under CIAP for the purpose for which the CIAP amount was provided, or for purposes consistent with an action plan submitted by the PHA under the Comprehensive Grant program, as the PHA determines to be appropriate. CIAP projects already underway would have to be completed, unless HUD authorized another use of unobligated funds. This authority would permit an orderly transition from CIAP to the Comprehensive Grant program, while giving PHAs the discretion to decide the most effective and efficient way for available modernization funds to be spent.

IV. FINDINGS AND CERTIFICATIONS

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50 that implement section 102(2)(C) of the National Environmenal Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh St. S.W., Washington, DC 20410.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, or innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The rule was listed as sequence number 1031 under the Office of Public and Indian Housing in the Department's Semiannual Regulatory Agenda published on April 25, 1988 (53 FR 13854, 13892), under Executive Order 12291 and the Regulatory Flexibility Act.

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the undersigned hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule would simplify the current Comprehensive Improvement Assistance program for the modernization of public housing and establish a new Comprehensive Grant program under which larger PHAs would receive modernization assistance from HUD on a formula basis. HUD does not anticipate a significant economic impact on small entities since PHAs would continue to carry out their modernization activities by entering into contracts for the work as they now do. There may be some beneficial effects, to the extent the rule would simplify and streamline the process.

Information collections for the CIAP program in Subpart B of this rule are identical to or less burdensome than ones contained in the currect CIAP program requirements. The approved paperwork control numbers assigned by the Office of Management and Budget appear in the text of Subpart B.

The collection of information requirements for the Comprehensive Grant program contined in this rule have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980. Several sections of this proposed rule have been determined by the Department to contain collection of information requirements. This information is needed for HUD to administer the CIAP Comprehensive Grant programs. PHAs are the likely respondents. Information on these requirements is provided as follows:

CHART 1.—TABULATION OF ANNUAL REPORTING BURDEN: PROPOSED RULE—PUBLIC HOUSING COMPREHENSIVE GRANT PROGRAM PHAS WITH 500 OR MORE PUBLIC HOUSING UNITS—24 CFR PART 968, SUBPART C

Description of Information Collection	Section of 24 CFR Affected	Number of respondents	Number of responses per respondents	Total annual responses	Hours per response	Total hours
Comprehensive plan, including action plan, local government statement, civil rights statement, PHA resolution, and public hearing requirement.	968.320	378	1	378	30.00	11,340
Annual statement of activities and expenditures, including tenant and local government consultation requirements.	968.330	378	1	378	8.00	3,024
Fund requisitions	968.335(b)	378	20	7,560	.50	3,780
Contract administration	968.335(c)	50	1	50	1.00	50
Fiscal closeout	968.335(d)	378	1	378	1.00	378
Performance and evaluation report, including tenant consultation requirement.	968.340	378	1	378	5.00	1,890
Corrective actions	968.345(c)(1)	25	2	50	5.00	250
Total annual burden						20,712

CHART 2.—TABULATION OF ANNUAL REPORTING BURDEN: PROPOSED RULE—PUBLIC HOUSING COMPREHENSIVE GRANT PROGRAM (CIAP) PHAS WITH FEWER THAN 500 PUBLIC HOUSING UNITS—24 CFR PART 968, SUBPART B

Description of Information Collection	Section of 24 CFR Affected	Number of respondents	Number of responses per respondents	Total Annual response	Hours per response	Total hours
CIAP application (2577-0004)	968.210 968.215(c)	1,000	1.0	1,000	3.00	3,000
CIAP survey instrument (physical needs assessment) (2577-0047)	968.210	500	1.5	750	12.00	9,000
CIAP project implementation schedule (2577-0065)	968.210	800	1.5	1,200	.50	600
CIAP evidence of consultation (tenant and homebuyer) (2577-0048)	968.220, 968.225	1000	1.5	1,500	2.00	3,000
CIAP contract administration (2577-0039).[1]	968.240	912	4.0	3,648	1.00	3,648
CIAP fund requisitions (2577-0043)	[illegible]	800	5.0	4,000	.50	2,000
CIAP reporting/monitoring/closeout (2577-0049)	968.250, 968.255	800	6.0	4,800	1.00	4,800
Total annual burden						26,048

[1] This information collection includes both public housing development and CIAP. The reduced total responses from 5849 to 3648 and the reduced total hours from 7023 to 3648 is due to a reduction in CIAP.

This rule has been developed in accordance with Executive Order 12612, Federalism, and determined not to have substantial, direct effects on PHAs. With respect to the CIAP porgram, the rule would simplify the application process, making it easier for PHAs to obtain modernization assistance. The changes are consistent with federalism principles since they reduce unnecessary burdens on PHAs. The nature and purpose of the program would not change.

With respect to the Comprehensive Grant program, the new program would simply provide an alternative means of funding PHAs, based on an allocation method to be enacted by Congress. PHAs would not longer have to compete for funding, and would be given greater discretion in carrying out their modernization activities. The new program is consistent with federalism principles since it reduces unnecessary burdens on PHAs. While it is a "new" program, it is primarily a change only to the way HUD funds PHA modernization activities, not to the modernization activities.

In addition, since the changes are principally to the allocation system for providing modernization assistance and since participation by PHAs is discretionary, the rule lacks the direct and substantial effects on PHAs required for a policy with federalism implications under the Order.

This rule has been developed in accordance with Executive Order 12606, The Family. It does not have potential significant impact on family formation, maintenance, or general well-being. The rule would change the application process for the CIAP program and would provide modernization funding for large PHAs on a formula grant basis. Families would not be affected since PHAs would continue to carry out modernization activities at public housing projects.

The Catalog of Domestic Assistance numbers for the programs affected by this rule are 14.850, 14.851, and 14.852.

List of Subjects in 24 CFR Part 968

Loan programs: housing and community development, Public housing, Reporting and recordkeeping requirements, Grant programs: housing and community development, Indians.

For the reasons set forth in the preamble, Part 968 of Title 24 of the Code of Federal Regulations is proposed to be revised to read as follows:

PART 968—PUBLIC HOUSING MODERNIZATION

Subpart A—General

Subpart B—Comprehensive Improvement Assistance Program (For PHAs That Own or Operate Fewer than 500 Public Housing Units)

Subpart C—Comprehensive Grant Program (For PHAs That Own or Operate 500 or More Public Housing Units)

Authority: Secs. 6 and 14, United States Housing Act of 1937 (42 U.S.C. 1437d, 1437*l*); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—General

§ 968.101 Purpose and applicability.

(a) *Purpose.* Section 14 of the Act established the Public Housing Modernization program, authorizing HUD to provide financial assistance to public housing agencies (PHAs) to improve the physical condition and upgrade the management and operation of existing public housing projects, to assure that such projects continue to be available to serve lower income families. These physical and management improvements are funded under section 5(c) of the Act. This part prescribes the requirements and procedures for the Public Housing Modernization program.

(b) *Applicability.* (1) Subpart A applies to all modernization under this part. Subpart B sets forth the requirements and procedures for the Comprehensive Improvement Assistance program (CIAP program) for PHAs that own or operate fewer than 500 public housing units. Subpart C sets forth the requirements and procedures for the Comprehensive Grant program for PHAs that own or operate 500 or more public housing units under subpart C. Modernization of housing owned or operated by Indian housing authorities (IHAs) is covered by 24 CFR Part 905. For purposes of the 500 unit threshold, units under the Turnkey III and Mutual Help Homeownership Opportunities programs are excluded.

(2) This part applies to PHA-owned lower income public housing projects, including conveyed Lanham Act and Public Works Administration (PWA) projects, and to Section 23 Leased Housing Bond-Financed projects, for which PHAs request assistance under the CIAP or Comprehensive Grant program. This part also applies to the implementation of modernization programs which were approved before FFY 1989. This part does not apply to projects under the Section 23 Leased Housing Non-Bond Financed program, the Section 10(c) Leased Housing program, or the Section 23 or Section 8 Housing Assistance Payments programs.

§ 968.105 Definitions.

As used in this part:

Act. The United States Housing Act of 1937 (42 U.S.C. 1437 et seq.).

Annual contributions contract (ACC). A contract under the Act between HUD and the PHA containing the terms and conditions under which the Department assists the PHA in providing decent, safe, and sanitary housing for lower income families. The ACC must be in a form prescribed by HUD under which HUD agrees to provide assistance in the development, modernization, and/or operation of a lower income housing project under the Act, and the PHA agrees to develop, modernize, and operate the project in compliance with all provisions of the ACC and the Act, and all HUD regulations and implementing requirements and procedures.

CIAP program. The Comprehensive Improvement Assistance program.

FFY. Federal fiscal year.

HUD. The Department of Housing and Urban Development, including the regional and field offices that have been delegated authority to perform functions pertaining to this part for the area in which the PHA is located.

IHA. Indian housing authority. (The regulations for IHAs are contained in 24 CFR Part 905.

PHA. Public housing agency (excluding an IHA).

§ 968.110 Other program requirements.

The PHA shall comply with the following program requirements:

(a) *Civil rights compliance.* The PHA shall comply with the Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4), 24 CFR Part 1; Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3601–3619); Executive Orders 11063 (Equal Opportunity in Housing), 11246 (Equal Employment Opportunity), and 12138 (Women's Business Enterprise); section 3 of the HUD Act of 1968 (12 U.S.C. 1701u); the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), 24 CFR Part 146; and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), 24 CFR Part 8.

(b) *Minority and women's business enterprise opportunity.* In conformance with Executive Order 11625 and 14432, the PHA shall take every action to meet Departmental goals for awarding modernization contracts to minority business enterprises. The PHA shall take appropriate affirmative action to assist women's business enterprise.

(c) *Environmental clearance.* Before approving a proposed project, HUD will comply with the requirements of 24 CFR Part 50, implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4332, *et seq.*) and related requirements of 24 CFR 50.4.

(d) *Flood insurance.* HUD will not approve for acquisition, construction, or improvement, a building located in an area that has been identified by the Federal Emergency Management Agency as having special flood hazards, unless the following conditions are met:

(1) Flood insurance on the building is obtained in compliance with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 *et seq.*); and

(2) The community in which the area is situated is participating in the National Flood Insurance Program in accord with 44 CFR Parts 59–79, or less than one year has passed since FEMA notification regarding flood hazards.

(e) *Wage rates.* —(1) *Davis Bacon.* With respect to modernization work or contracts over $2,000 (except for nonroutine maintenance work), all laborers and mechanics employed by the PHA or its contractors shall be paid not less than the wages prevailing in the locality, as predetermined by the

Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a through 276c).

(2) *HUD-determined.* With respect to all nonroutine maintenance work or contracts, all laborers and mechanics employed by the PHA or its contractors shall be paid not less than the wages prevailing in the locality, as determined or adopted by HUD pursuant to section 12 of the United States Housing Act of 1937.

(3) *State.* Prevailing wage rates determined under State law are inapplicable under the circumstances set out in § 968.120.

(f) *Technical wage rates.* All architects, technical engineers, draftsmen, and technicians employed in the development of a project, shall be paid not less than the wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable State or local law) by HUD.

(g) *Relocation assistance.* (1) On and after April 2, 1989, modernization under this part shall be subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Uniform Relocation Act Amendments of 1987, and implementing regulations, 49 CFR Part 24 (to be published by the Department of Transportation).

(2) Actual and reasonable moving costs for tenants who have to be moved, either temporarily or permanently, to accommodate the modernization are eligible modernization costs. The PHA shall provide temporary or permanent housing at comparable cost for affected tenants on a nondiscriminatory basis.

(h) *Physical accessibility.* The PHA shall comply with the Architectural Barriers Act of 1968 (42 U.S.C. 4152–4157), and HUD implementing regulations (24 CFR Part 40).

(i) *Audits.* Under the Single Audit Act of 1984 (31 U.S.C. 7501–7507), all PHAs that receive assistance under this part must comply with the audit requirements of 24 CFR Part 44. The Secretary of Housing and Urban Development, the Inspector General of the Department of Housing and Urban Development, and the Comptroller General of the United States shall have access to all books, documents, papers, or other records that are pertinent to the activities carried out under this section in order to make audit examinations, excerpts, and transcripts.

(j) *Administrative requirements—OMB Circular A–102.* The Administrative Requirements for Grants and Cooperative Agreements to States, Local, and Federally Recognized Indian Tribal Governments under OMB Circular A–102, as set forth in 24 CFR Part 85, are applicable to grants under this part, except as specified in this part and in 24 CFR 990.103(c) and 24 CFR 990.201.

(k) *Lead-based paint poisoning prevention—(1) General—CIAP program.* The PHA shall comply with the lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846) and HUD implementing regulations (24 CFR Part 35 and Part 965, Subpart H). Comprehensive plans (as described in § 968.210(c)) shall be amended to include the schedule for lead-based paint testing and abatement. Testing shall be completed on or before June 6, 1993. Testing and abatement shall be completed with respect to family projects approved for comprehensive and homeowners modernization (paragraph (k)(l)(i) of this section), applications for comprehensive and homeownership modernization of family projects (paragraph (k)(l)(ii) of this section), and other family projects not undergoing comprehensive and homeownership modernization (paragraph (i)(l)(iii) of this section). Any previous testing or abatement work which does not meet the requirements of this rule must be tested and abated in accordance with these requirements.

(i) *Comprehensive and homeownership modernization in progress.* With respect to family projects approved for comprehensive and homeownership modernization (assisted under section 9 of the United States Housing Act of 1937) which may contain lead-based paint for which funds have been reserved by HUD before June 6, 1988, no construction contracts, excluding those contracts solely for emergency or energy conservation work items, shall be executed until random testing as described in this paragraph has taken place and any necessary abatement as described in this paragraph is included in the modernization budget.

(ii) *Application for comprehensive and homeownership modernization projects.* With respect to applications for family projects for comprehensive and homeownership modernization (assisted under section 9 of the United States Housing Act of 1937) which may contain lead-based paint for which funds are reserved on or after June 6, 1988, no construction contracts, excluding those contracts solely for emergency or energy conservation work items, shall be executed until random testing as described in this paragraph has taken place and any necessary abatement as described in this paragraph is included in the modernization budget.

(iii) *Other family projects not undergoing comprehensive and homeownership modernization.* Any family project (assisted under section 9 of the United States Housing Act of 1937) not undergoing comprehensive and homeownership modernization (as covered in paragraphs (k)(l) (i) and (ii) of this section), including family projects which previously have been comprehensive or homeownership modernized under previous regulations, shall be randomly tested as described in this paragraph and abated if lead-based paint is found as described in this paragraph.

(2) *General—Comprehensive Grant program.* The PHA shall comply with the Lead-Based Paint poisoning Prevention Act (42 U.S.C. 4821–4846) and HUD implementing regulations (24 CFR Part 35 and Part 965, Subpart H). Comprehensive plans (as described in § 968.320) shall include the schedule for lead-based paint testing and abatement. Testing shall be completed on or before June 6, 1993. Any previous testing or abatement work which does not meet the requirements of this rule must be tested and abated in accordance with these requirements.

(i) With respect to family projects (assisted under section 9 of the Act) to be modernized, which may contain lead-based paint, no construction contracts, excluding those contracts solely for emergency work items, shall be executed until random testing as described in this paragraph has taken place and any necessary abatement as described in this paragraph is included in the action plan.

(ii) Any family project (assisted under section 9 of the Act) not undergoing modernization under this subpart, including family projects which previously have been modernized under previous regulations, shall be randomly tested as described in this paragraph and abated if lead-based paint is found as described in this paragraph.

(3) *Random testing.*—(i) *Requirements for random testing.* If the family project (including homeownership units) was constructed before 1978 or substantially rehabilitated before 1978, the PHA shall cause a random sample of all family project units to be tested for lead-based paint on applicable surfaces (including defective paint surfaces). Random testing shall be scheduled or prioritized by age of the family projects and whether the family projects are known to have lead-based paint from unit turnover testing or presence of previous elevated blood levels (EBLs). Ten units shall be tested in family projects that are comprised of contiguous units which were built at the same time and contain 20 or more units. Six units shall be

tested in similar projects with fewer than 20 units. A sample of interior common areas and exterior surfaces which are part of the family project shall also be tested. For scattered site family projects involving multi-unit structures, 10 units shall be tested in structures containing 20 or more units and six units shall be tested in projects with fewer than 20 units, together with a sample of interior common areas and exterior surfaces and defective paint surfaces which are part of the family project. For other scattered site family projects involving single unit structures which are not contiguous or were built at different times, the PHA shall cause each unit to be tested for lead-based paint on applicable surfaces. The interior common areas required to be sampled by this paragraph may include PHA-owned or operated child care facilities or non-dwelling PHA facilities commonly used by children under seven years of age.

(ii) *Random testing results.* If none of the tested units, interior common areas, or exterior surfaces contain lead-based paint, the family projects may be considered free of lead-based paint, and no further testing or abatement action will be required. If lead-based paint is found in any units in the sample, all units in the family project are required to be tested. If lead-based paint is found in any interior common areas, all interior common areas in the family project are required to be tested. If lead-based paint is found on any exterior surface, all exterior surfaces in the family project are required to be tested. In the family projects that are known to contain some lead-based paint, no random sampling is necessary, but all applicable surfaces shall be tested.

(iii) *Requirements.* Testing, tenant protection, lead-based paint debris disposal, recordkeeping, and state and local law requirements as described in §§ 965.705, 965.707, 965.708, 965.709 and 965.710 of this chapter shall be followed.

(iv) *Eligibility as planning cost.* Random testing as described in this paragraph (k)(3) is an eligible planning cost as authorized by §§ 968.205(d) and 968.310(a)(1).

(v) *Exemption.* Where abatement will result from rehabilitation activities planned (i.e., where all applicable surfaces will be replaced, covered, or otherwise abated as described in this part), those surfaces need not be tested.

(4) *Abatement.* If lead-based paint is found on applicable surfaces, such surface shall be treated in accordance with § 965.705 of this chapter. Abatement within a comprehensive and homeownership modernization project should be prioritized in relation to the immediacy of the hazards found to children under seven years of age.

(Information collection requirements contained in paragraph (k) were approved by the Office of Management and Budget under control number 2577-0090).

(l) *Energy conservation.* The PHA shall comply with 24 CFR Part 965, Subpart C, regarding the conduct or update of an energy audit and the undertaking of cost-effective energy conservation measures. The cost of performing or updating an energy audit is an eligible modernization cost.

§ 968.115 Modernization and energy conservation standards.

(a) All improvements funded under this part, which may include alterations, betterments, additions, replacements, or non-routine maintenance, shall meet the HUD modernization standards, described in paragraph (b) of this section and established to provide decent, safe, and sanitary living conditions in PHA-owned and PHA-operated public housing, and the HUD energy conservation standards for cost-effective energy conservation measures in such projects, described in paragrpah (c) and (d) of this section.

(b) The modernization standards are standards which will provide decent, safe, and sanitary living conditions in public housing, including corrections of violations of basic health and safety codes, and address all deficiencies, including those related to defered maintenance, in order to meet the intent of HUD's minimum property standards as they could reasonably be applied to existing housing. In addition, these standards cover improvements relating to site and building security. The modernization standards are contained in HUD Handbook 7485.2, as revised, Public and Indian Housing Modernization Standards, and in other documents cited in the Handbook.

(c) The energy conservation standards are standards for the installation of cost-effective energy conservation measures, including solar energy systems. The energy conservation standards provide for the conducting or updating of energy audits, including cost-benefit analyses of energy saving opportunities, in order to determine which measure will be cost-effective in conserving energy. The energy conservation standards are contained in the HUD Workbook, Energy Conservation for Housing, and in other documents cited in the Workbook.

(d) Life-cycle cost-effective energy performance standards established by HUD to reduce the operating costs of public housing projects over the estimated life of the building shall apply to projects modernized under this part. These standards are contained in HUD Handbook 7418.1, as revised, Life-Cycle Cost Analysis for Utility Combinations.

§ 968.120 Preemption of State prevailing wage requirements.

(a) A prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State law shall be inapplicable to the modernization of a project whenever:

(1) The modernization of the project is otherwise subject to State law requiring the payment of wage rates determined by a State or local government or agency to be prevailing; and

(2) The wage rate determined under State law to be prevailing with respect to an employee in any trade or position employed in the modernization of a project exceeds whichever of the following Federal wage rates is applicable:

(i) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade;

(ii) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency;

(iii) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(iv) In the case of non-routine maintenance, the wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(v) For the purpose of ascertaining whether a wage rate determined under State law for a trade or position exceeds the Federal wage rate:

(A) Where a rate determined by the Secretary of Labor or an apprentice of trainee wage rate based thereon is applicable, the total wage rate determined under State law, including fringe benefits (if any) and basic hourly rate, shall be compared to the total wage rate determined by the Secretary of Labor or apprentice or trainee wage rate; and

(B) Where at a rate determined by the Secretary of HUD is applicable, any fringe benefits determined under State law shall be excluded from the comparison with the rate determined by the Secretary of HUD.

(b) Whenever paragraph (a)(1) of the section is applicable:

(1) Any solicitation of bids or proposals issued by the PHA and any

contract executed by the PHA for modernization of the project shall include a statement that any prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State law to be prevailing with respect to an employee in any trade or position employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract whenever either of the following occurs:

(i) Such nonfederal prevailing wage rate exceeds:

(A) The applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trade;

(B) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency; or

(C) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(ii) Such nonfederal prevailing wage rate, exclusive of any fringe benefits, exceeds the applicable wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

Failure to include this statement may constitute grounds for requiring resolicitation of the bid or proposal;

(2) The PHA itself shall not be required to pay the basic hourly rate or any fringe benefits comprising a prevailing wage rate determined under State law and described in paragraph (a)(2) of this section to any of its own employees who may be engaged in the modernization of the project; and

(3) Neither the basic hourly rate nor any fringe benefits comprising a prevailing wage rate determined under State law and described in paragraph (a)(2) of this section shall be enforced against the PHA or any of its contractors or subcontractors with respect to employees engaged in the modernization of the project.

(c) Nothing in this section shall affect the applicability of any wage rate established in a collective bargaining agreement with a PHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable Federal wage rate referred to in paragraph (a)(2) of this section, nor does this section impose a ceiling on wage rates a PHA or its contractors or subcontractors may choose to pay independent of State law.

(d) The provisions of this section shall be applicable to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any worked performed by employees of a PHA on or after October 6, 1988.

Subpart B—Comprehensive Improvement Assistance Program (For PHAs That Own or Operate Fewer Than 500 Public Housing Units)

§ 968.201 Purpose.

The purpose of this subpart is to set forth the policies and procedures for the CIAP program under which PHAs that own or operate fewer than a total of 500 units of public housing receive financial assistance for the modernization of public housing projects, including comprehensive, emergency, homeownership, land-based paint and special purpose modernization.

§ 968.203 Definitions.

In addition to the definitions in § 968.103, the following definitions apply to this subpart:

Comprehensive modernization. A modernization program for a project which provides for all needed physical and management improvements. Under CIAP, all modernization programs are comprehensive modernization, except those defined as emergency, homeownership, lead-based paint, or special purpose.

Emergency modernization. A modernization program for a project that is limited to physical work items of an emergency nature, posing an immediate threat (i.e., must be corrected within one year of funding approval) to tenant life, health, or safety or related to fire safety. Under emergency modernization, management improvements are not eligible modernization costs.

Financial feasibility. The cost (excluding the cost of management improvements, administration, architectural and engineering fees, and other fees) of the modernization program does not exceed 62.5 percent (for a nonelevator structure) or 69 percent (for an elevator structure) of the total cost guidelines for a new project with the same structure type and number and size of units in the market area.

Financially distressed PHA. A PHA that has an operating reserve level of 20 percent or less of its authorized maximum or other level as determined by HUD, as shown on the latest year-old financial statement.

Homebuyer Agreement. A Turnkey III Homebuyer's Ownership Opportunity Agreement.

Homeownership modernization. A modernization program for a project that is under the Turnkey III Homeownership Opportunities program. Under homeownership modernization, limited physical improvements are eligible modernization costs, but management improvements are not eligible modernization costs.

Lack of management capability. The PHA has inadequate management practices, as determined by HUD on the basis of regular monitoring and performance of on-site reviews, audits, and surveys, and has not taken appropriate corrective action. Management practices which are to be considered include, but are not limited to: management, financial, and accounting controls; tenant programs and services; tenant and project security; tenant selection and eviction; occupancy; rent collection; and maintenance.

Lack of modernization capability. The PHA has previously approved, but unobligated, modernization funds that are over one year old for emergency modernization and over three years old (or older, where HUD has approved a longer period) for comprehensive, special purpose, lead-based paint, or homeownership modernization, and that HUD has determined that the failure to obligate the funds is due to reasons within the PHA's control; or has spent modernization funds so that the quality of the work does not assure the long-term social and physical viability of the modernized units.

Lead-based paint modernization. A modernization program for a family project, constructed or substantially rehabilitated before 1978, that is limited to lead-based paint testing and lead-based paint hazard abatement as prescribed in §§ 965.705 and 968.110(k)(1)(iii). Under lead-based paint modernization, management improvements are not eligible modernization costs.

Modernization funds. Funds derived from an allocation of budget authority for the purpose of funding physical and management improvements under an approved modernization program.

Modernization program. A PHA's program for carrying out modernization, as set forth in the approved application for modernization funds.

Modernization project. The improvement of one or more existing public housing projects under a new project number designated for modernization purposes. The term "project" or "public housing project" means a development project with a unique project number.

Non-routine maintenance. Work items that ordinarily would be performed on a regular basis in the course of upkeep of a property, but have become substantial in scope because they have been put off, and that involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Replacement of equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does qualify, but reconstruction, substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units does not qualify.

Special purpose modernization. A modernization program for a project that is limited to cost-effective energy conservation work items which will not be adversely affected by any subsequent comprehensive modernization. Under special purpose modernization, management improvements are not eligible modernization costs.

Work item. Any separately identifiable unit of work constituting a part of a modernization program.

§ 968.205 Eligible costs.

(a) *Physical improvements.* Physical improvements eligible for modernization funding include alterations, betterments, additions, replacements, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 968.115. These standards may be exceeded only when necessary or highly desirable for the long-term physical and social viability of the individual project. If demolition is proposed, the PHA shall comply with 24 CFR Part 970.

(b) *Management improvement costs—*(1) *Eligibility.* Management improvements that are project-specific or PHA-wide in nature are eligible modernization costs only under comprehensive modernization, subject to all of the following conditions:

(i) The management improvements are necessary to correct identified management problems and to sustain the physical improvements at the project to be comprehensively modernized;

(ii) The managment improvements require additional funds for implementation and the funds are not available from other sources;

(iii) The combined costs for management improvements and planning under paragraph (d) of this section do not exceed 10 percent of the total estimated physical improvement costs for a project (from all fiscal years), unless specifically approved by HUD. Under paragraph (d) of this section, planning costs shall not exceed 5 percent of the funds available to a HUD regional office in a particular FFY;

(iv) Management improvement costs are funded only for the implementation period of the physical improvements. In rare cases, HUD may approve a longer period, up to a maximum of five years where it is clearly shown to be necessary to complete the initial installation and demonstrate that the management work item will bring about needed management improvements; and

(v) Where an approved modernization program includes management improvements which involve ongoing costs, HUD is not obligated to provide continued funding or additional operating subsidy after the end of the implementation period of the management improvements. The PHA is responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities.

(2) *Eligible management areas.* Subject to the conditions set forth in paragraph (b)(1) of this section, management improvements may involve or upgrade the following areas:

(i) Management, financial, and accounting control systems of the PHA that are related to the project to be modernized;

(ii) Adequacy and qualifications of personnel employed by the PHA in the management and operation of the project to be modernized, for each significant category of employment;

(iii) Adequacy and efficacy of the following for the project to be modernized:

(A) Tenant programs and services;

(B) Tenant and project security;

(C) Tenant selection and eviction;

(D) Occupancy;

(E) Rent collection; and

(F) Maintenance; and

(iv) Tenant management corporations under paragraph (i) of this section.

(c) *Tenant moving costs.* See § 968.110(g).

(d) *Planning costs.* Planning costs necessary for developing the application (i.e., costs incurred before modernization program approval) are eligible modernization costs. These costs may be reimbursed after application approval. Financially distressed PHAs may request approval from HUD for up-front funding of planning costs where HUD determines that developing the application would otherwise present an undue financial hardship. Not more than 5 percent of the funds available to the HUD regional office in a particular FFY shall be used for planning costs.

(e) *Administrative costs.* Administrative costs necessary for the additional design and implementation of the physical and management improvements (*i.e.*, costs to be incurred after modernization program approval) are eligible modernization costs, as follows:

(1) *Nontechnical and technical salaries.* The salaries of nontechnical and technical PHA personnel assigned full-time or part-time to the modernization program are eligible modernization costs. Any proration of salaries shall be justified by the PHA, authorized by HUD, and reflected by an appropriate revision to the PHA's operating budget.

(2) *Employee benefit contributions.* PHA contributions to employee benefit plans on behalf of nontechnical and technical PHA personnel are eligible modernization costs in proportion to the amount of salary charged to the modernization program.

(f) *Homeownership projects.* For homeownership projects only, eligible physical improvements are limited to work items that are not the responsibility of the homebuyer families and that are related to health and safety, correction of development deficiencies, physical accessibility, cost-effective energy conservation measures, and lead-based paint testing and abatement. Nonroutine maintenance or replacements, additions, items that are the responsibility of the homebuyer families, and management improvements are not eligible modernization costs for homeownership projects.

(g) *Lead-based paint testing.* Lead-based paint testing costs, as described in §§ 965.705 and 965.706 of this chapter and § 968.110(k), are eligible modernization costs.

(h) *Lead-based paint hazard abatement.* Lead-based paint hazard abatement costs, as described in §§ 965.705 and 965.706 of this chapter and § 968.110(k), are eligible modernization costs.

(i) *Tenant management corporations.* Eligible modernization costs include use of management improvement funds to assist a tenant or resident management corporation, as defined in § 964.7 of this chapter, to develop its management capabilities and carry out management improvements identified as PHA-wide or project-specific in nature, under the terms of a management contract between the PHA and the tenant management corporation. (See Part 964 of this chapter for information on the establishment and functions of tenant management corporations) Such

funding is subject to the limitations indicated in paragraph (b) of this section.

§ 968.210 Procedures for obtaining approval of a modernization program.

(a) *HUD notification.* As soon as possible after modernization funds for a particular FFY become available, HUD shall give written notification of the availability of such funds and the time frame for submission of the application.

(b) *PHA consultation with local officials and tenants/homebuyers.* The PHA shall develop the application in consultation with local officials and tenants/homebuyers at the project to be modernized, as set forth in §§ 968.220 and 968.225. Before developing the application, the PHA shall consult with local government officials as to whether the proposed comprehensive, special purpose, or homeownership modernization is financially feasible and will result in long-term physical and social viability of the project.

(c) *Application.* The PHA shall submit to HUD an application, in a form prescribed by HUD, which shall include, but not be limited to:

(1) A five-year funding request plan, which includes the PHA's estimate of the comprehensive modernization funds to be requested over a five-year period to meet the total physical management improvement needs of its projects sufficient to meet the modernization and energy conservation standards in § 968.115, including any special purpose, lead-based paint, and homeownership needs, as well as any emergency needs in the current FFY.

(2) A preliminary assessment of the total physical and management improvement needs and estimated costs of the project(s) for which the PHA is requesting comprehensive modernization and of the specialized needs and estimated costs of the project(s) for which the PHA is requesting special purpose, lead-based paint, homeownership, or emergency modernization in the current FFY.

(3) For each project proposed for comprehensive modernization, an identification of and an estimate of the total costs of replacement of the equipment, systems, or structural elements that would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the application, whichever period is longer.

(4) A resolution by the PHA Board of Commissioners, approving the application and containing certifications as required by HUD.

(d) *HUD screening and review.* HUD shall screen and review the application, and select an application for further processing, on the basis of such factors as the extent and urgency of the need and the PHA's management and modernization capability.

(e) *PHA preparation for joint review.* The PHA shall prepare for the joint review by:

(1) Reaching agreement with HUD on the specific project(s) to be covered during the joint review;

(2) For each project proposed for comprehensive modernization, conducting the comprehensive assessment, which shall include: consideration of the current physical condition and the physical improvements necessary to meet the standards (see § 968.205(a)); and an identification of management needs related to items set forth in § 968.205(b)(2) and the improvements needed to upgrade the management and operation of each such project so that decent, safe, and sanitary living conditions will be provided. The comprehensive assessment shall include a plan for making the improvements and replacements and for meeting the needs, including:

(i) A project operating budget for each 12-month period covered by the plan, excluding modernization costs; and

(ii) An estimate of the financial resources to be available from all sources and the amounts of modernization funds to be requested for each 12-month period covered by the plan.

(3) Reviewing the other factors to be covered during the joint review as prescribed by HUD.

(f) *Joint review.* The PHA and HUD shall conduct an on-site review to discuss the proposed modernization program, as set forth in the application, and reach tentative agreement on PHA needs. The joint review shall include an on-site inspection of the property and resolution of the relevant issues as prescribed by HUD.

(g) *Comprehensive modernization approach.* HUD will fund proposed comprehensive modernization in one stage, or, on an exception basis, in more than one stage—not to exceed a total of five stages. Bases for exception include a PHA's lack of modernization or management capability (which necessitates multi-stage funding), or a total funding requirement for the comprehensive modernization of a large magnitude relative to the funding available to the HUD regional office.

(1) *One-stage funding.* Under one-stage funding, the total amount of modernization funds for all required physical and management improvements at the project shall be approved at one time, from funds for a single FFY, under application.

(2) *Multi-stage funding.* Under multi-stage funding, the total amount of modernization funds for all required physical and management improvements at the project shall be approved in the fewest number of stages that are feasible, over several different FFYs, with the total number of stages not to exceed five. The first stage will include funds for architectural/engineering work and/or a portion of the physical improvements. Management improvements may be included in the first stage to the extent they are eligible costs under § 968.205(b).

(i) *First stage.* At the first stage of funding, the final application shall include a comprehensive assessment of the project's physical and management improvement needs and a plan under paragraph (e)(2) of this section addressing only the work items to be completed during this stage. When approving the first stage, HUD will indicate the approximate balance of the funds required to complete the comprehensive modernization, but also will indicate that future funding will be subject to all of the following conditions: the availability of funds, satisfactory progress by the PHA in obligating first stage and subsequent stage funds, PHA submission of additional documents, and PHA compliance with HUD regulatory and statutory requirements.

(ii) *Subsequent stages.* Where the PHA is requesting for a subsequent stage of a multi-stage comprehensive modernization, HUD will determine whether the PHA has made satisfactory progress in obligating prior stage funds, whether it has submitted necessary additional documents, and whether it has complied with HUD regulatory and statutory requirements. If the PHA has not satisfied these conditions, HUD will not approve that subsequent stage of funding at this time. The PHA submission for any subsequent stage should not duplicate items previously submitted.

(3) *Implementation.* After the application for each stage is approved, the PHA and HUD shall agree on an implementation period that is appropriate for that funding stage, not to exceed five years for any stage from the date on which that stage is first funded.

(h) *HUD funding decisions.* After all of the joint reviews, HUD will determine whether the PHA will be approved for funding and whether any further modifications are required to the

application, giving preferences to PHAs which request assistance for:

(1) Group 1, projects having emergency conditions that pose an immediate threat (i.e., must be corrected within one year of funding approval) to tenant life, health, or safety or related to fire safety. Funding is limited to correction of emergency conditions and may not be used for substantial rehabilitation. Emergency conditions include all lead-based paint testing and abatement as required by § 965.706 of this chapter.

(2) Group 2, projects:

(i) Having conditions which threaten tenant life, health, or safety or having a significant number (10 percent or more) of vacant or substandard units; and

(ii) located in PHAs having demonstrated a capability of carrying out the proposed modernization activities (comprehensive, special purpose, lead-based paint, and homeownership modernization); or

(iii) other family projects not receiving comprehensive modernization funds as defined in § 968.203, and are required to conduct lead-based paint testing and abatement under §§ 965.705 and 968.110(k)(1)(iii) of this part.

Within this group, the Secretary may also give priority to additional factors, such as the correction of physical disparities under the nondiscrimination preference, the project is at the second or subsequent stage of comprehensive modernization, cost benefit, and the need for lead-based paint testing and hazard abatement.

(3) Group 3, other projects located in PHAs having demonstrated a capability of carrying out the proposed modernization activities (comprehensive, special purpose, and homeownership modernization). The Secretary may give priority to factors which demonstrate that the modernization will result in the greatest cost benefit.

(i) *ACC amendment.* After HUD approval of the application, HUD and the PHA shall enter into an ACC amendment to obtain modernization funds.

(j) *Implementation schedule.* After HUD executes the ACC, the PHA shall submit for HUD approval an implementation schedule for each project in the approved modernization program.

§ 968.215 Modernization project.

(a) *Modernization projects.* For purposes of funding modernization, each modernization program approved for a PHA shall be treated as a separate modernization project. The modernization project may include improvements to one or more public housing projects. Improvements to a single public housing project may be included in more than one modernization project.

(b) *ACC.* HUD and the PHA shall enter into an ACC amendment for each modernization project. The ACC amendment shall require lower income use of the housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC).

(c) *Declaration of trust.* The PHA shall execute and file for record a Declaration of Trust as provided under the ACC to protect the rights and interests of HUD throughout the 20 year period during which the PHA is obligated to operate the individual projects receiving modernization grant funds in accordance with the ACC, the Act, and HUD regulations and requirements.

§ 968.220 Tenant participation.

For a rental project only, before submission of the application, the PHA shall consult with the tenant (including, for purposes of this section, tenant organizations and resident management corporations (see § 964.37 of this chapter), if any) regarding its intent to submit an application for modernization funds. Before the joint review, the PHA shall notify the tenant of the project to be modernized of the proposed modernization program, give tenants a reasonable opportunity to present their views on the proposed program and alternatives to it, and give full and serious consideration to tenant recommendations. At the joint review, the PHA shall provide the tenants and HUD with copy of, and an evaluation of, tenant recommendations, indicating the reasons for PHA acceptance or rejection, consistent with HUD requirements and the PHA's own determination of efficiency, economy, and need. The PHA also shall provide a copy of this evaluation to the tenants. After HUD approval of the modernization program, the PHA shall inform the tenants of the approved work items. The provisions of this section do not apply to proposed work items of an emergency nature affecting the life, health, and safety of tenants. However, the PHA shall inform tenants of approved emergency work items.

(Approved by the Office of Management and Budget under OMB control number 2577-0048.)

§ 968.225 Homebuyer participation.

(a) For a homeownership project only, before the joint review, the PHA shall discuss the modernization program with the homebuyer families of the project to be modernized and advise them of the effect of the modernization on the terms of the homebuyer agreements. The PHA shall give the homebuyer families a reasonable opportunity to present their views of the proposed program and give full and serious consideration to their recommendations consistent with HUD requirements and the PHA's own determination of efficiency, economy, and need.

(b) The PHA shall inform each homebuyer family that:

(1) To participate, it must be in substantial compliance with the terms of its homebuyer agreement;

(2) It will have an opportunity to express its views and preferences with respect to the modernization of its home;

(3) The purchase price and the amortization period will be increased as provided in § 968.230;

(4) It will have an opportunity to participate in the final inspection of the work to determine completion in accordance with the requirements; and

(5) Participation in the program is optional.

(c) The PHA shall provide each homebuyer family with a copy of the PHA's evaluation of its recommendations, the tentative decisions reached on the modernization program to be submitted to HUD, the estimated cost of the proposed modernization program, and the amount of the cost to be attributed to its home.

(d) If the homebuyer family decides to participate in the modernization program with respect to any of the proposed work items, it must agree in writing that its homebuyer agreement will be amended upon approval of the application to provide that, as a result of the amount of modernization cost attributed to its home, the purchase price and the amortization period will be increased as provided in § 968.230.

(e) Any homebuyer family may decline to participate without risk to its homebuyer status.

(f) Before HUD approval of the application, the PHA shall obtain a signed agreement from each participating homebuyer family that it will amend its homebuyer agreement upon approval of the application. The PHA shall retain copies of the signed agreements in its files for inspection by HUD.

(g) The provisions of paragraphs (b) through (f) of this section do not apply where modernization work is limited to correction of development deficiencies, conduct of energy audits, undertaking of cost-effective energy conservation

measures, or lead-based paint testing and abatement.

(Approved by the Office of Management and Budget under OMB control number 2577-0048.)

§ 968.230 Special requirements for homeownership projects.

(a) Promptly after HUD approval of the application, each homebuyer family shall execute an amendment to its Homebuyer Agreement, reflecting an increase in the purchase price of its home and an extension of the amortization period in accordance with paragraphs (b) and (c) of this section, except where the modernization work is limited to the correction of development deficiencies, conduct of energy audits, undertaking of cost-effective energy conservation measures, or lead-based paint testing and abatement.

(b) For Turnkey III projects that have purchase price schedules:

(1) The amount of estimated modernization cost attributable to the home, as shown in the HUD-approved application, shall be added to the homebuyer's purchase price as initially determined for Turnkey III projects.

(2) The period of the homebuyer's current purchase price schedule shall be extended by the same percentage as the percentage of increase in the homebuyer's purchase price. The new purchase price schedule shall:

(i) Show monthly amortization of the new purchase price over a period commencing on the same day as the original purchase price schedule and terminating at the end of the extended period; and

(ii) Be computed on the basis of the same interest rate as used for the current purchase price schedule.

(3) If a modernization program is approved for a project after one or more earlier modernization programs for the same project, the total amount of modernization cost attributable to the home under the prior modernization program(s) shall be included as part of the homebuyer's initial purchase price in apply the provisions of paragraphs (b) (1) and (2) of this section.

(c) For Turnkey III projects that do not have purchase price schedules:

(1) These projects do not involve purchase price schedules for amortization of the homebuyer's purchase price over a fixed period of time because the homebuyer's purchase price in these projects is based on the unamortized balance of the portion of the project's development debt attributable to the home. Consequently, it is necessary to establish a separate schedule for the amortization of the estimated modernization cost attributable to the home, as shown by the HUD-approved application.

(2) The PHA shall furnish to the homebuyer a schedule showing monthly amortization of the estimated modernization cost attributable to the home, at the minimum loan interest rate specified in the ACC for the modernization project, over a period commencing on the first day of the month after the date of original occupancy of the home by the homebuyer and terminating at the end of the period determined as follows:

(i) Divide the amount of the estimated modernization cost attributable to the home (including the total amount of modernization cost attributable to the home under prior modernization programs, if any) by the amount of the current HUD-approved estimated replacement cost of the home.

(ii) Multiply this amount by 25, round the result to the next higher number, and add that number to 25. This is the number of years to be used as the period for the modernization amortization schedule.

(iii) The purchase price for the unit shall be the sum of (a) the balance of the debt attributable to the home and (b) the amount remaining on the modernization schedule at the time of settlement.

§ 968.235 Special requirements for Section 23 Leased Housing Bond-Financed projects.

(a) A Section 23 Leased Housing Bond-Financed project is eligible for modernization only if HUD determines that the project has met the following conditions:

(1) The project was financed by the issuance of bonds;

(2) Clear title to the project will be conveyed to or vested in the PHA at the end of the section 23 lease term;

(3) There are no legal obstacles affecting the PHA's use of the property as public housing during the 20-year period of the modernization;

(4) After completion of the modernization, the project will have a remaining useful life of at least 20 years and it is in the financial interest of the Federal Government to improve the project; and

(5) The project is covered by a cooperation agreement between the PHA and local governing body during the 20-year period of the modernization.

(b) A Section 23 Leased Housing Bond-Financed project which has been conveyed to the PHA after the bonds have been retired is similarly eligible for modernization if the conditions specified under paragraph (a) of this section have been satisfied.

§ 968.240 Contracting requirements.

(a) *Compliance with State and local law and Federal requirements.* The PHA shall comply with State and local laws and Federal requirements applicable to bidding and contract awards. (See § 968.110 (e) and (f) and § 968.120 for wage rate requirements.)

(b) *PHA agreement with architect/engineer.* The PHA shall obtain architectural/engineering services through the competitive negotiation process, except where FFY 1981 or subsequent year funds are being used to finance additional services under an existing contract. Notwithstanding 24 CFR 85.36(g), the PHA shall comply with HUD requirements either to submit the contract for prior HUD approval before execution or to certify that the scope of work is in consistent with any agreements reached with HUD, and that the fee is appropriate and does not exceed the HUD-approved budget amount.

(c) *Sealed bid (formal advertising) requirements.* For each construction or equipment contract over $25,000, and lead-based paint testing services over $25,000, the PHA shall conduct formal advertising as required in § 85.36(d)(2) of this chapter, except for procurement under the HUD Consolidated Supply Program, 24 CFR Part 965, Subpart G.

(d) *Assurance of completion.* For each construction or equipment contract over $25,000, the contractors shall furnish a performance and payment bond for 100 percent of the contract price or, notwithstanding 24 CFR 85.36(h) and as may be required by law, separate performance and payments bonds, each for 50 percent or more of the contract price, or a 20 percent cash escrow, or a 25 percent letter of credit.

(e) *Construction and bid documents.* Notwithstanding 24 CFR 85.36(g), the PHA shall comply with HUD requirements either to submit complete construction and bid documents for prior HUD approval before inviting bids or certify to receipt of the required architect's/engineer's certification that the construction documents accurately reflect HUD-approved work and that the bid documents are complete and include all mandatory items.

(f) *Contract award.* The PHA shall obtain HUD approval of the proposed award of modernization construction and equipment contracts if the bid amount exceeds the HUD-approved budget amount or if the procurement meets the criteria set forth in 24 CFR 85.36(g)(2) (i) through (iv). In all other instances, the PHA shall make the award without HUD approval after the PHA has certified that:

(1) The bidding procedures and award were conducted in compliance with State or local laws and Federal requirements;

(2) The award does not exceed the approved budget amount and does not meet the criteria in § 85.36(g)(2) (i) through (iv) for prior HUD approval; and

(3) HUD clearance has been obtained for the award under previous participation procedures, including absence of the contractor from the HUD Consolidated List of Debarred, Suspended or Ineligible Contractors and Grantees.

(g) *Contract modifications.* Notwithstanding 24 CFR 85.36, except in an emergency endangering life or property, the PHA shall comply with HUD requirements either to submit the proposed contract modifications for prior HUD approval, or certify that such modifications are within the scope of the contract and that any additional costs are within the latest HUD-approved budget or otherwise approved by HUD.

(h) *Construction requirements.* The PHA shall submit to HUD periodic progress reports and shall submit all contract settlement documents for prior HUD approval.

(i) *Management improvement contracts.* The PHA shall obtain consultant services through the competitive proposal process. The PHA shall comply with HUD requirements either to submit contracts for management improvements, as well as contract changes, for prior HUD approval, or certify that the contracts accurately reflect HUD-approved work, do not exceed the HUD-approved budget amount, and have received HUD clearance under previous participation procedures. In the case of contract changes, the PHA also shall certify that the changes are within the scope of the contract and that any additional costs are within the latest HUD-approved budget or otherwise are approved by HUD.

§ 968.245 Fund requisitions.

To request modernization funds against the total approved modernization budget, the PHA shall submit a request to HUD in accordance with HUD requirements.

(The information collection requirements were approved by the Office of Management and Budget under OMB control numbers 2577–0104 and 2577–0049.)

§ 968.250 Budget revisions.

The PHA shall not incur any modernization cost in excess of the total approved budget. The PHA shall submit a budget revision, in a form prescribed by HUD, if the PHA plans (within the total approved modernization budget) to incur modernization costs in excess of the approved budget amount for any project. The PHA also shall comply with HUD requirements either to submit the proposed budget revision for prior HUD approval if the PHA plans to delete or substantially revise approved work items, add new work items, or incur modernization costs in excess of the approved budget amount for a work item, or certify that the revisions are necessary to carry out the approved work and do not result in the approved budget amount for any project being exceeded.

§ 968.255 Fiscal closeout of a modernization program

Upon completion of a modernization program, the PHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to HUD for review, audit verification, and approval. The PHA shall immediately remit any excess funds provided by HUD. The audit shall follow the guidelines prescribed by 24 CFR Part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate indicates that there are still excess funds, the PHA shall remit the excess funds as directed by HUD. If the audited modernization cost certificate discloses unauthorized expenditures, the PHA shall take such corrective actions as HUD may direct.

(Approved by the Office of Management and Budget under OMB control number 2577–0049.)

Subpart C—Comprehensive Grant Program (for PHAs That Own or Operate 500 or More Public Housing Units)

§ 968.301 Purpose.

(a) *Purpose.* (1) The purpose of the Comprehensive Grant program under this subpart is:

(i) To provide modernization assistance to PHAs that own or operate a total of 500 or more units of public housing on a reliable and more predictable basis, to enable them to operate, upgrade, modernize, and rehabilitate public housing projects, to ensure their continued availability for lower income families as decent, safe, and sanitary rental housing at affordable rents;

(ii) To provide considerable discretion to PHAs to decide the specific improvements, the manner of their execution, and the timing of the expenditure of modernization funding;

(iii) To simplify significantly the program of Federal assistance for capital improvements in public housing projects;

(iv) To provide increased opportunities and incentives for more efficient management of public housing projects; and

(v) To give PHAs greater control in planning and expending funds for modernization, rehabilitation, maintenance, and improvement of public housing projects to benefit lower income families.

(2) The purpose of this subpart is to set forth the policies and procedures for the Comprehensive Grant program under which PHAs that own or operate a total of 500 or more units of public housing receive financial assistance on a formula grant basis for the modernization of public housing projects.

§ 968.305 Definitions.

In addition to the definitions in § 968.103, the following definitions apply to this subpart:

Action plan. A plan of the actions to be completed by a PHA over a period of five years to make the necessary physical and management improvements identified in the PHA's comprehensive plan. The action plan is part of the comprehensive plan and may be revised as necessary. See § 968.320(b)(4).

Annual statement. A statement submitted annually by a PHA to HUD of the activities and expenditures it expects to undertake during the 12-month period following provision of assistance to the PHA by HUD. See § 968.330.

Comprehensive plan. A plan prepared by a PHA and approved by HUD setting forth all of the physical and management improvement needs of the PHA's public housing projects, and the management improvement needs of the agency, including the PHA's action plan, cost estimates, and required local government and PHA certifications. The comprehensive plan may be revised, as necessary. See § 968.320(b).

Emergency work. Physical work items of an emergency nature, posing an immediate threat to tenant life, health, or safety or related to fire safety. Under the Comprehensive Grant program, management improvements are not eligible as emergency work and, therefore, must be covered by the comprehensive plan before the PHA may carry them out.

Homebuyer agreement. A Turnkey III Homebuyer's Ownership Opportunity Agreement.

Lack of management capability. The PHA (a) has inadequate management

practices, as determined by HUD on the basis of its annual review of PHA performance under § 968.345, or lacks management capability, as defined in § 968.203, with respect to CIAP funding received by the PHA before FFY 1989, and (b) has not taken appropriate corrective action.

Lack of modernization capability. The PHA (a) has inadequate modernization capability, as determined by HUD on the basis of its annual review of PHA performance under § 968.345 or lacks modernization capability, as defined in § 968.203, with respect to CIAP funding received by the PHA before FFY 1989, and (b) has not taken appropriate corrective action.

Modernization funds. Funds derived from an allocation of budget authority for the purpose of funding physical and management improvements under an approved comprehensive plan.

Modernization project. The improvements to one or more existing public housing projects, as set forth in the annual statement, under a new grant number designated for that FFY. The term "project" or "public housing project" means a development project with a unique project number.

Non-routine maintenance. Work items that ordinarily would be performed on a regular basis in the course of upkeep of property, but have become substantial in scope because they have been put off, and involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Replacement of equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does qualify, but reconstruction, substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units does not qualify.

Reasonable cost. The cost (excluding the cost of management improvements, administration, architectural and engineering fees, and other fees) of rehabilitating a project does not exceed 62.5 percent (for a nonelevator structure) of the total cost guidelines for a new project with the same structure type and number and size of units in the market area.

§ 968.310 Eligibile costs.

(a) *Eligible costs.* A PHA may use financial assistance received under this subpart only:

(1) To undertake activities described in its approved comprehensive plan under § 968.320(b), and its annual statement under § 968.330, including the following:

(i) Physical improvements, including alterations, betterments, additions, replacement, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 968.115. These standards may be exceeded only when the PHA determines that is appropriate for the long-term physical and social viability of the individual project. If demolition is proposed, the PHA shall comply with 24 CFR Part 970;

(ii) Management improvements;

(iii) Tenant moving costs (see § 968.110(g));

(iv) Administrative costs necessary for the additional design and implementation of the physical and management improvements (*i.e.*, costs to be incurred after modernization program approval), as follows:

(A) The salaries of nontechnical and technical PHA personnel assigned full-time or part-time to the modernization program are eligible modernization costs. Any proration of salaries shall be justified by the PHA, authorized by HUD, and reflected by an appropriate revision to the PHA's operating budget; and

(B) PHA contributions to employee benefit plans on behalf of nontechnical and technical PHA personnel are eligible modernization costs in proportion to the amount of salary charged to the modernization program;

(v) Lead-based paint testing costs, as described in §§ 965.705 and 965.706 of this chapter and § 968.110(k);

(vi) Lead-based paint hazard abatement costs, as described in §§ 965.705 and 965.706 of this chapter and § 968.110(k); and

(vii) Use of management funds to assist a tenant or resident management corporation, as defined in § 964.7 of this chapter, to develop its management capabilities and carry out management improvements identified as PHA-wide or project-specific in nature, under the terms of a management contract between the PHA and the tenant management corporation. (See Part 964 of this chapter for information on the establishment and functions of tenant management corporations.) Such funding is subject to the limitations indicated in paragraph (c) of this section;

(2) To carry out emergency work, whether or not the need is indicated in the PHA's comprehensive plan or annual statement; and

(3) To fund a reserve to carry out eligible activities in future years;

(4) To prepare a comprehensive plan, including an action plan, under § 968.320, including reasonable costs necessary to assist tenants in participating in the planning process in a meaningful way; an annual statement under § 968.330; and an annual performance and evaluation report under § 968.340.

(b) *Homeownership projects.* For homeownership projects only, eligible physical improvements are limited to work items that are not the responsibility of the homebuyer families and that are related to health and safety, correction of development deficiencies, physical accessibility, cost-effective energy conservation measures, and lead-based paint testing and abatement. Nonroutine maintenance or replacements, additions, items that are the responsibility of the homebuyer families, and management improvements are not eligible modernization costs for homeownership projects.

(c) *Cost limitations.* A PHA shall not use more than a total of 15 percent of its annual grant for management improvements, administration, fees and costs, and relocation expenses.

(d) *Luxury improvements prohibited.* A PHA shall not make luxury improvements, as specified by HUD.

§ 968.315 Allocation of assistance.

(a) *Formula distribution of assistance.* [Reserved]

(b) *Prerequisite for receiving assistance.* No financial assistance, except for emergency work, may be made available under this subpart unless HUD has approved a comprehensive plan submitted by the PHA meeting the requirements of § 968.320. To receive funding for emergency work where HUD has not approved a PHA's comprehensive plan, the PHA shall submit an annual statement to HUD, and any other supporting documentation required by HUD, describing its proposed emergency work, and requesting funding to carry out the work.

§ 968.320 Comprehensive plans.

(a) *Deadline for submission.* As soon as possible after modernization funds first become available for allocation under this subpart, HUD shall notify PHAs in writing of their availability and the deadline for submitting a comprehensive plan.

(b) *Contents of comprehensive plan.* The comprehensive plan shall identify the physical and management improvements needed for each of the PHA's projects, as well as any necessary PHA-wide improvements. The plan shall also include estimates of the cost of these improvements. The plan

shall set forth general strategies for addressing the needs, and highlight any special strategies, such as major redesign or partial demolition of a project, that are necessary to ensure the long-term physical and social viability of the projects. Accordingly, each comprehensive plan shall contain the following elements:

(1) *Comprehensive assessment of physical needs.* The plan shall include a comprehensive assessment of:

(i) The current physical condition of each project owned or operated by the PHA;

(ii) The physical improvements necessary for each project to permit the project to be rehabilitated to a level at least equal to the modernization standards, and to comply with the life-cycle cost-effective energy conservation performance standards, as required in § 968.115;

(iii) The replacement needs of equipment systems and structural elements that will be required to be met (assuming routine and timely maintenance is performed) during the period covered by the action plan (see paragraph (b)(4) of this section); and

(iv) Whether one or more buildings occupied predominantly by one racial or ethnic group are in substandard condition and are in significantly worse condition than one or more buildings occupied predominantly by other racial or ethnic groups, and in such cases the improvements required to correct the conditions.

(2) *Comprehensive assessment of management needs.* The plan shall include a comprehensive assessment of the improvements needed to upgrade the management and operation of the PHA and of each viable project, so decent, safe, and sanitary living conditions will be provided. The assessment shall include at least an identification of needs related to:

(i) The management, financial, and accounting control systems of the PHA;

(ii) The adequacy and qualifications of personnel employed by the PHA in the management and operation of its projects, for each significant category of employment;

(iii) The adequacy and efficacy of the following:

(A) Tenant programs and services;

(B) Tenant and project security;

(C) Tenant selection and eviction;

(D) Occupancy;

(E) Rent collection; and

(F) Maintenance; and

(iv) Tenant management corporations as provided in § 968.205(i).

(3) *Demonstration of long-term physical and social viability.* The plan shall include an analysis, on a project-by-project basis, demonstrating that completion of the improvements and replacements identified under paragraphs (b) (1) and (2) of this section will reasonably ensure, in accordance with HUD guidelines, the long-term physical and social viability of each project at a reasonable cost. The plan may not include improvements and replacements unless their completion would reasonably ensure long-term viability at a reasonable cost, except in the case of emergency work. In addition, if the PHA has received assistance under Part 968 within the preceding five-year period (other than for emergency work), it shall demonstrate that the proposed improvements and replacements do not duplicate work funded during that period.

(4) *Action plan.* The comprehensive plan shall include an action plan to carry out the improvements and replacements identified under paragraphs (b) (1) and (2) of this section that the PHA determines will reasonably ensure the long-term physical and social viability of each project at a reasonable cost, as required by paragraph (b)(3) of this section, and will reasonably ensure that the PHA will meet or make reasonable progress towards meeting the performance standards in § 968.345. The PHA shall develop the action plan based on estimates provided by HUD of the amount of assistance the PHA will receive over its five-year term and on PHA estimates of funds that will be available from other sources, such as State and local governments.

(i) The action plan shall include a schedule, in priority order, of the improvements to be completed over a period of no more than five years from the date HUD approves the comprehensive plan and that are necessary:

(A) To make the improvements and replacements identified under paragraph (b)(1) of this section for each project in which the PHA plans to use assistance under this subpart (the PHA shall give priority to activities required to correct conditions that are life-threatening); and

(B) To upgrade the management and operation of the PHA and its projects, as described in paragraph (b)(2) of this section.

(ii) The action plan shall specify the estimated period of time within which each project will be comprehensively modernized. The period for completion of the modernization shall be reasonable, taking into consideration the amount of work required.

(iii) If the needs identified in the comprehensive plan cannot be completed within five years covered by the action plan, the PHA shall maintain a current five-year action plan by annually amending its action plan, in connection with submission of its annual statement, until all necessary work is covered by the action plan.

(iv) The action plan shall include preliminary estimate of the total cost of the items identified under paragraphs (b) (1) and (2) of this section, for each year covered by the action plan.

(5) *Local government statement.* The comprehensive plan shall include a statement signed by the chief executive officer of the unit of general local government, certifying to the following:

(i) The PHA developed the comprehensive plan in consultation with appropriate local government officials and with tenants of the housing projects, including at least one public hearing. The PHA held the hearing before initial adoption of the comprehensive plan by the PHA, and the hearing gave tenants and other interested parties an opportunity to summarize their priorities and concerns, to ensure full consideration of their priorities and concerns in the PHA's planning process.

(ii) The comprehensive plan is consistent with the unit of general local government's assessment of its lower income housing needs (as evidenced by its housing assistance plan under the Community Development Block Grant program, 24 CFR Part 570, where applicable), and that the unit of general local government will cooperate in providing tenant programs and services.

(6) *Civil rights statement.* The plan shall include a statement, signed by the chief executive officer of the PHA, certifying that the PHA will carry out the comprehensive plan in conformity with title VI of the Civil Rights Act of 1964, title VIII of the Civil Rights Act of 1968, and section 504 of the Rehabilitation Act of 1973.

(7) *PHA resolution.* The plan shall include a resolution adopted by the PHA Board of Commissioners approving the comprehensive plan and certifying that:

(i) The PHA will comply with all policies, procedures, and requirements prescribed by HUD for the modernization, including implementation of the modernization in a timely, efficient, and economical manner;

(ii) The proposed physical work meets the modernization and energy conservation standards in § 968.115;

(iii) The PHA will comply with applicable civil rights requirements under § 968.110(a).

(iv) The PHA has adopted the goal of awarding a specified percentage of the dollar value of the total of the

modernization contracts, to be awarded during subsequent FFYs, to minority business enterprises under § 968.110(b);

(v) The PHA has obtained flood insurance or determined that flood insurance is not required under § 968.110(d);

(vi) The PHA will comply with relocation assistance requirements under § 968.110(g);

(vii) The PHA will comply with requirements for physical accessibility under § 968.110(h);

(viii) The PHA will comply with lead-based paint testing and abatement requirements under § 968.110(k); and

(ix) The PHA will comply with all other applicable laws, regulations, and other program requirements.

(c) *Conversion of a CPM under the CIAP program to an Comprehensive Grant comprehensive plan.* If, under the CIAP program in connection with pre-FFY 1990 funding, a PHA has submitted a comprehensive plan for modernization (CPM) before the effective date of this subpart, the PHA may submit only the changes necessary to reflect the results of consultations with local government officials and tenants and to include the additional items required by § 968.320, instead of an entirely new comprehensive plan.

(d) *Amendments.* When the bases for the needs assessment or other feature of the comprehensive plan have substantially changed, the PHA shall propose an amendment to its comprehensive plan (including its action plan), as part of its annual statement (see § 968.330(b)(4)) or at any other time. The proposed amendment shall include certifications that the PHA has made the proposed amendment publicly available for comment before its submission to HUD, including consultation with appropriate local government officials; given tenants sufficient time to review and comment on the amendments; and taken tenant and local governments comments into consideration in preparing and submitting the amendment. A PHA shall have the right to amend its comprehensive plan and related anual statements to extend the time for performance whenever HUD has not provided the amount of assistance set forth in the comprehensive plan or has not provided the assistance in a timely manner.

§ 968.325 HUD review and approval of comprehensive plan.

(a) *Submission of comprehensive plan.* (1) Upon receipt of a comprehensive plan from a PHA, HUD shall determine whether:

(i) It is complete in all significant matters; and

(ii) The PHA has submitted any additional information or assurances required as a result of HUD monitoring, findings of inadequate PHA performance, or audit findings.

If the PHA has submitted a complete comprehensive plan and all required information and assurances, HUD will accept the plan for review, as of the date of receipt. If the PHA has not submitted all required material, HUD will promptly notify the PHA that it has disapproved the plan as submitted, indicating the reasons for disapproval and the modifications required to qualify the comprehensive plan for HUD review.

(b) *HUD approval of comprehensive plan.* (1) A comprehensive plan accepted for review in accordance with paragraph (a) of this section shall be considered to be approved, unless HUD notifies the PHA in writing, postmarked or delivered within 75 calendar days of the date of receipt, that HUD has disapproved the comprehensive plan, indicating the reasons for disapproval and the modifications required to make the comprehensive plan approvable.

(2) HUD shall approve the comprehensive plan except where it makes a determination in accordance with one or more of the following:

(i) On the basis of available significant facts and data pertaining to the physical and operational condition of the PHA's projects or the management and operations of the PHA, HUD determines that the PHA's identification of modernization needs (see § 968.320(b) (1) and (2)) is plainly inconsistent with such facts and data. HUD will take into account facts and data such as those derived from HUD monitoring, audits, and tenant comments and will disapprove a comprehensive plan based on such findings as:

(A) The completion of the improvements and replacements will not bring all of the PHA's projects to a level at least equal to the standards in § 968.115;

(B) The improvements identified relating to management and operation do not address all of the PHA's areas of deficiency; and

(C) The proposed improvements are not related to the identified needs, such as where one or more projects have significant vacancy rates, but the plan does not address how to fill the vacancies.

(ii) On the basis of the comprehensive plan, HUD determines that the action plan (see § 968.320(b)(4)) is plainly inappropriate to meeting the needs identified in the comprehensive plan. HUD may take into account the thoroughness of the PHA in identifying the physical and managerial needs, including causes of managerial problems; and the effectiveness, based on experience, of the proposed activities in meeting the PHA's management and physical improvement needs.

(iii) On the basis of the comprehensive plan, HUD determines that the PHA has failed to demonstrate that completion of improvements and replacements identified in the comprehensive plan, as required by § 968.320(b) (1) and (2), will reasonably ensure long-term viability of one or more public housing projects to which they relate at a reasonable cost, as required by § 968.320(b)(3).

(iv) HUD has evidence which tends to challenge, in a substantial manner, the local government statement or PHA resolution contained in the comprehensive plan, as required in § 968.320(b) (5) and (6). Any unresolved preliminary finding or final determination by HUD that the PHA is in violation of one of the civil rights requirements listed in § 968.110(a) will be considered such evidence. Such evidence could also include complaints form tenants that they did not have an opportunity to express their views, or complaints from the unit of general local government that it was not adequately consulted in the development of the plan.

(3) After HUD approves the comprehensive plan (or any amendments to it), it shall be binding upon HUD and the PHA.

(c) *Partial approval of plan.* Where the PHA and HUD disagree over a viability determination under paragraph (b)(3) of this section or other substantive matters, HUD may approve a comprehensive plan subject to resolution of the disagreement between HUD and the PHA.

§ 968.330 Annual statement of activities and expenditures.

(a) *Submission of annual statement of activities and expenditures.* After being advised by HUD of the estimated amount of assistance it will receive under this subpart with respect to any fiscal year and estimating how much funding will be available from other sources, such as State and local governments, the PHA shall submit an annual statement of activities and expenditures in accordance with instructions contained in the notification to the PHA. Upon receipt of an annual statement from a PHA, HUD shall determine whether:

(1) It is complete in all significant matters; and

(2) The PHA has submitted any additional information or assurances required as a result of HUD monitoring, findings of inadequate PHA performance, or audit findings.

If the PHA has submitted a complete annual statement and all required information and assurances, HUD will accept the statement for review, as of the date of receipt. If the PHA has not submitted all required material, HUD will promptly notify the PHA that it has disapproved the statement as submitted, indicating the reasons for disapproval and the modifications required to qualify the annual statement for HUD review.

(b) *Contents of annual statement.* The annual statement:

(1) Shall describe, for each project, the activities, obligations, and expenditures the PHA plans to undertake, in whole or in part, with the assistance HUD indicates the PHA will receive (the PHA may include any activities and expenditures, so long as they are consistent with its approved plan);

(2) Shall relate, for each project, the activities, obligations, and expenditures to the comprehensive plan, stating the amount of work to be done in the year covered by the annual statement, and the remaining amount of work to be done;

(3) Shall include certifications by the PHA that:

(i) The proposed activities, obligations, and expenditures are consistent with the approved comprehensive plan of the PHA;

(ii) The PHA has given tenants affected by the planned activities and appropriate local government officials an opportunity to review the draft annual statement and comment on it, and that the PHA has taken tenant and local government comments into account in developing the annual statement submitted to HUD for approval;

(iii) The PHA will comply with § 968.230, where a homeownership project is involved; and

(iv) The PHA will comply with § 968.235, with respect to section 23 leased housing bond-financed projects;

(4)(i) Shall propose an amendment to its action plan, approved as part of its comprehensive plan, where more than five years is needed to complete the improvements and replacements identified in the comprehensive plan and the action plan must be amended to maintain a current five-year plan, as required by § 968.320(b)(4)(iii); and

(ii) When the bases for the needs assessment or other feature of the comprehensive plan have substantially changed, shall propose an amendment to its comprehensive plan, as required by § 968.320(d); and

(5) Shall include a PHA resolution approving the annual statement, and stating that the resolution submitted in accordance with § 968.320(b)(6) is still current or amending the obsolete resolution.

(c) *HUD review and approval of annual statement.* (1) An annual statement accepted in accordance with paragraph (a) of this section shall be considered to be approved, unless HUD notifies the PHA in writing, postmarked or delivered within 75 calendar days of the date HUD accepts it for review under paragraph (a) of this section (or of the date funds are appropriated, if later), that HUD has disapproved the annual statement, indicating the reasons for disapproval and the modifications required to make the annual statement approvable.

(2) HUD shall approve the annual statement, except where:

(i) HUD determines the annual statement is plainly inconsistent with the activities specified in the comprehensive plan;

(ii) HUD has evidence which tends to challenge, in a substantial manner, the certifications or resolution contained in the annual statement, as required by paragraphs (b) (3), (4), and (5) of this section; or

(iii) HUD determines the proposed amendments, if any, to the PHA's comprehensive plan are not acceptable in accordance with the review standards in § 968.325(b).

(3) *HUD conditional approval of annual statement.* HUD may approve an annual statement with conditions, where HUD determines, based on substantial evidence, that the PHA has failed to meet the standards in paragraph (c)(2) of this section. In such a case, HUD shall notify the PHA that the annual statement is being approved with conditions, indicating the reasons for the conditions and the modifications required for HUD to remove the conditions. The conditions may restrict use of funds in accordance with HUD guidelines and may include the actions specified in § 968.345(c).

(d) *Amendments to annual statement.* The PHA shall submit major changes in its annual statement to HUD for approval, except in the case of emergency work or unanticipated work discovered during the rehabilitation of a project. The PHA shall advise HUD of changes due to emergencies and unanticipated work in its performance and evaluation report submitted under § 968.340. HUD shall review a request to amend an annual statement in accordance with paragraph (c) of this section.

(e) *ACC Amendment.* After HUD approval of each year's annual statement, HUD and the PHA shall enter into an ACC amendment to obtain modernization funds.

§ 968.335 Conduct of modernization activities.

(a) *Initiation of activities.* After HUD has approved the annual statement and entered into an ACC amendment with the PHA, the PHA shall undertake the modernization activities and expenditures set forth in its approved annual statement.

(b) *Fund requisitions.* To request modernization funds against the approved annual statement, the PHA shall submit a request to HUD in accordance with HUD requirements.

(c) *Contracting requirements.* The contracting requirements set forth in 24 CFR Part 85 shall apply, unless HUD imposes additional requirements under § 968.345(d).

(d) *Fiscal closeout of a comprehensive grant.* Upon completion of activities funded by each annual grant, the PHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to HUD for review, audit verification, and approval. The audit shall follow the guidelines prescribed by 24 CFR Part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate discloses unauthorized expenditures, the PHA shall take such corrective actions as HUD may direct.

§ 968.340 PHA performance and evaluation report.

No later than 30 days after each PHA fiscal year for which a PHA has received assistance under this subpart, the PHA shall submit a performance and evaluation report, in a form prescribed by HUD, describing its use of assistance made available under this subpart in accordance with the approved annual statement. The report shall include an assessment of the relationship of the use of funds made available under this subpart, as well as the use of other funds such as Community Development Block Grant program assistance, State assistance, and private funding, to the needs identified in the PHA's comprehensive plan and to the purposes of this subpart specified in § 968.301(a). The report shall include a certification that the PHA has made the draft report available for review and comment by affected tenants before its submission to HUD.

§ 968.345 HUD review of PHA performance.

(a) *HUD determination.* At least annually, HUD shall carry out such reviews of PHA performance as may be necessary or appropriate to make the determinations required by this paragraph, taking into consideration all available evidence.

(1) *Conformity with comprehensive plan.* HUD will determine whether the PHA has carried out its activities under this Subpart in a timely manner and in accordance with its comprehensive plan.

(i) In making this determination, HUD will review the PHA's performance to determine whether the modernization activities undertaken during the period under review conform substantially to the activities specified in the approved annual statement, consistent with the approved comprehensive plan. The review may include whether any activities that were undertaken which were not included in the approved annual statement are eligible under § 968.310, are specified in the action plan, or are due to emergencies or unanticipated work discovered during rehabilitation. HUD will also consider whether the PHA received more or less funding than anticipated when it developed its annual statement.

(ii) HUD will review a PHA's performance to determine whether the activities carried out comply with the requirements of the Act, including the requirement that the work carried out meets the modernization and energy conservation standards in § 968.115, this part, and other applicable laws and regulations.

(2) *Continuing capacity.* HUD will determine whether the PHA has a continuing capacity to carry out its comprehensive plan in a timely manner.

(i) The primary factors to be considered in arriving at a determination that a recipient has a continuing capacity are those described in paragraphs (a) (1) and (3) of this section as they relate to carrying out the comprehensive plan. If HUD determines that the PHA has carried out its activities under this subpart in a timely manner, taking into account the level of funding available, and in accordance with its comprehensive plan and that the PHA has satisified, or has made reasonable progress towards satisfying, the performance standards prescribed in paragraph (a)(3) of this section as they relate to activities under this subpart, HUD will generally consider the PHA to have a continuing capacity.

(ii) HUD will give particular attention to PHA efforts to accelerate the progress of the program and to prevent the recurrence of past deficiencies or noncompliance with applicable laws and regulations.

(3) *Reasonable progress.* HUD shall determine whether the PHA has satisified, or has made reasonable progress towards satisfying, the following performance standards:

(i) With respect to the physical condition of each project, whether the projects are in substantial compliance with the housing quality standards in 24 CFR 882.109; and

(ii) With respect to the management condition of the PHA, whether:

(A) Operating reserves, exclusive of tenants accounts receivable, exceed a reasonable percentage of maximum operating reserves, in accordance with HUD guidelines;

(B) Operating expenses are less than or equal to income, or do not exceed income by more than a reasonable amount, in accordance with HUD guidelines;

(C) Annual utility consumption, as compared to the average of the previous three years' rolling base consumption, adjusted for variances in heating degree days, has not increased more than a reasonable amount, in accordance with HUD guidelines, has not changed, or has decreased

(D) The PHA is a "high occupancy" PHA, as determined by HUD, or is meeting the occupancy goals of a comprehensive occupancy plan approved by HUD, in accordance with § 990.118 of this chapter.

(E) Annual rent collections equal or exceed a percentage, as specified by HUD, of annual rents chargeable by the PHA plus rental accounts receivable as of the end of the PHA's fiscal year;

(f) The annual average number of vacancy days between tenants is not more than a reasonable number of days, as specified by HUD; and

(G) The PHA has inspected all of its dwelling units annually, or more or less often, as specified by HUD, using housing quality standards as a minimum standard.

In setting standards under paragraph (a)(3)(ii) of this section and making the determination under paragraph (a)(3) of this section, HUD will take into account what is reasonable to expect a PHA to achieve, based on the experience of PHAs in similar circumstances, as determined by HUD.

(iii) HUD will propose changes to these standards only after consultation with PHAs and PHA organizations.

(b) *Condition for receipt of assistance.* No financial assistance may be made available under this subpart unless HUD determines that the PHA has made substantial efforts to meet the objectives of the preceding year under the PHA's comprehensive plan, or, for the first year a PHA receives assistance under this subpart, under the PHA's approved CIAP program. In making this determination HUD will take into account its determinations under paragraph (a) of this section.

(c) *Corrective action.* (1) HUD may order a PHA to take corrective action only if HUD determines:

(i) The PHA has not submitted a performance and evaluation report, in accordance with § 968.340;

(ii) The PHA has not carried out its activities under Subpart C in a timely manner and in accordance with its comprehensive plan;

(iii) The PHA does not have a continuing capacity to carry out its comprehensive plan in a timely manner;

(iv) The PHA has not satisfied, or has not made reasonable progress towards satisfying, the performance standards specified in paragraph (a)(3) of this section.

(v) An audit conducted in accordance with 24 CFR Part 44 and § 968.110(i) reveals findings that HUD reasonably believes require corrective action.

(2) HUD shall design corrective action to prevent a continuation of the deficiency; mitigate any adverse effects of the deficiency to the extent possible; and prevent a recurrence of the same or similar deficiencies.

(3) HUD may direct a PHA to take one or more of the following corrective actions:

(i) Submit additional information:

(A) Concerning the PHA's administrative, planning, budgeting, accounting, management, and evaluation functions, to determine the cause for a PHA not meeting the standards in paragraphs (a) (1), (2), or (3) of this section;

(B) Explaining any steps the PHA is taking to correct the deficiencies;

(C) Documenting that PHA activities were not inconsistent with the PHA's annual statement or other applicable laws, regulations, or program requirements; and

(D) Demonstrating that the PHA has a continuing capacity to carry out the comprehensive plan in a timely manner;

(ii) Submit schedules for completing the work identified in its annual statement and report periodically on its progress on meeting the schedules;

(iii) Correct deficiencies specified in a letter from HUD advising the PHA of the deficiencies and warning it that HUD will impose sanctions if the deficiency recurs or if it is not corrected within a specified time;

(iv) Submit supporting material to document one or more of the statements, resolutions, and certifications submitted as Part of the PHA's comprehensive plan, annual statement, or performance and evaluation report;

(v) Not to incur financial obligations, or to suspend payments for one or more activities;

(vi) Reimburse, from non-HUD sources, one or more program accounts for any amounts improperly expended;

(vii) Take such other corrective actions HUD determines appropriate to correct PHA deficiencies.

(d) *Conditioning.* HUD may condition the approval of the next year's annual statement, or otherwise condition a PHA's program, based on substantial evidence, in accordance with paragraph (a) of this section.

(e) *Withholding and reallocating grant amounts.* (1) HUD may withhold some or all of the PHA's annual grant where it has required a PHA to take corrective action and the PHA has failed to correct the deficiency within a reasonable time.

(2) Where HUD has withheld a PHA's annual grant to two or more consecutive fiscal years, it may reallocate some or all of the amounts that have been withheld up to that time, as well as future allocations, to other PHAs in the next FFY. HUD will not reallocate annual grant amounts until HUD has required a PHA to take corrective action and the PHA has failed to correct the deficiency within a reasonable time. Before reallocating a grant, HUD will notify the PHA and give it an opportunity, within a prescribed time, to consult with HUD regarding the proposed action.

Dated: September 28, 1988.

Jacqueline Aamot,

Associate General Deputy Assistant Secretary for Public and Indian Housing.

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LIST OF PUBLIC LAWS

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 523-6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202-275-3030).

H.R. 2772/Pub. L. 100-516

Mni Wiconi Project Act of 1988. (Oct. 24, 1988; 102 Stat. 2566; 12 pages) Price: $1.00

H.R. 3235/Pub. L. 100-517

Health Maintenance Organization Amendments of 1988. (Oct. 24, 1988; 102 Stat. 2578; 6 pages) Price: $1.00

H.R. 4345/Pub. L. 100-518

United States Grain Standards Act Amendments of 1988. (Oct. 24, 1988; 102 Stat. 2584; 5 pages) Price: $1.00

H.R. 4417/Pub. L. 100-519

To authorize appropriations to the Secretary of Commerce for the programs of the National Bureau of Standards for fiscal year 1989, and for other purposes. (Oct. 24, 1988; 102 Stat. 2589; 10 pages) Price: $1.00

H.R. 4724/Pub. L. 100-520

To direct the Secretary of Agriculture to release a reversionary interest of the United States in certain land located in Oktibbeha County, Mississippi. (Oct. 24, 1988; 102 Stat. 2599; 2 pages) Price: $1.00

H.R. 2399/Pub. L. 100-521

Forest Ecosystems and Atmospheric Pollutaion Research Act of 1988. (Oct. 24, 1988; 102 Stat. 2601; 3 pages) Price: $1.00

H.R. 5423/Pub. L. 100-522

To authorize continued storage of water at Abiquiu Dam in New Mexico. (Oct. 24, 1988; 102 Stat. 2604; 1 page) Price: $1.00

S. 1911/Pub. L. 100-523

To amend title 5, United States Code, to allow all forest fire fighting employees to be paid overtime without limitation while serving on forest fire emergencies. (Oct. 24, 1988; 102 Stat. 2605; 1 page) Price: $1.00

S 2018/Pub. L. 100-524

Concaree Swamp National Monument Expansion and Wilderness Act. (Oct. 24, 1988; 102 Stat. 2606; 3 pages) Price: $1.00

S. 2479/Pub. L. 100-525

Immigration Technical Corrections Act of 1988. (Oct. 24, 1988; 102 Stat. 2609; 14 pages) Price: $1.00

S. 2749/Pub. L. 100-526

Defense Authorization Amendments and Base Closure and Realignment Act. (Oct. 24, 1988; 102 Stat. 2623; 12 pages) Price: $1.00