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Monday
March 13, 1989

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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

Executive Order 12670 of March 9, 1989

Nuclear Cooperation With EURATOM

By the authority vested in me as President by the Constitution and laws of the United States of America, including Section 126a(2) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2155(a)(2)), and having determined that, upon the expiration of the period specified in the first proviso to Section 126a(2) of such Act and extended for 12-month periods by Executive Orders Nos. 12193, 12295, 12351, 12409, 12463, 12506, 12554, 12587, and 12629, failure to continue peaceful nuclear cooperation with the European Atomic Energy Community would be seriously prejudicial to the achievement of U.S. non-proliferation objectives and would otherwise jeopardize the common defense and security of the United States, and having notified the Congress of this determination, I hereby extend the duration of that period to March 10, 1990.

THE WHITE HOUSE,
March 9, 1989.

[FR Doc. 89-5920
Filed 3-10-89; 10:24 am]
Billing code 3195-01-M

Editorial note: For the text of the President's letters to the Speaker of the House of Representatives and the President of the Senate, dated Mar. 10, on nuclear cooperation with EURATOM, see the *Weekly Compilation of Presidential Documents* (vol. 24, no. 10).

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Farmers Home Administration

7 CFR Part 1951

Servicing and Collections

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule.

SUMMARY: The Farmers Home Administration (FmHA) amends its account servicing regulations to provide for the consolidation of the annual statement of loan accounts and the loan summary statements required by the Food Security Act of 1985. The intended effect is to consolidate the year end work load of the Agency and eliminate the cost of providing two annual statements to FmHA field offices for borrowers with loans made or insured under the Consolidated Farm and Rural Development Act. Other revisions are made to reflect changes in internal processing of account information.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: John E. Distler, Chief, Accounting Systems Planning and Design Branch I, Accounting Systems Planning Division, USDA, 1520 Market Street, St. Louis, MO 63103, Telephone (314) 425–4458.

SUPPLEMENTARY INFORMATION: This final action has been reviewed under USDA procedures established in Departmental Regulation 1512–1 which implements Executive Order 12291 and has been determined to be exempt from those requirements because it involves only internal agency management.

A loan summary statement is required for the loan programs listed in the Catalog of Federal Domestic Assistance under titles and numbers as follows: Farm Ownership Loans, 10.407; Farm Operating Loans, 10.406; Emergency Loans, 10.404; Soil and Water Loans, 10.416; Water and Waste Disposal Systems for Rural Communities, 10.418; and Community Facilities Loans, 10.423.

The first three of these listed programs are not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with state and local officials.

This final action has been reviewed in accordance with FmHA Instruction 1940–G, "Environmental Program." FmHA has determined that this final action does not constitute a major Federal action significantly affecting the quality of the human environment and, in accordance with the National Environmental Policy Act of 1969, Pub. L. 91–190, an Environmental Impact Statement is not required.

The Food Security Act of 1985 (Pub. L. 99–198) requires that FmHA furnish to a borrower, upon their request, a loan summary statement for any loan made or insured under the Consolidated Farm and Rural Development Act. The Form FmHA 389–777, Loan Summary Statement, provides FmHA field offices with a detailed status of each loan for the loan summary period. Farmers Home Administration also produces a Form FmHA 450–14, Annual Statement of Loan Account, which is currently sent to the field offices and to all borrowers with loans made or insured by FmHA. Form FmHA 450–14 is being merged with the loan summary statement to provide a detailed summary of all loan activity to all borrowers.

The statement will reflect the detail of each loan for the reporting period, including the interest rate, outstanding principle due at the beginning of the period, amount of payments made during the period, amount due at the end of the period, allocation of payments, total amount due on all loans at the end of the period, and any delinquency. As of December 31 of each year, a hard-copy report will be produced and forwarded to each borrower, a copy will be retained in the borrower's file in the field office. In addition, at the end of each calendar quarter, a cumulative report will be produced on microfiche and retained in the Finance Office. Form FmHA 1951–9 will be created by the Agency's automated accounting system. The reporting period will begin on January 1, or the date of loan closing and end on December 31.

Since all field offices are now equipped with multifunction work stations and have the capability of retrieving current borrower information from the automated accounting system, the reference as to how the field offices will inquire about borrower information is being altered.

Also, the regulations are revised to reflect that a notice of the availability of loan summary statements is posted in FmHA offices and to contain a sample of this notice.

These changes in regulations are being made to advise FmHA field offices of the changes in the procedures to be followed when a borrower requests a loan summary statement and to formalize what already is being done regarding the posting of the notice of availability of loan summary statements in FmHA offices. This is internal agency management. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rule making and the opportunity for comment are not required; this rule may be made effective less than 30 days after publication in the Federal Register.

List of Subjects in 7 CFR Part 1951

Account servicing, Credit, Loan programs—agriculture, Loan programs—housing and community development, Low and moderate income housing loans—servicing requirements, Reporting requirements, Rural areas.

Therefore, Chapter XVIII, Title 7, of the Code of Federal Regulations is amended as follows:

PART 1951—SERVICING AND COLLECTIONS

1. The authority citation for Part 1951 is revised to read as follows:

Authority: 7 U.S.C. 1989, 42 U.S.C. 1480, 5 U.S.C. 301, 7 CFR 2.23, and 7 CFR 2.70

Subpart A—Account Servicing Policies

2. § 1951.7 is amended by redesignating paragraph (g) as paragraph (h) and by adding a new paragraph (g) and revising paragraph (h) to read as follows:

§ 1951.7 Accounts of borrowers.

* * * * *

(g) *Inquiry for other than Multiple Family Housing (MFH) loans.* Inquiry for these loan programs will be made through field terminals using procedures

in the "Automated Discrepancy Processing System (ADPS)" manuals.

(h) *Loan Summary Statements.* Upon request of a borrower, FmHA issues a loan summary statement that shows the account activity for each loan made or insured under the Consolidated Farm and Rural Development Act. The field office will post on the bulletin board a notice informing the borrower of the availability of the loan summary statement. See Exhibit A for a sample of the required notice.

(1) The loan summary statement period is from January 1 through December 31. The Finance Office forwards a copy of Form FmHA 1951–9, "Annual Statement of Loan Account," to field offices to be retained in borrower files as a permanent record of borrower activity for the year.

(2) Quarterly Forms FmHA 1951–9 are retained in the Finance Office on microfiche. These quarterly statements reflect cumulative data from the beginning of the current year through the end of the most recent quarter. If a borrower requests a loan summary statement with data through the most recent quarter, county supervisors may request copies of these quarterly or annual statements by sending Form FmHA 1951–57, "Request for Loan Summary Statement," to the Finance Office.

(3) When a loan summary statement is requested by the borrower, the field office will copy the applicable annual or quarterly Forms FmHA 1951–9. A copy(ies) of Form FmHA 1951–9; a copy of Form FmHA 1951–58, "Basis for Loan Account Payment Application for Farmer Program Loans;" and a copy of the promissory note showing borrower installments will constitute the loan summary statement provided to the borrower.

3. Subpart A of Part 1951 is amended by adding Exhibit A to read as follows:

Exhibit A—Notice to FmHA Borrowers

FmHA borrowers with farmer program and community program loan types made under the Consolidated Farm and Rural Development Act may request a loan summary statement which shows the calendar year account activity for each loan. Interested borrowers may request these statements through their local FmHA office.

Subpart E—Servicing of Community Program Loans and Grants

4. § 1951.207, paragraph (l) is revised to read as follows:

§ 1951.207 General servicing actions.

* * * * *

(l) *Loan Summary Statements.* Upon request of a borrower, FmHA issues a loan summary statement that shows the account activity for each loan made or insured under the Consolidated Farm and Rural Development Act. The field office will post on the bulletin board a notice informing the borrower of the availability of the loan summary statement. See Exhibit A of Subpart A of this part for a sample of the required notice.

(1) The loan summary statement period is from January 1 through December 31. The Finance Office forwards to field offices a copy of Form FmHA 1951–9, "Annual Statement of Loan Account," to be retained in borrower files as a permanent record of borrower account activity for the year.

(2) Quarterly Forms FmHA 1951–9 are retained in the Finance Office on microfiche. These quarterly statements reflect cumulative data from the beginning of the current year through the end of the most recent quarter. Servicing offices may request copies of these quarterly or annual statements by sending Form FmHA 1951–57, "Request for Loan Summary Statement," to the Finance Office.

(3) When a loan summary statement is requested by the borrower, the servicing office copies the applicable Forms FmHA 1951–9. A copy(ies) of Form FmHA 1951–9 and a printout from the multifunction work stations which reflects all future installments owed by the borrower will constitute the loan summary statement to be provided to the borrower.

Date: May 23, 1988.

Vance L. Clark,

Administrator, Farmers Home Administration.

[FR Doc. 89–5686 Filed 3–10–89; 8:45 am]

BILLING CODE 3410–07–M

FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A]

Extensions of Credit by Federal Reserve Banks; Change in Discount Rates

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors has amended its Regulation A, "Extensions of Credit by Federal Reserve Banks," for the purpose of increasing discount rates.

The Board took this action in light of inflationary pressures on the economy.

The Board acted on requests submitted by the Boards of Directors of the twelve Federal Reserve Banks. The discount rate is the interest rate that is charged despository institutions when they borrow from their district Federal Reserve Bank.

EFFECTIVE DATE: This rule is effective on March 6, 1989. The discount rate changes were effective on the dates specified below.

FOR FURTHER INFORMATION CONTACT: William W. Wiles, Secretary of the Board (202/452–3257); for the hearing impaired *only*, Telecommunications Device for the Deaf (TTD) (202/452–3544), Earnestine Hill or Dorothea Thompson, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Pursuant to the authority of sections 10(b), 13, 14, 19, *et al.*, of the Federal Reserve Act, the Board has amended its Regulation A to incorporate changes in discount rates on Reserve Bank extensions of credit. Further, under the authority of 5 U.S.C. 553(b)(3) (B) and (d)(3), these amendments are being published without prior general notice of proposed rulemaking, public participation, or deferred effective date. The Board has for good cause found that current economic and financial considerations require that these amendments be adopted immediately.

List of Subjects in 12 CFR Part 201

Banks, Banking, Credit, Federal Reserve System.

For the reasons outlined above, the Board of Governors amends 12 CFR Part 201 as set forth below:

PART 201—[AMENDED]

1. The authority citation for 12 CFR Part 201 continues to read as follows:

Authority: Secs. 10(a), 10(b), 13, 13a, 14(d) and 19 of the Federal Reserve Act (12 U.S.C. 347a, 347b, 343 *et seq.*, 347c, 348 *et seq.*, 357, 374, 374a and 461); and sec. 7(b) of the International Banking Act of 1978 (12 U.S.C. 347d).

2. Section 201.51 is revised to read as follows:

§ 201.51 Short-term adjustment credit for depository institutions.

The rates for short-term adjustment credit provided to depository institutions under § 201.3(a) of Regulation A are:

Federal Reserve Bank	Rate	Effective
Boston	7.0	Feb. 24, 1989.
New York	7.0	Do.
Philadelphia	7.0	Do.
Cleveland	7.0	Do.
Richmond	7.0	Do.
Atlanta	7.0	Do.
Chicago	7.0	Do.
St. Louis	7.0	Do.

Federal Reserve Bank	Rate	Effective
Minneapolis	7.0	Do.
Kansas City	7.0	Do.
Dallas	7.0	Feb. 27, 1989.
San Francisco	7.0	Feb. 24, 1989.

3. Section 201.52 is revised to read as follows:

§ 201.52 Extended credit for depository institutions.

(a) *Seasonal credit.* The rates for seasonal credit extended to depository institutions under § 201.3(b)(1) of Regulation A are:

Federal Reserve Bank	Rate	Effective
Boston	7.0	Feb. 24, 1989.
New York	7.0	Do.
Philadelphia	7.0	Do.
Cleveland	7.0	Do.
Richmond	7.0	Do.
Atlanta	7.0	Do.
Chicago	7.0	Do.
St. Louis	7.0	Do.
Minneapolis	7.0	Do.
Kansas City	7.0	Do.
Dallas	7.0	Feb. 27, 1989.
San Francisco	7.0	Feb. 24, 1989.

(b) *Other extended credit.* The rates for other extended credit provided to depository institutions under sustained liquidity pressures or where there are exceptional circumstances or practices involving a particular institution under § 201.3(b)(2) of Regulation A are:

Federal Reserve Bank	Rate	Effective
Boston	7.0	Feb. 24, 1989.
New York	7.0	Do.
Philadelphia	7.0	Do.
Cleveland	7.0	Do.
Richmond	7.0	Do.
Atlanta	7.0	Do.
Chicago	7.0	Do.
St. Louis	7.0	Do.
Minneapolis	7.0	Do.
Kansas City	7.0	Do.
Dallas	7.0	Feb. 27, 1989.
San Francisco	7.0	Feb. 24, 1989.

These rates apply for the first 30 days of borrowing. For credit outstanding for more than 30 days, a flexible rate will be charged which takes into account rates on market sources of funds, but in no case will the rate charged be less than the basic discount rate plus one-half percentage point. Where credit provided to a particular depository institution is anticipated to be outstanding for an unusually prolonged period and in relatively large amounts, the 30-day time period may be lengthened or shortened.

By order of the Board of Governors of the Federal Reserve System, March 6, 1989.

William W. Wiles,

Secretary of the Board.

[FR Doc. 89-5623 Filed 3-10-89; 8:45 am]

BILLING CODE 6210-01-M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 124

Protest and Appeals Procedures Concerning Determinations of Social and Economic Disadvantaged Status as a Condition of Eligibility

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: The Small Business Administration (SBA) has established procedures to govern protests of social and economic disadvantaged status of certain small businesses and appeals of SBA's determinations of such status. These procedures apply to certifications of disadvantaged status for purposes of the Defense Department's (DoD's) Small Disadvantaged Business Set-Asides and Small Disadvantaged Business Evaluation Preferences, authorized under section 1207 of Pub. L. 99-661, the Subcontracting Program authorized by section 8(d) of the Small Business Act (15 U.S.C. 636(d)) and for any other Federal procurement program, excluding SBA's section 8(a) program, which requires SBA to determine social and economic disadvantage as a condition of eligibility.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Jane Palsgrove Butler, Deputy Director, Office of Program Eligibility, (202) 653-6813.

SUPPLEMENTARY INFORMATION: On June 8, 1988, SBA published a proposed rule establishing procedures to govern protests of social and economic disadvantaged status of certain small businesses and appeals of SBA's determination of such status. 53 FR 21482 (1988). These procedures apply to certifications of disadvantaged status for purposes of DoD's Small Disadvantaged Business Set-Asides and Small Disadvantaged Business Evaluation Preferences, authorized under section 1207 of Pub. L. 99-661, the Subcontracting Program authorized by section 8(d) of the Small Business Act and for any other Federal procurement program where disadvantaged status is a criterion of eligibility. The procedures, however, are not intended to apply to SBA's section 8(a) program, which requires SBA to determine social and economic disadvantage as a condition of eligibility. The reasons for the rule may be found in the preamble to the proposed rule at 53 FR 21482 (June 1988).

SBA has made five changes to the rule. First, SBA has amended § 124.605(b)(1)(iv) to clarify that protests brought by contracting officers must state their reasons for initiating a protest and may not be initiated merely by forwarding the protest of a third party. This amendment is made in response to the growing practice of some contracting officers who deliberately or unwittingly aid unsuccessful offerors in circumventing the SDB protest timeliness requirements by forwarding late protests without adopting the grounds for such protests as their own or further elaborating on such grounds.

In adopting this amendment, SBA considered the alternative of permitting contracting officers and SBA to initiate protests only until the date of contract award. This alternative was rejected, however, because it would limit the ability of the contracting officer to question the disadvantaged status of successful SDB offerors, even when the contracting officer was presented with persuasive evidence to the contrary. It is important that the benefits of the SDB program accrue only to small disadvantaged businesses. In negotiated procurements, especially, it is possible that the date of award might coincide with the date the unsuccessful offerors are notified. In such cases, any avenue or protest would be closed if contracting officers and SBA were precluded from initiating a protest after the date of award.

In order to prevent this undesirable result and to address the problem of circumvention of protest timeliness requirements, SBA has amended § 124.605 specifically to preclude such action on the part of contracting officers.

In § 124.608(c), the last sentence has been reworded to clarify that materials requested from the protested concern are late if they are not received by SBA's Director of the Office of Program Eligibility (for the Office of Minority Small Business and Capital Ownership Development) within ten days from the date the notification of the protest was received by the protested concern. Late submissions will not be considered in deciding the protest. SBA believes the expeditious operation of the procurement system and fairness to other eligible SDB concerns justify a strict timeliness requirement.

SBA has amended § 124.608(b)(2) to specify that SBA may allow an affidavit

for a current 8(a) program participant in lieu of other documentation, and to limit such submission to 8(a) concerns for which SBA has conducted an annual review within the 12 month period preceding the date on which SBA receives the protest, and then only if proceedings to suspend, terminate or graduate the concern from the 8(a) program are not pending. If an annual review has not been conducted, or if suspension or removal proceedings are pending, an affidavit may not be allowed. These changes were made to more clearly reflect that the submission of an affidavit from the firm is at SBA's discretion, and to clearly indicate that the firm's 8(a) participation must be in good standing with SBA at the time of the submission of the affidavit.

SBA has amended § 124.608 to delete paragraph (3) which allowed a non-8(a) firm which has been found to be an eligible SDB within the past six months to submit an affidavit in lieu of other documentation. The affidavit procedure with respect to non-8(a) concerns was deleted because SBA determined that the administration of the affidavit system would be unduly burdensome on the Agency. In addition, the Agency believes that requiring complete documentation each time a protest is made would not place an undue hardship on the protested firm since the firm can merely update the documentation which it previously provided to SBA.

Finally, SBA has amended § 124.602 to include definitions for termination proceedings, graduation proceedings, suspension proceedings and annual review.

SBA provided a 30-day public comment period following publication of the proposed rule. SBA received two comments in response to the proposed rule.

One comment addressed the application of the ten percent evaluation preference for SDBs but did not comment on the proposed rule at all. SBA has forwarded the comment to the Department of Defense for its consideration.

The other commenter objected to limiting the potential protesters of disadvantaged status to SBA, the contracting officer and those who have submitted a bid on the requirement at issue. SBA has considered this comment and has decided not to adopt it in this final rule. Given the limited resources SBA has available to devote to SDB protests, the limitation on potential protesters is appropriate. Moreover, the regulation permits non-bidders to submit to the contracting officer or to SBA the information supporting their view that the disadvantaged status of the apparent low SDB bidder should be challenged.

SBA certifies that this rule is not a major rule for purposes of Executive Order 12291. The rule sets forth agency procedures for determining disadvantaged status. Utilization of and compliance with such procedures should not entail significant costs and will not approach an economic impact of $100 million.

SBA further certifies that this rule is not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Section 603 of that Act requires an agency to prepare a regulatory flexibility analysis whenever the agency is required by section 553 of the Administrative Procedure Act (5 U.S.C. 553) to publish a notice of proposed rulemaking. This rule is exempted from such requirements by 5 U.S.C. 553(b)(A) as it establishes agency procedures for challenging disadvantaged status.

This rule also will not impose any new reporting or recordkeeping requirements for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. Chapter 35. SBA Forms 1010A, 1010B, and 413, appearing in § 124.608, have been approved by the Office of Management and Budget under control numbers 3243–0015, 3245–0015, and 3245–0188, respectively.

List of Subjects in 13 CFR Part 124

Administrative practice and procedure, Government procurement, Minority business, Reporting and recordkeeping requirements, Technical assistance.

Accordingly, pursuant to sections 5(b)(6), 8(a) and 8(d) of the Small Business Act (15 U.S.C. 634(b)(6), 636(a) and 636(d)), Part 124 of title 13 CFR is amended as follows:

PART 124—[AMENDED]

1. The authority citation is revised to read:

Authority: 15 U.S.C. 634(b)(6), 637(a), 637(d); Pub. L. 99–661 (sec. 1207).

2. The title of Part 124 is revised to read "Minority Small Business and Capital Ownership Development/Small Disadvantaged Business Status Protest and Appeal Procedures."

3. Sections 124.1 through 124.503 are designated as Subpart A, entitled "Section 8(a) and Section 7(j) Programs".

4. New Subpart B (consisting of §§ 124.601 through 124.610), entitled "Disadvantaged Business Status Protest and Appeal Procedures" is added as follows:

Subpart B—Disadvantaged Business Status Protest and Appeal Procedures

Sec.

Subpart B—Disadvantaged Business Status Protest and Appeal Procedures

§ 124.601 Introduction.

(a) This subpart sets forth the procedures to be used whenever the SBA is asked to make a determination as to whether a particular concern is "disadvantaged" for purposes of Department of Defense's (DoD's) Small Disadvantaged Business (SDB) set-aside contracts and SDB evaluation preferences, authorized by section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99–661, SBA's section 8(d) subcontracting program, and any other Federal procurement program requiring SBA to determine social and economic disadvantage as a condition for eligibility. These procedures are separate and distinct from those governing size protests and appeals.

(b) In determining the disadvantaged status of a protested concern, the SBA shall utilize the definitions of social and economic disadvantage and other eligibility requirements established in Subpart A of Part 124 of this title, including the requirements placed on ownership and control. In addition, for purposes of SDB set-asides and SDB evaluation preferences only, there is the additional requirement that the majority of the earnings of the concern directly accrue to the disadvantaged individual who owns and controls it. SBA shall apply these definitions in accordance with the presumption contained in section 8(d) of the Small Business Act (15 U.S.C. 636(d)).

(c) All protests relating to whether a concern is a "small" business for purposes of any Federal program requiring such a condition for eligibility, including SDB set-asides and SDB evaluation preferences, are to be filed pursuant to the procedures set forth in § 121.9 of these regulations. The rules contained in Part 121 apply to all such size determinations. For purposes of

SDB set-asides, SDB evaluation preferences and the section 8(a) subcontracting program, the size standard contained in the solicitation is the applicable size standard for the requirement. An appeal of such a size determination may be made pursuant to § 121.11 of these regulations.

§ 124.602 General definitions.

(a) *Annual Review.* SBA's annual review and evaluation of financial statements, eligibility certifications submitted by the 8(a) concern, and such other submissions as may be required of Program Participants to ascertain continued eligibility of a concern for participation in the 8(a) program.

(b) *Appeal.* A request for re-examination of the initial SBA determination regarding a protest.

(c) *Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD).* The SBA official who is responsible for deciding appeals of disadvantaged status.

(d) *Control.* See § 124.104, Title 13, CFR.

(e) *Current Section 8(a) Program Participant.* Any business concern which is approved for participation in the section 8(a) program as of the date on which SBA receives the protest on the solicitation at issue.

(f) *Director, Office of Program Eligibility.* For purposes of this section, the term Director shall include the head of the Office of Program Eligibility or any individual which he/she designates.

(g) *Office of Program Eligibility (OPE).* The SBA office within the Office of Minority Small Business and Capital Ownership Development which is responsible for making determinations regarding protests of disadvantaged status.

(h) *Economic Disadvantage.* See § 124.106, Title 13, CFR.

(i) *Graduation Proceeding.* See § 124.110(k), Title 13, CFR.

(j) *Ownership.* See § 124.103, Title 13, CFR.

(k) *Protest.* An initial challenge of the disadvantaged status of a business concern.

(l) *Small Disadvantaged Business (SDB) Concern.* A business concern, including mass media:

(1) Which is small as defined pursuant to section (3) of the Small Business Act and implementing regulations at 13 CFR Part 121;

(2) Which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals as defined by §§ 124.105 and 124.106, Title 13, CFR; or in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals;

(3) Which has the majority of its earnings accruing directly to such individuals; and

(4) Whose management and daily business operations are controlled by one or more of such individuals.

(m) *Social Disadvantage.* See § 124.105, Title 13, CFR.

(n) *Suspension Proceeding.* See § 124.113, Title 13, CFR.

(o) *Termination Proceeding.* See § 124.112, Title 13, CFR.

§ 124.603 Who may protest the disadvantaged status of a concern.

(a) In connection with a specific SDB set-aside requirement or a requirement for which the apparent low bidder is an SDB which has invoked its SDB evaluation preference, the following entities may protest the disadvantaged status of a concern which is the apparent low responsible offeror:

(1) Any other concern which submitted an offer for that requirement;

(2) The procuring agency contracting officer; and

(3) The Small Business Administration.

(b) In connection with an 8(d) subcontract, the procuring agency contracting officer or SBA may protest the disadvantaged status of a proposed subcontractor. Other small business subcontractors and the prime contractor may submit information to the contracting officer in an effort to persuade the contracting officer to initiate a protest.

(c) Protests of disadvantaged status relating to other Federal procurement programs, excluding SBA's section 8(a) program, which require SBA to determine social and economic disadvantage as a condition of eligibility, may be filed by the Federal agency official responsible for determining program eligibility, and any other interested party.

§ 124.604 Who makes disadvantaged status determinations.

In response to a protest challenging the disadvantaged status of a concern, the SBA's Director of the Office of Program Eligibility (OPE), or such person as the Director shall designate, in the Office of Minority Small Business and Capital Ownership Development (MSB&COD) shall determine whether the concern is disadvantaged.

§ 124.605 Protest procedures.

(a) *Filing.* (1) Except in cases where the contracting officer or SBA initiates a protest, all protests shall be directed to the procuring agency contracting officer responsible for the particular requirement.

(2) In cases where the contracting officer initiates a protest, he/she shall file the protest with SBA in accordance with paragraph (c) of this section and shall provide notification in accordance with § 124.608 of this part.

(3) In cases where SBA initiates a protest, the protest shall be referred to the Office of Program Eligibility within the Office of MSB&COD and notification shall be provided in accordance with § 124.608 of this part.

(b) *Timeliness of Protest.*—(1) *SDB Set-Aside and SDB Evaluation of Preference Protest*—(i) *Written SDB Set-Aside Protest.* In order for a written protest submitted by a business concern in connection with a specific SDB set-aside requirement to be considered timely, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the bid opening date for sealed bids, or after the receipt from the contracting officer of notification of the identity of the prospective awardee in negotiated acquisitions.

(ii) *Written SDB Evaluation Preference Protest.* In order for a protest by a business concern to be timely when challenging the SDB status of an apparent low bidder to which an SDB evaluation preference has been applied, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the receipt from the contracting officer of notification of the prospective awardee.

(iii) *Oral Protests.* A protest for SDB set-asides or SDB evaluation preferences shall also be considered timely if made orally to the contracting officer within the allotted 5-day period, and the contracting officer thereafter receives a confirming letter postmarked no later than one calendar day after the date of such telephone protest.

(iv) A protest by the contracting officer or SBA shall be timely for the purpose of the SDB acquisition in question whether filed before or after award. However, when a protest is brought by the contracting officer, it must be brought on his or her own behalf stating the grounds for such protest. The contracting officer may not initiate a protest merely by forwarding to SBA the protest of a third party.

(v) A protest received after the time limits set forth above shall not be considered.

(2) *Section 8(d) Protests.* (i) In order for a protest in connection with an 8(d) subcontract to be considered timely, it must be received by the contracting officer prior to the completion of performance by the intended 8(d) subcontractor.

(ii) A protest received after subcontract performance by the intended 8(d) subcontractor shall not be considered.

(3) Protests, in connection with any procurement, which are filed by any person before bid opening or notification of intended award, whichever applies, shall be considered premature and shall not be forwarded to SBA, but shall be returned to the protestor without action.

(c) *Referral to SBA.* (1) Any contracting officer who receives a timely protest shall promptly forward such protest to the SBA's Director of the Office of Program Eligibility, Office of Minority Small Business and Capital Ownership Development, 1441 L Street, NW., Washington, DC 20416.

(2) When a contracting officer receives a protest and refers it to the SBA, such referral shall contain the following:

(i) The protest and any accompanying materials;

(ii) The date on which the protest was received and a determination as to timeliness;

(iii) A copy of the protested concern's self-certification as to disadvantaged status; and

(iv) the date of bid opening or the date on which notification of the apparent successful offeror was sent to all unsuccessful offerors, as applicable.

(3) A protest by a Federal agency in connection with a procurement program requiring SBA to determine social and economic disadvantage as a condition of eligibility shall be accompanied by any materials in the possession of the agency which cause it to question the disadvantaged status of the concern.

§ 124.606 Grounds of protest.

(a) Protests challenging the social disadvantage of the protested concern must demonstrate that the protested concern is not owned and controlled by one or more socially disadvantaged individuals as defined by Subpart A of this part. A protest could challenge the social disadvantage of the protested concern by submitting evidence that:

(1) The individuals who own and control the protested concern have not been subjected to, or have overcome racial or ethnic prejudice or cultural bias, or

(2) The individuals associated with the protested concern who could be considered socially disadvantaged do not actually own and control the protested concern.

(b) Protests challenging the economic disadvantage of the protested concern must demonstrate that the protested concern is not owned and controlled by one or more economically disadvantaged individuals as defined in Subpart A of this part.

§ 124.607 Form and specificity of protest.

(a) No specific form is required for a protest under this subpart.

(b) A protest must be sufficiently specific to provide reasonable notice as to the ground(s) upon which the protested concern's disadvantaged status is challenged and to call into question the disadvantaged status of the protested concern. A protest merely alleging that the protested concern is not disadvantaged, without setting forth any basis for the allegation, will not be deemed to specify adequate grounds for the protest. Some basis for the belief stated in the protest must be given. However, the contracting officer shall forward all protests received to SBA for a decision on whether to pursue the determination of disadvantaged status.

(c) Protests which do not contain sufficient specificity may be dismissed by the SBA.

(d) A dismissal by the Director of OPE of a protest for lack of specificity may be appealed to SBA's AA/MSB&COD pursuant to § 124.609 of these regulations.

§ 124.608 Notification of protest.

(a) Upon receipt of a protest challenging the disadvantaged status of a concern, the Director of OPE shall immediately notify the protestor and the contracting officer of the date such protest was received and whether it will be processed or dismissed for lack of specificity.

(b) In cases where the protest is sufficiently specific, the Director of OPE shall also immediately advise the protested concern of the receipt of the protest and forward to the protested concern a copy of the protest.

(1) In such cases, the Director of OPE is authorized to ask the protested concern to provide any or all of the following information and documentation: a completed SBA Form 1010A, "Statement of Personal Eligibility" for each individual claiming disadvantaged status; a completed SBA Form 1010B, "Statement of Business Eligibility;" a completed SBA Form 413, "Personal Financial Statement," no older than 60 days, for each individual claiming disadvantaged status; whether the protested concern, or any of its owner(s), officers or directors have applied for admission to or participated in the SBA's section 8(a) program and if so, the name of the company which applied for 8(a) participation and the date of the application; business tax returns for the last two completed fiscal years; personal tax returns for the last two completed fiscal years; personal tax returns for the last two years for all officers, directors and for any individual owning at least 5% of the business entity; business financial statements for the last two completed fiscal years, and current business financial statements no older than 90 days; articles of incorporation, corporate by-laws, or partnership agreements, as appropriate; and any other information which the Director of OPE deems necessary to permit a determination as to the social and/or economic disadvantaged status of the protested concern.

(2) Unless the protest presents specific information which would call into question the veracity of the application documents filed by a current participant in SBA's section 8(a) program, SBA may allow such a concern to submit, in lieu of the information specified in paragraph (b)(1) of this section, a sworn affidavit by its owner, managing partner, President or Chief Executive Officer that the 8(a) application and any amendments thereto remain accurate, and that circumstances concerning the ownership and control of the business and the disadvantaged status of its principal(s) have not changed since the most recent annual review. If the ownership and/or control of the business have changed since the date of the most recent annual review, the protested concern must comply with paragraph (b)(1) of this section. An affidavit may be allowed only if SBA has conducted an annual review of the 8(a) participant firm during the 12-month period preceding the date on which SBA receives the protest; and if proceedings to suspend, terminate or graduate the concern from the 8(a) program are not pending.

(3) Notwithstanding the exceptions in paragraph (b)(2) of this section, the Director of OPE is authorized to request any document which he/she deems necessary to determine disadvantaged status.

(c) Within 10 working days of the date that notification of the protest was received from the Director of OPE, the protested concern must deliver to the Director of OPE by hand or by mail the information and documentation requested pursuant to paragraph (b)(1) of this section or the affidavit permitted by paragraph (b)(2) of this section.

Materials submitted by mail must be received by the close of business on the 10th working day. Materials, including affidavits, not received by close of business on the 10th working day shall not be considered in deciding the protest.

§ 124.609 Making the disadvantaged status determination.

(a) *General.* The Director of OPE shall make a disadvantaged status determination within 15 working days after receipt of a protest challenging such status, or as soon thereafter as possible. If, in connection with an SDB acquisition or other procurement requirement, the SBA cannot make such a determination within 15 working days, the Director of OPE shall inform the contracting officer responsible for the particular requirement when a determination is expected to be made.

(b) *Time Limits for Response.* If the information and documentation requested by SBA under § 124.608(b) is not received by the Director of OPE within the 10-day period as required by § 124.608(c), SBA may determine the protested concern to be non-disadvantaged.

(c) *Withdrawal of Protest.* Once properly instituted by the filing of a specific disadvantaged status protest, the determination may be completed by the SBA even if the protest is withdrawn or the SDB acquisition or other procurement requirement in question is cancelled or awarded. The continuation of the disadvantaged status determination is discretionary with the SBA.

(d) *Basis for Determination.* (1) Except with respect to a concern which is a current participant in SBA's section 8(a) program or a concern authorized by § 124.608(b) of this part to submit an affidavit concerning its disadvantaged status, the disadvantaged status determination shall be based on the protest record as supplied by the protestor, protested concern, SBA or others.

(2) If deemed necessary or appropriate, the SBA may make a part of the protest record information in its files and information submitted in response to requests to the protestor, the protested concern, the contracting officer, or other persons for additional specific information.

(3) In determining disadvantaged status, SBA shall review ownership and control of each protested firm as well as social and economic disadvantage regardless of the grounds specified in the protest.

(e) *Disadvantaged Status Determination.* The SBA shall base its disadvantaged status determination upon the record, including reasonable inferences therefrom. SBA shall render a written determination including the basis for its findings and conclusions.

(f) *Summary Determination for Current 8(a) Participant.* The SBA may summarily determine that a concern is socially and economically disadvantaged if that concern is a current participant in the SBA's section 8(a) program so long as SBA has completed an annual review of the concern within the previous 12 month period unless the protested concern cannot submit or fails to submit an affidavit authorized by § 124.608(b) of these regulations. This summary determination shall not apply if suspension, termination, or graduation proceedings are pending against the concern.

(g) *Notification of Determination.* After making its disadvantaged status determination, the SBA shall immediately notify the contracting officer, the protestor, and the protested concern of its determination. No later than one business day thereafter, SBA shall provide by certified mail, return receipt requested, a copy of its written determination to the protested concern and, consistent with the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552), to all other parties to the proceeding.

(h) *Results of an SBA Disadvantaged Status Determination.* (1) A disadvantaged status determination becomes effective immediately and remains in full force and effect unless and until reversed upon appeal by SBA's AA/MSB&COD pursuant to § 124.610 of this part.

(2) A concern which was determined to be non-disadvantaged may certify itself as a disadvantaged business for purposes of future SDB evaluation preferences, future SDB acquisitions, 8(d) subcontracts, and other Federal procurement programs requiring disadvantaged status as a condition for eligibility provided that it has a good faith belief that it has changed the conditions upon which the determination of non-disadvantaged status was based. At the time of such certification, the concern shall notify the contracting officer that it was previously determined to be non-disadvantaged. However, if such concern is the lowest responsive offeror for an SDB acquisition, or for any requirement by involving its SDB evaluation preference, or is otherwise deemed eligible for a Federal procurement program requiring disadvantaged status as a condition for eligibility, the contracting officer shall treat such certification as a protest of the concern's disadvantaged status and shall forward it to SBA pursuant to § 124.605(c) of this part. SBA shall process a protest based on such certification in accordance with the provisions of this part.

(3) If a current 8(a) participant is found to be non-disadvantaged as a result of failure to submit the affidavit permitted by § 124.608(b)(ii) of this part, or for other cause, the concern will be subject to the same certification and notice requirements specified in paragraph (i)(2) of this section. However, a determination of non-disadvantaged status will not automatically terminate the concern's 8(a) program participation. A hearing before an administrative law judge is required before a firm can be terminated from the 8(a) program, *see* § 124.112 of this part.

(i) *Misrepresentation of Disadvantaged Status.* (1) A concern which was determined to be non-disadvantaged and which has not overcome or changed the circumstances which caused this determination cannot certify itself to be disadvantaged for future SDB acquisitions, 8(d) subcontracts, and other Federal procurement programs requiring disadvantaged status as a condition for eligibility. A certification of disadvantaged status by such a firm may be deemed a misrepresentation of disadvantaged status.

(2) A concern which was previously determined to be non-disadvantaged and certifies, in good faith, that it is a disadvantaged business for a subsequent SDB acquisition, SDB evaluation preference, 8(d) subcontract, or other Federal procurement program requiring disadvantaged status as a condition for eligibility, must nevertheless inform the contracting officer that it previously had been determined by the SBA to be non-disadvantaged. Failure to advise the contracting officer of such a non-disadvantaged status determination by the SBA may be deemed a misrepresentation of disadvantaged status.

§ 124.610 Appeals of disadvantaged status determinations.

(a) Appeals to re-examine disadvantaged status determinations may be filed with the SBA's AA/MSB&COD by any of the following:

(1) The concern whose disadvantaged status was determined by the Director of OPE;

(2) The original protestor; and

(3) The procuring agency contracting officer responsible for the SDB

acquisition or other procurement requirement in question.

(b) Notice of an appeal must be provided to the protested concern, the original protestor, and the procuring agency contracting officer responsible for the SDB acquisition or other procurement requirement in question.

(c)(1) An appeal must be in writing and must be received by the Associate Administrator for Minority Small Business and Capital Ownership Development, U.S. Small Business Administration, 1441 L Street, NW., Washington, DC 20416, no later than 5 working days after the date of receipt of such determination.

(2) An untimely appeal shall be dismissed.

(d) *Grounds for Appeal.* The SBA will re-examine a disadvantaged status determination only if there was a clear and significant administrative error in the processing of such decision, or if the Director of OPE completely failed to consider a significant fact contained within the materials supplied by the protestor or the protested concern. Disadvantaged status determinations shall not be re-examined based on additional information or changed circumstances which were not disclosed to the Director of OPE at the time of his/her decision.

(e) No specific form is required for the appeal. However, the appeal must identify the disadvantaged status determination for which a re-examination is sought, set forth a full and specific statement of the reasons as to why the disadvantaged status determination is alleged to be erroneous pursuant to paragraph (d) of this section, and present arguments in support of such allegations.

(f) An appeal may proceed to completion even though an award of the SDB acquisition or other procurement requirement which prompted the initial protest has been made. In such a case, however, a reversal by the AA/MSB&COD shall not apply to the awarded SDB acquisition or other awarded procurement requirement and shall have future effect only.

(g) The appeal will be decided by the AA/MSB&COD within 5 working days of its receipt, if practicable.

(h) The appeal decision shall be based on all the information and documentation in the record. A copy of the decision shall be provided to the protested concern by certified mail, return receipt requested. To the extent consistent with the Privacy Act and the Freedom of Information Act, all parties to the proceeding shall be notified of SBA's final decision.

(i) The decision of the AA/MSB&COD is the final decision of the Small Business Administration.

Date: January 24, 1989.

James Abdnor,

Administrator.

[FR Doc. 89-5121 Filed 3-10-89; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 89-NM-09-AD; Amdt. 39-6154]

Airworthiness Directives; Boeing Model 747 Series Airplanes Equipped With General Electric CF6-45/50 Series Engines or Rolls Royce RB211-524 Engines; McDonnell Douglas Model DC-9 Series Airplanes, Including Model DC-9-80 Series Airplanes, Model MD-88 Airplanes, and C-9 (Military) Airplanes; McDonnell Douglas Model DC-10 Series Airplanes and KC-10 (Military) Airplanes; Airbus Industrie Model A300 Series Airplanes, Model A300-600 Series Airplanes Equipped With General Electric CF6-80C2 Engines, and Model A310 Series Airplanes Equipped with Pratt & Whitney (P&W) 4000 Series Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain transport category airplanes identified above, which requires inspection and replacement, if necessary, of certain main fuel supply and vapor recovery hoses. This amendment is prompted by reports of premature degradation of the hoses, which has resulted in fuel leakage. This condition, if not corrected, could result in a fire in the airplane engine compartments.

EFFECTIVE DATE: March 30, 1989.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124; McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, C1-L00 (54-60); or Airbus Industrie, Product Support Division, Avenue Didier Daurat, 31700 Blagnac Cedex, France. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the FAA, Central Region, Chicago Aircraft Certification Office, 2300 East Devon Avenue, Room 232, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Mr. Les Taylor, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Central Region, 2300 East Devon Avenue, Room 232, Des Plaines, Illinois 60018; telephone (312) 694-7126.

SUPPLEMENTARY INFORMATION: The FAA has received several reports of failure of certain main fuel supply and vapor recovery hoses on various transport category airplanes, and consequent fuel leakage. The suspect hoses were manufactured using a material that has subsequently been found to be understrength in that it degrades prematurely under certain heat conditions. This hose material was manufactured by Aeroquip Corporation and the suspect hoses are installed in 601-type hose assemblies. The suspect fuel supply hoses bear cure date codes of 3Q84 through 2Q87; the suspect vapor recovery hoses bear cure date codes of 2Q84 through 3Q87. The suspect bulk 601 hose has a CAGE code of 50556 (regardless of cure date code).

Failure of the main fuel supply or vapor recovery hose could result in a fire in the airplane engine compartments.

The FAA has reviewed and approved the following service bulletins, which describe procedures for inspection of the main fuel supply and vapor recovery hoses on the various affected airplanes, and replacement of the hoses, if necessary:

Airplane	Manufacturer	Service Bulletin	Date
B-747 series with CF6-45/50 engines	Boeing	747-73A2048	June 9, 1988.
B-747 series with RB211-524 engines	Boeing	747-73A2049	December 8, 1988.
DC-9 series, DC-9-80 series, Model MD-88	McDonnell Douglas	A73-10, Rev. 1	June 22, 1988.
DC-10 series	McDonnell Douglas	A73-21	June 23, 1988.

Additionally, Airbus Industrie has issued the following service bulletins which describe similar procedures:

Airplane	Manufacturer	Service Bulletin	Date
A300	Airbus Industrie	A300-73-009	September 30, 1988.
A300-600	Airbus Industrie	A300-73-6008	October 11, 1988.
A310	Airbus Industrie	A310-73-2011 Rev. 1	September 27, 1988.

Airbus Industrie Model A300, A300-600, and A310 series airplanes are manufactured in France and type certificated in the United States under the provisions of section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since this situation is likely to exist or develop on other airplanes of the same type designs, this AD requires inspection of the main fuel supply and vapor recovery hoses and, if fuel leakage is detected, replacement of the hoses prior to futher flight, in accordance with the applicable service bulletin previously described. If fuel leakage is not detected, the suspect hoses must be repetitively inspected until replaced with serviceable hoses. Such replacement constitutes terminating action for the repetitive inspections. This section also prohibits the installation of bulk 601 hose with CAGE code of 50556.

The Direction Générale de L'Aviation Civile (DGAC), which is the airworthiness authority of France, has issued a similar airworthiness directive addressing this subject.

Since a situation exists that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation and is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required).

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

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

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing, McDonnell Douglas, and Airbus: Applies to Boeing Model 747 series airplanes equipped with General Electric CF6-45/50 series engines, as listed in Boeing Alert Service Bulletin 747-73A2048, dated June 9, 1988; Boeing Model 747 series airplanes equipped with Rolls Royce RB211-524 engines, as listed in Boeing Alert Service Bulletin 747-73A2049, dated December 8, 1988; McDonnell Douglas Model DC-9 series airplanes, including Model DC-9-80 series airplanes, Model MD-88 airplanes, and C-9 (Military) airplanes, as listed in McDonnell Douglas Service Bulletin A73-10, Revision 1, dated June 22, 1988; McDonnell Douglas Model DC-10 series airplanes and KC-10 (Military) airplanes, as listed in McDonnell Douglas Alert Service Bulletin A73-21, dated June 23, 1988; Airbus Industrie Model A300 series airplanes, as listed in Airbus Industrie Service Bulletin A300-73-009, dated September 30, 1988; Airbus Model A300-600 series airplanes equipped with General Electric CF6-80C2 engines, as listed in Airbus Industrie A300-73-6008, dated October 11, 1988; and Airbus Model A310 series airplanes equipped with Pratt & Whitney (P&W) 4000 series engines, as listed in Airbus Industrie Service Bulletin A310-73-2011, Revision 1, dated September 27, 1988; certificated in any category.

Compliance is required as indicated, unless previously accomplished.

To prevent engine compartment fires due to fuel leakage from degraded hose assemblies, accomplish the following:

A. Within 30 days after the effective date of this amendment, inspect the main fuel and vapor recovery hose assembly for fuel leakage and determine the cure date code contained on both the main fuel supply hose and the vapor recovery hose, in accordance with Boeing Alert Service Bulletin 747-73A2048, dated June 9, 1988 (for Model 747 series airplanes equipped with General Electric CF6-45/50 series engines); Boeing Alert Service Bulletin 747-73A2049, dated December 8, 1988 (for Boeing Model 747 series airplanes equipped with Rolls Royce RB211-524 engines); McDonnell Douglas Service Bulletin A73-10, Revision 1, dated June 22, 1988 (for Model DC-9 and DC-9-80 series airplanes, and Model MD-88 airplanes); McDonnell Douglas Service Bulletin A73-21, dated June 23, 1988 (for Model DC-10 series airplanes); Airbus Industrie Service Bulletin A300-73-009, dated September 30, 1988 (for Model A300 series airplanes); Airbus Industrie A300-73-6008, dated October 11, 1988 (for Model A300-600 series airplanes); or Airbus Industrie Service Bulletin A310-73-2011, Revision 1, dated

September 27, 1988 (for Model A310 series airplanes). The affected hose assemblies are Aeroquip Part Numbers (P/N):

AE1006944H0140	AE704313-1.
AE703400-3	AE704312-2.
AE703402-2	AE704314-1.
AE1000100H0072	AE705348-1.
AE703630-1	AE700064-2.
AE703651-1	AE703402-2 or RBSL0010-503.
601000-8-0304	AE704312-5.
AE703650-1	AE704312-7 or 221D4020-501.
AE703652-1	AE704312-4 or 221D0041-1.
AE703653-1	
1AE1006944H0144	

The affected main fuel supply hoses contain cure date codes of 3Q84 through 2Q87. The affected vapor recovery hoses contain cure date codes of 2Q84 through 3Q87. The affected bulk 601 hose contains a CAGE code of 50556 (regardless of cure date code).

1. If fuel leakage is detected, prior to further flight, replace the hose(s) with a serviceable hose not containing the cure date codes or CAGE code specified above, in accordance with the applicable service bulletin identified above.

2. If the affected hoses are installed, but fuel leakage is not detected, repetitively inspect the hoses for evidence of fuel leakage in accordance with the schedule specified in the applicable service bulletin.

B. After the effective date of this amendment, bulk 601 hose with CAGE code or 50556 shall not be installed on any airplane.

C. Replacement of main fuel supply and vapor recovery hoses with serviceable hoses that do not contain the cure date codes or CAGE code specified in paragraph A., above, constitutes terminating action for the requirements of this AD.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Chicago Aircraft Certification Office, FAA, Central Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Chicago Aircraft Certification Office.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124; McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, C1-L00 (54-60); or Airbus Industrie, Product Support Division, Avenue Didier Daurat, 31700 Blagnac Cedex, France. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the FAA, Central Region, Chicago Aircraft Certification Office, 2300 East Devon Avenue, Room 232, Des Plaines, Illinois.

This amendment becomes effective March 30, 1989.

Issued in Seattle, Washington, on March 3, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-5630 Filed 3-10-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 95

[Docket No. 25814; Amdt. No. 349]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

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

EFFECTIVE DATE: April 6, 1989.

FOR FURTHER INFORMATION CONTACT: Paul J. Best, Flight Procedures Standards Branch (AFS-420), Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-8277.

SUPPLEMENTARY INFORMATION: This amendment to Part 95 of the Federal Aviation Regulations (14 CFR Part 95) prescribes new, amended, suspended, or revoked IFR altitudes governing the operation of all aircraft in IFR flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in Part 95. The specified IFR altitutes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances which create the need for this amendment involve matters of flight safety, operational efficiency in the National Airspace System, and are related to published aeronautical charts that are essential to the user and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment is unnecessary, impracticable, and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Aircraft, Airspace.

Issued in Washington, DC on March 2, 1989.

Robert L. Goodrich,

Acting Director, Flight Standards Service.

Adoption of the Amendment

Accordingly and pursuant to the authority delegated to me by the Administrator, Part 95 of the Federal Aviation Regulations (14 CFR Part 95) is amended as follows effective at 0901 g.m.t.:

PART 95—[AMENDED]

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

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

2. Part 95 is amended to read as follows:

BILLING CODE 4910-13-M

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS

AMENDMENT 349 EFFECTIVE DATE, APRIL 6, 1989

FROM	TO	MEA
§95.6002 VOR FEDERAL AIRWAY 2 IS AMENDED TO READ IN PART		
MULLAN PASS, ID VOR/DME	ALTON, MT FIX	9600
GARRI, MT FIX	HELENA, MT VORTAC	9800
§95.6004 VOR FEDERAL AIRWAY 4 IS AMENDED TO READ IN PART		
HILL CITY, KS VORTAC	WESAL, KS FIX	*5500
*4000 - MOCA		
WESAL, KS FIX	SALINA, KS VORTAC	*4000
*2900 - MOCA		
SADEN, MO FIX	ST LOUIS, MO VORTAC	2400
§95.6007 VOR FEDERAL AIRWAY 7 IS AMENDED TO READ IN PART		
MENOMINEE, MI VOR/DME	*GERLA, MI FIX	3600
*8000 - MRA		
GERLA, MI FIX	MARQUETTE, MI VOR/DME	3600
§95.6008 VOR FEDERAL AIRWAY 8 IS AMENDED TO READ IN PART		
TRIDE, IL FIX	JOLIET, IL VORTAC	2600
§95.6010 VOR FEDERAL AIRWAY 10 IS AMENDED TO READ IN PART		
LAMAR, CO VORTAC	ADEER, KS FIX	*5600
*5000 - MOCA		
§95.6019 VOR FEDERAL AIRWAY 19 IS AMENDED TO READ IN PART		
KRONA, MT FIX	BILLINGS, MT VORTAC	
	SE BND	8000
	NW BND	6200
BILLINGS, MT VORTAC	*SHELA, MT FIX	
	SE BND	6100
	NW BND	7700
*8500 - MRA		
LEWISTOWN, MT VORTAC	SHONK, MT FIX	7700
§95.6021 VOR FEDERAL AIRWAY 21 IS AMENDED TO READ IN PART		
IDAHO FALLS, ID VOR/DME	*DUBOIS, ID VORTAC	7600
*8600 - MCA DUBOIS VORTAC, N BND		

FROM	TO	MEA
§95.6021 VOR FEDERAL AIRWAY 21—Continued		
DILLON, MT VORTAC	*WHITEHALL, MT VORTAC	**10000
*9300 - MCA WHITEHALL VORTAC, N BND		
**9000 - MOCA		
CUT BANK, MT VORTAC	U.S. CANADIAN BORDER	6200
§95.6083 VOR FEDERAL AIRWAY 83 IS AMENDED TO READ IN PART		
ALAMOSA, CO VORTAC	BLOKE, CO FIX	
	NE BND	*14000
	SW BND	*10400
*10100 - MOCA		
BLOKE, CO FIX	*GOSIP, CO FIX	14000
*13500 - MCA GOSIP FIX, SW BND		
§95.6086 VOR FEDERAL AIRWAY 86 IS AMENDED TO READ IN PART		
BILLINGS, MT VORTAC	KRONA, MT FIX	
	NW BND	6200
	SE BND	8000
§95.6101 VOR FEDERAL AIRWAY 101 IS AMENDED TO READ IN PART		
MALTT, ID FIX	*BURLEY, ID VORTAC	
	NW BND	**8000
	SE BND	**11400
*9300 - MCA BURLEY VORTAC, SE BND		
**7400 - MOCA		
§95.6113 VOR FEDERAL AIRWAY 113 IS AMENDED TO READ IN PART		
RENOL, ID FIX	*BOISE, ID VORTAC	6000
*8200 - MCA BOISE VORTAC, NE BND		
BOISE, ID VORTAC	PLUTO, ID FIX	
	SW BND	9700
	NE BND	12500
SLIPP, MT FIX	*COPPERTOWN, MT VORTAC	
	SW BND	13000
	NE BND	11000
*10200 - MCA COPPERTOWN VORTAC, SW BND		
§95.6120 VOR FEDERAL AIRWAY 120 IS AMENDED TO READ IN PART		
CHARL, MT FIX	SHIMY, MT FIX	*13000
*11800 - MOCA		

FROM	TO	MEA
§95.6120 VOR FEDERAL AIRWAY 120—Continued		
SHIMY, MT FIX	GREAT FALLS, MT VORTAC	
	E BND	6800
	W BND	9500

§95.6133 VOR FEDERAL AIRWAY 133

IS AMENDED TO READ IN PART

MARQUETTE, MI VOR/DME	*BRIDE, MI FIX	**3600
*6000 - MRA		
**3000 - MOCA		
BRIDE, MI FIX	HOUGHTON, MI VORTAC	*3600
*3000 - MOCA		

§95.6148 VOR FEDERAL AIRWAY 148

IS AMENDED TO READ IN PART

THURMAN, CO VORTAC	MCJEF, NE FIX	*7000
*6500 - MOCA		

§95.6210 VOR FEDERAL AIRWAY 210

IS AMENDED TO READ IN PART

PEACH SPRINGS, AZ VORTAC	*GRAND CANYON, AZ VOR/DME	10000
*14500 - MCA GRAND CANYON VOR/DME, E BND		
GRAND CANYON, AZ VOR/DME	*TUBA CITY, AZ VORTAC	**14500
*14500 - MCA TUBA CITY VORTAC, W BND		
**9600 - MOCA		
ALAMOSA, CO VORTAC	BLOKE, CO FIX	
	NE BND	*14000
	SW BND	*10400
*10100 - MOCA		
BLOKE, CO FIX	*GOSIP, CO FIX	14000
*13500 - MCA GOSIP FIX, SW BND		
GOSIP, CO FIX	*RADIO, CO FIX	**12000
*10900 - MCA RADIO FIX, SW BND		
**8500 - MOCA		
RADIO, CO FIX	BLOOM, CO FIX	*9400
*8000 - MOCA		

§95.6228 VOR FEDERAL AIRWAY 228

IS AMENDED TO READ IN PART

MADISON, WI VORTAC	*DEBOW, WI FIX	10000
*10000 - MRA		
DEBOW, WI FIX	BESIE, IL FIX	10000

§95.6244 VOR FEDERAL AIRWAY 244

IS AMENDED TO READ IN PART

GLIDE, KS FIX	SALINA, KS VORTAC	*3600
*2900 - MOCA		

FROM	TO	MEA

§95.6253 VOR FEDERAL AIRWAY 253

IS AMENDED TO READ IN PART

*BOISE, ID VORTAC	BANGS, ID FIX	9000
*7400 - MCA BOISE VORTAC, N BND		

§95.6257 VOR FEDERAL AIRWAY 257

IS AMENDED TO READ IN PART

BISOP, AZ FIX	*GRAND CANYON, AZ VOR/DME	10000
*14500 - MCA GRAND CANYON VOR/DME, N BND		
GRAND CANYON, AZ VOR/DME	*DOZIT, AZ FIX	**14500
*14500 - MCA DOZIT FIX, S BND		
**11200 - MOCA		
DOZIT, AZ FIX	KACIR, AZ FIX	*13000
*11200 - MOCA		
GARRI, MT FIX	SCAAT, MT FIX	9800

§95.6293 VOR FEDERAL AIRWAY 293

IS AMENDED TO READ IN PART

*GRAND CANYON, AZ VOR/DME	**KLIFF, AZ FIX	***14500
*14500 - MCA GRAND CANYON VOR/DME, N BND		
**14500 - MCA KLIFF FIX, S BND		
***10900 - MOCA		
KLIFF, AZ FIX	PAGE, AZ VOR/DME	8700

IS AMENDED TO DELETE

ABASI, AZ FIX	PAGE, AZ VOR/DME	8500

§95.6298 VOR FEDERAL AIRWAY 298

IS AMENDED TO READ IN PART

MC CALL, ID VORTAC	*DUBOIS, ID VORTAC	#**16000
*9800 - MCA DUBOIS VORTAC, W BND		
**13600 - MOCA		
#MEA IS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE.		
DUBOIS, ID VORTAC	*SABAT, ID FIX	
	W BND	**9000
	E BND	**13000
*11100 - MCA SABAT FIX, E BND		
**8300 - MOCA		
SABAT, ID FIX	LAMON, ID FIX	
	W BND	*9000
	E BND	*13000
*7700 - MOCA		

FROM	TO	MEA
§95.6307 VOR FEDERAL AIRWAY 307		
IS AMENDED TO READ IN PART		
HARRISON, AR VOR/DME	NEOSHO, MO VORTAC	*3400
*2800 - MOCA		
§95.6361 VOR FEDERAL AIRWAY 361		
IS AMENDED TO READ IN PART		
MARKE, CO FIX	UNLAP, CO FIX	
	N BND	*16200
	S BND	*11000
*10400 - MOCA		
SCRUB, CO FIX	LYZZA, CO FIX	
	S BND	*16200
	N BND	*13000
*12300 - MOCA		
§95.6365 VOR FEDERAL AIRWAY 365		
IS AMENDED TO READ IN PART		
IDAHO FALLS, ID VOR/DME	RIGBY, ID FIX	7600
MENAR, MT FIX	VESTS, MT FIX	*9700
*9100 - MOCA		
WOKEN, MT FIX	SHIMY, MT FIX	*9500
*7500 - MOCA		
CHOTE, MT FIX	CUT BANK, MT VORTAC	*7000
*6400 - MOCA		
§95.6430 VOR FEDERAL AIRWAY 430		
IS AMENDED TO READ IN PART		
GLASGOW, MT VOR/DME	WILLISTON, ND VORTAC	*6000
*5000 - MOCA		
§95.6444 VOR FEDERAL AIRWAY 444		
IS AMENDED TO READ IN PART		
DERSO, ID FIX	AROWS, ID FIX	*11500
*9700 - MOCA		
§95.6484 VOR FEDERAL AIRWAY 484		
IS AMENDED TO READ IN PART		
WODEN, ID FIX	*DRYAD, ID FIX	**12000
*13000 - MCA DRYAD FIX, SE BND		
**9500 - MOCA		
§95.6500 VOR FEDERAL AIRWAY 500		
IS AMENDED TO READ IN PART		
AROWS, ID FIX	DERSO, ID FIX	*11500
*9700 - MOCA		
SOLDE, ID FIX	*REAPS, ID FIX	**12500
*9500 - MCA REAPS FIX, W BND		
**8000 - MOCA		

FROM	TO	MEA
§95.6500 VOR FEDERAL AIRWAY 500—Continued		
REAPS, ID FIX	BETRE, ID FIX	*9500
*6700 - MOCA		
§95.6508 VOR FEDERAL AIRWAY 508		
IS AMENDED TO READ IN PART		
GLIDE, KS FIX	SALINA, KS VORTAC	*3600
*2900 - MOCA		
ESTRE, KS FIX	DESOT, KS FIX	2700
§95.6520 VOR FEDERAL AIRWAY 520		
IS AMENDED TO READ IN PART		
LEWISTON, ID VOR/DME	FERDI, ID FIX	
	W BND	*6700
	E BND	*12000
*6600 - MOCA		
DUBOIS, ID VORTAC	*JACKSON, WY VOR/DME	**15000
*14300 - MCA JACKSON VOR/DME, W BND		
**10200 - MOCA		
§95.6536 VOR FEDERAL AIRWAY 536		
IS AMENDED TO READ IN PART		
MULLAN PASS, ID VOR/DME	CELIR, MT FIX	*10500
*9400 - MOCA		
PIKUN, MT FIX	*CHOTE, MT FIX	
	W BND	**10000
	E BND	**9000
*9200 - MCA CHOTE FIX, W BND		
**6900 - MOCA		
§95.6551 VOR FEDERAL AIRWAY 551		
IS AMENDED TO READ IN PART		
SALINA, KS VORTAC	MANKATO, KS VORTAC	4500
§95.6553 VOR FEDERAL AIRWAY 553		
IS AMENDED TO READ IN PART		
SALINA, KS VORTAC	PAWNEE CITY, NE VORTAC	3400
§95.6583 VOR FEDERAL AIRWAY 583		
IS AMENDED BY ADDING		
AUSTIN, TX VORTAC	COLLEGE STATION, TX VORTAC	2000
COLLEGE STATION, TX VORTAC	LEONA, TX VORTAC	2000

FROM	TO	MEA	MAA
§95.7060 JET ROUTE NO. 60			
	IS AMENDED TO READ IN PART		
EAST TEXAS, PA VORTAC	SPARTA, NJ VORTAC	18000	32000
§95.7065 JET ROUTE NO. 65			
	IS AMENDED BY ADDING		
SAN ANTONIO, TX VORTAC	ABILENE, TX VORTAC	18000	45000
§95.7070 JET ROUTE NO. 70			
	IS AMENDED TO READ IN PART		
STILLWATER, NJ VOR/DME	LA GUARDIA, NY VOR/DME	18000	24000
§95.7077 JET ROUTE NO. 77			
	IS AMENDED TO READ IN PART		
SPARTA, NJ VORTAC	BARNES, MA VORTAC	18000	31000
§95.7080 JET ROUTE NO. 80			
	IS AMENDED TO READ IN PART		
BELLAIRE, OH VORTAC	KIPPI, PA FIX	18000	45000
KIPPI, PA FIX	EAST TEXAS, PA VORTAC	18000	38000
EAST TEXAS, PA VORTAC	SPARTA, NJ VORTAC	18000	32000
SPARTA, NJ VORTAC	BARNES, MA VORTAC	18000	31000
§95.7106 JET ROUTE NO. 106			
	IS AMENDED TO READ IN PART		
STILLWATER, NJ VOR/DME	LA GUARDIA, NY VOR/DME	18000	24000

§95.8003 VOR FEDERAL AIRWAYS CHANGEOVER POINTS

AIRWAY SEGMENT		CHANGEOVER POINTS	
FROM	TO	DISTANCE	FROM
	V-532 IS AMENDED TO READ IN PART		
SALINA, KS VORTAC	LINCOLN, NE VORTAC	51	SALINA

[FR Doc. 89-5628 Filed 3-10-89; 8:45 am]
BILLING CODE 4910-13-C

14 CFR Part 97

[Docket No. 25813; Amdt. No. 1395]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The 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.

EFFECTIVE DATE: 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 the 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: Paul J. Best, Flight Procedures Standards Branch (AFS-420), Air Transportation Division, Flight Standards Service, 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 continued 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 require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

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

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep then operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Approaches, Standard instrument, Incorporation by reference.

Issued in Washington, DC on March 3, 1989.

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 June 1, 1989

Boise, ID—Boise Air Terminal (Gowen Field), VOR/DME or TACAN RWY 28L, Amdt. 1
Boise, ID—Boise Air Terminal (Gowen Field), LOC/DME BC RWY 28L, Amdt. 5
Muscatine, IA—Muscatine Muni, VOR RWY 5, Amdt. 4, CANCELLED
Muscatine, IA—Muscatine Muni, VOR RWY 23, Amdt. 5
Muscatine, IA—Muscatine Muni, VOR RWY 30, Amdt. 4, CANCELLED
Muscatine, IA—Muscatine Muni, VOR/DME RWY 12, Amdt. 4, CANCELLED
Muscatine, IA—Muscatine Muni, NDB RWY 5, Amdt. 11
Muscatine, IA—Muscatine Muni, RNAV RWY 23, Orig.

. . . Effective May 4, 1989

Colusa, CA—Colusa County, VOR–A, Amdt. 4
Santa Rosa, CA—Sonoma County, VOR/DME RWY 14, Amdt. 1
Atlanta, GA—The William B. Hartsfield Atlanta Intl, RADAR–1, Amdt. 31
Calhoun, GA—Tom B. David Fld, LOC RWY 35, Amdt. 1
Calhoun, GA—Tom B. David Fld, NDB RWY 35, Amdt. 1
DeKalb, IL—DeKalb Taylor Muni, VOR/DME RWY 27, Amdt. 3
DeKalb, IL—DeKalb Taylor Muni, NDB RWY 27, Amdt. 1
Marion, IN—Marion Muni, VOR RWY 4, Amdt. 11
Marion, IN—Marion Muni, VOR RWY 15, Amdt. 8
Marion, IN—Marion Muni, VOR RWY 22, Amdt. 14
Marion, IN—Marion Muni, ILS RWY 4, Amdt. 5
Cherokee, IA—Cherokee Muni, NDB RWY 36, Amdt. 3
New Bedford, MA—New Bedford Muni, LOC (BC) RWY 23, Amdt. 6
New Bedford, MA—New Bedford Muni, NDB RWY 5, Amdt. 10
New Bedford, MA—New Bedford Muni, ILS RWY 5, Amdt. 23
Romeo, MI—Romeo, VOR/DME–A, Amdt. 5
Columbus, OH—Port Columbus Intl, NDB RWY 10L, Amdt. 6
Columbus, OH—Port Columbus Intl, NDB RWY 10R, Amdt. 6
Columbus, OH—Port Columbus Intl, ILS RWY 10L, Amdt. 14
Columbus, OH—Port Columbus Intl, ILS RWY 10R, Amdt. 5
Georgetown, SC—Georgetown County, NDB RWY 05, Amdt. 4
Arlington, TN—Arlington Muni, NDB RWY 15, Amdt. 6
Arlington, TN—Arlington Muni, NDB RWY 33, Amdt. 6
Jacksboro, TN—Campbell County, NDB RWY 23, Amdt. 3
Jacksboro, TN—Campbell County, RNAV–A, Amdt. 3
Waukesha, WI—Waukesha County, VOR–A, Amdt. 14
Waukesha, WI—Waukesha County, LOC RWY 10, Amdt. 3
Waukesha, WI—Waukesha County, NDB RWY 28, Amdt. 2

. . . Effective April 6, 1989

Wiscasset, ME—Wiscasset, NDB RWY 25, Amdt. 4
Grand Island, NE—Central Nebraska Regional, LOC/DME BC RWY 17, Amdt. 8
Grand Island, NE—Central Nebraska Regional, ILS RWY 35, Amdt. 8
Kenosha WI—Kenosha Muni, NDB RWY 6L, Orig.
Kenosha WI—Kenosha Muni, ILS RWY 6L, Orig.

. . . Effective March 1, 1989

Atlanta, GA—Fulton County Airport-Brown Field, ILS RWY 8, Amdt. 14

. . . Effective February 28, 1989

Mesquite, TX—Phil L. Hudson Muni, LOC RWY 17, Amdt. 1
Mesquite, TX—Phil L. Hudson Muni, NDB RWY 17, Amdt. 2

. . . Effective February 21, 1989

Bangor, ME—Bangor Intl, VOR/DME RWY 33, Amdt. 6

. . . Effective February 16, 1989

Hyannis, MA—Barnstable Muni-Boardman/Polando Field, VOR RWY 6, Amdt. 4

[FR Doc. 89–5629 Filed 3–10–89; 8:45 am]
BILLING CODE 4910–13–M

FEDERAL TRADE COMMISSION

16 CFR Part 456

Trade Regulation Rule; Ophthalmic Practice Rules

AGENCY: Federal Trade Commission.
ACTION: Final Trade Regulation Rule.

SUMMARY: The Federal Trade Commission issues a final rule that removes restraints imposed by state law on certain specified forms of commercial ophthalmic practice. The Commission has concluded that these restrictions are unfair acts or practices within the meaning of Section 5 of the Federal Trade Commission Act and are appropriately remedied by the Trade Regulation Rule promulgated today. The rule bars four types of state restrictions on commercial practice: (1) Prohibitions on certain forms of lay association with or control over optometric practices; (2) limitations on the number of branch offices which optometrists may own or operate; (3) prohibitions on the practice of optometry in commercial locations; and (4) prohibitions on the practice of optometry under a nondeceptive trade name. The rule also incorporates, with minor technical changes, the prescription release requirement originally promulgated as part of the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services.

Published here are the Rule's Statement of Basis and Purpose, which incorporates a Regulatory Analysis, and the text of the final rule.

EFFECTIVE DATE: September 1, 1989.

ADDRESS: Requests for copies of the Rule and the Statement of Basis and Purpose should be sent to the Public Reference Branch, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Richard Kelly, Renee Kinscheck, or Patricia Brennan, Division of Service Industry Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580 (202) 326–3304, (202) 326–3287, or (202) 326–3274.

SUPPLEMENTARY INFORMATION:

List of Subjects in 16 CFR Part 456

Eyeglasses, Ophthalmic practice, Trade rules.

By direction of the Commission, Chairman Oliver dissenting.

Donald S. Clark,
Secretary.

Statement of Basis and Purpose

I. Introduction

A. Overview of the Rule

1. *Commercial Practice Restrictions.* Some state-imposed restrictions on the commercial practice [1] of optometry cause significant injury to consumers. While justified as necessary to protect consumers, these restrictions actually work to deprive consumers of necessary eye care, restrict consumer choice, and impede innovation in the eye care industry.

The monetary cost—likely to be millions of dollars annually—is great. Over half of all Americans and more than 90 percent of elderly consumers use corrective eyewear, and over eight billion dollars was spent on eye exams and eyewear in 1983.[2] A significant

[1] Optometric practices range across a continuum from what can be characterized as strictly traditional (e.g., solo practitoner operating in an office building under own name) to highly commercial (e.g., large chain optometric firm, with offices in many states). For purposes of this proceeding, an optometrist is considered to be in "commercial practice" if he or she is associated with or employed by a nonoptometrist, uses a trade name, operates more than a single office, or practices at a mercantile location.

[2] NAOO, H–78, at 7 (figure derived from the annual National Consumer Eyewear study conducted by the Optical Manufacturers Association). The NAOO anticipated that 1985 sales would exceed nine billion dollars.

All documents on the rulemaking record have been given alphanumeric designations based upon the system established by the Presiding Officer. A full explanation of these designations is given at the beginning of Bureau of Consumer Protection.

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proportion of these costs can be attributed to the inefficiencies of an industry protected from competition by state regulation. A study done by the FTC's Bureau of Economics shows that prices for eye care are 18 percent higher in markets where chain firms are totally restricted than in markets where chain firms operate freely.

State restrictions on commercial practice are pervasive. Some restrictions are statutory. Others are found in regulations promulgated by state boards of optometry.[3] This rule declares unfair four specific types of state restrictions on competition among optometrists and other vision care providers:

(1) *Restrictions on Affiliations With Nonoptometrists.* Most states have one or more restrictions on lay affiliations. Such restrictions take many forms, including restrictions on employment of optometrists by business corporations or nonoptometrists, on the forming of partnerships between optometrists and nonoptometrists, on the splitting of optometrists' professional fees with nonoptometrists (which, in effect, can prohibit joint-ownership or equity-participation agreements), and on the forming of franchise agreements and landlord-tenant agreements between optometrists and nonoptometrists, including agreements under which rental payments are based on a percentage of gross revenue.[4] Some states also prohibit such corporate affiliations by prohibiting nonoptometrists from exercising any control over the business aspects of an optometric practice.[5]

(2) *Restrictions on practice in mercantile locations.*[6] Over twenty states impose one or more bans that appear to explicitly prohibit the practice of optometry in mercantile locations. The most common ban explicitly prohibits optometrists from practicing in or leasing space from a retail establishment, such as a department store or optical store. Most states that prohibit optometrists from practicing in a retail establishment permit optometrists to locate in or next to that business only if there is a separate entrance to a public street or hallway, in what is known as a "two-door" or "side-by-side" arrangement. In addition, several states appear to restrict practice in shopping malls.[7]

(3) *Restrictions on branch offices.* Many states restrict the number of offices that an optometrist may own or operate. Some impose flat limitations on the number of offices that an optometrist may open,[8] while others indirectly impose limits by requiring an optometrist to be present a certain percentage of the time a branch office is open.[9]

(4) *Restrictions on the use of trade names.*[10] Trade name restrictions generally take one of three forms. First, some states explicitly ban any use of trade names by optometrists.[11] Second, some states specify that trade names must include certain words.[12] Third, several states require that the names of all optometrists practicing under a trade name or at any advertised location must be disclosed in all advertisements that use the trade name.[13]

As of 1985, at least 44 states had one or more of these four types of restrictions.[14] Thirty-nine states prohibited employer-employee or other business affiliations between optometrists and persons who are not optometrists, including partnerships, joint-ownership or equity-participation agreements, franchise agreements, landlord-tenant agreements, and other similar affiliations. At least 19 states limited the number of branch offices which may be owned or operated by optometrists, often limiting optometrists to one or two branch offices. Thirty states restricted optometrists from practicing in mercantile locations such as shopping malls, department stores, and other retail establishments. At least 32 states prohibited the use of nondeceptive trade names by optometrists. Each of these restrictions prevents or restricts the development of alternatives to the traditional solo practice.

Evidence gathered during a lengthy investigation and an extensive rulemaking proceeding includes two Commission-sponsored surveys, additional survey evidence, and expert economic, testimonial, and documentary evidence. That substantial body of evidence demonstrates that these restrictions raise prices to consumers and, by reducing the frequency with which consumers obtain vision care, decrease the overall quality of care provided in the market. The rulemaking record establishes that the presence of commercial optometric firms lowers the cost of eye care to patients of both commercial and noncommercial optometrists. The evidence also indicates that these restrictions do not provide offsetting quality-related benefits to consumers.

The Commission has concluded that these restrictions are unfair acts or practices within the meaning of section 5 of the Federal Trade Commission Act and are appropriately remedied by the Trade Regulation Rule promulgated today.

2. *Prescription Release.* The rule continues to require that optometrists and ophthalmologists release eyeglass lens prescriptions to their patients upon completion of an eye examination. The Commission considered a staff proposal

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Federal Trade Commission, Ophthalmic Practice Rules: State Restrictions on Commercial Practice, (1986), L–1 (hereinafter referred to as "Final Staff Report"). For example, documents in the H category are written comments filed by providers or sellers of ophthalmic goods or services and by ophthalmic organizations. Documents in the J category are written witness statements, transcripts of the hearings and hearing exhibits. Hearing transcripts, which appear on the rulemaking record as J–71, are cited by page number (e.g., "Tr. 999").

[3] In still other cases, attorney general opinions, judicial interpretations, and board interpretations may reveal restrictions not apparent from the face of the statute or regulation.

[4] The sharing of profits or of gross revenues is an integral part of many of these business relationships. For example, partnership agreements involve distribution of income on a percentage basis. An essential element of franchise agreements is payment of a percentage of gross revenues by the franchisee to the franchiser, often referred to as a "royalty."

[5] Some degree of lay control over the business aspects of a practice is an essential element of these relationships.

[6] As used herein, "mercantile location" refers to shopping malls and to retail establishments such as department stores and optical outlets.

[7] Two states, Rhode Island and Alaska, apparently prohibit shopping mall practices altogether. While Rhode Island's prohibition does not mention shopping malls explicitly, it does bar optometrists from practicing in a building where over 50% of the remaining space is rented under percentage leases. Since such leases are almost universally used in shopping centers, J. Solish, Counsel, R.H. Teagle Corp., Tr. 1371; C. Callsen, NAOO, Tr. 353, the effect of this provision is to inhibit optometric practice in shopping centers. In Alaska, no such ban appears in statute or regulation. However, there is evidence that the Board of Optometry enforces such a restriction. J. Ingalls, President, Western States Optical, J–54, at 3–4.

[8] See, e.g., Ky. Rev. Stat. section 320.310(3) (1983).

[9] See, e.g., Or. Admin. R. section 852–10–030(5) (1984).

[10] The Supreme Court's decision in *Friedman v. Rogers*, 440 U.S. 1 (1979), that a Texas statute prohibiting the use of trade names did not violate the First Amendment, does not preclude a Commission finding of unfairness regarding trade name bans. The Commission applies a different standard for purposes of an unfairness analysis under section 5 of the FTCA.

[11] See, e.g., Fla. Stat. section 463.014(1)(a); Ind. Admin. R.1–4–1(a).

[12] For example, California requires that all trade names contain the word "optometrist" or "optometric." Cal. Bus. & Prof. Code sections 3125 (b) and (c).

[13] See, e.g., Mo Rev. Stat. section 336.200.

[14] See charts in Final Staff Report, L–1, at 33–46, for a detailed breakdown of state regulation of the practice of optometry. The statistics on commercial practice restrictions cited here and elsewhere in the Statement are based on an analysis of state regulatory practice as of 1985. A sampling of state statutes and regulations, as of October 1988, confirmed that one or more of the restraints at issue here continue to exist in a majority of the states

to modify this provision to require that prescriptions be released only upon request. After weighing the evidence, we conclude that there is a continuing need for the "automatic release" component of the requirement. However, technical changes have been made in the rule language in order to make clear that this provision is directed only at prescriptions for eyeglass lenses and creates no obligation concerning the release of prescriptions for contact lenses.

B. History of the Proceeding.

This proceeding grew out of an investigation begun in 1975 into state and private restraints on advertising of ophthalmic goods and services. The first phase of the investigation culminated with the promulgation in 1978 of the Trade Regulation Rule on the Advertising of Ophthalmic Goods and Services.[15] As the investigation progressed, the staff began to accumulate evidence that restrictions on advertising were not the only public restraints that appeared to limit competition, increase prices, and reduce the quality of eye care provided to the public. The second phase of this inquiry focused on the commercial practice restrictions described above.

To obtain further evidence on these issues, staff conducted two comprehensive studies. The first, published in 1980 by the Bureau of Economics, compared the price and quality of optometric services in restrictive and nonrestrictive markets.[16] The second study, published in 1982 by the Bureaus of Consumer Protection and Economics, compared the price and quality of cosmetic contact lens fitting services of commercial optometrists and other provider groups.[17] At the same time, the staff conducted a study measuring compliance with the prescription release requirement of the Eyeglasses Rule.[18]

In July 1980 staff published the results of its investigation on commercial practice restrictions in an initial staff report.[19] Based on this report and other evidence gathered, the Commission published an Advance Notice of Proposed Rulemaking ("ANPR") in December 1980, that requested comments on the issues presented by the investigation and on what action, if any, the Commission should take.[20]

Based on the survey evidence, the initial staff report, and the comments received in response to the ANPR, the Commission published on January 4, 1985, a Notice of Proposed Rulemaking initiating this rulemaking proceeding ("Eyeglasses II").[21] During the proceeding, 243 written comments were received: 12 from consumers and consumer groups; 159 from optometrists, sellers of ophthalmic goods, and their professional associations; 69 from federal, state, and local government officials; and 3 from members of the academic community. Ninety-four persons testified during three weeks of public hearings.[22] Twenty-four rebuttal comments were filed in response to that testimony.

The staff reviewed the entire record and published its final report in October 1986.[23] The report recommended the promulgation of a rule that would eliminate the four types of commercial practice restrictions described above and modify the prescription release provisions in the Eyeglasses Rule. The Presiding Officer's Report, released in December 1986,[24] recommended against adopting a rule that would proscribe commercial practice restrictions, and also recommended against modifying the prescription release requirements of the Eyeglasses Rule. After review of these comments, the staff submitted its final recommendations to the Commission in July 1987.[25]

On November 5, 1987, the Commission heard oral presentations from several rulemaking participants who had asked to present their views directly to the Commission as provided in § 1.13(i) of the Commission's Rule.[26] The Commission met on February 10, 1988, and voted to promulgate a rule that prohibits four specified types of state bans on commercial practice and retains the prescription release requirement from the original Eyeglasses Rule.

II. Factual Basis for the Rulemaking

A. Evidentiary Standards for an Unfairness Rulemaking [27]

The Commission requires that a preponderance of the evidence support the factual propositions underlying a determination that an existing act or practice is legally unfair. Before promulgating an unfairness rule the Commission requires answers to the following questions: (1) Is the act or practice prevalent? (2) Does the act or practice injure consumers? (3) Is the proposed rule likely to reduce that injury? (4) Is the injury to consumers outweighed by countervailing benefits that flow from the act or practice at issue? and (5) Can consumers reasonably avoid the injury? [28]

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[15] 16 CFR Part 456 (hereinafter cited as "Eyeglasses Rule"). The Commission found public and private bans on nondeceptive advertising by vision care providers and the providers' failure to release eyeglass lens prescriptions to be unfair acts or practices in violation of section 5 of the FTC Act. The rule prohibited bans on nondeceptive advertising and required vision care providers to furnish copies of prescriptions to consumers after eye examinations. Subsequently, the U.S. Court of Appeals for the District of Columbia in *American Optometric Association v. FTC*, 626 F.2d 896 (D.C. Cir. 1980), upheld the prescription release requirement but remanded the advertising portions of the Eyeglasses Rule for further consideration in light of the Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). After further consideration, the Commission has addressed the few remaining advertising restrictions through administrative litigation rather than rulemaking.

[16] Bureau of Economics, Federal Trade Commission, Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980), B–2–31 (hereinafter cited as "BE Study"). That study showed that commercial practice restrictions resulted in higher prices for eyeglasses and eye examinations, but did not increase their quality.

[17] Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983), B–5–1 (hereinafter cited as "Contact Lens Study"). That study showed that commercial optometrists charged significantly lower prices for fitting cosmetic contact lenses and fitted such lenses at least as well as other fitters of contact lenses.

[18] Market Facts Public Sector Research Group, FTC Eyeglasses Study: An Evaluation of the Prescription Release Requirement (1981) (hereinafter cited as "Market Facts Study").

[19] Bureau of Consumer Protection, Federal Trade Commission, State Restrictions on Vision Care Providers: The Effect on Consumers (1980), B–2–1 (hereinafter cited as "1980 Staff Report").

[20] 45 FR 79,823 (1980). During the 60-day comment period, 247 comments were received.

[21] 50 FR 598 (1985).

[22] Some organizations sponsored several witnesses; 74 organizations or individuals presented testimony.

[23] Final Staff Report, *supra* note 2.

[24] James P. Greenan, Presiding Officer, Report of the Presiding Officer on Proposed Trade Regulation Rule of Ophthalmic Practice Rules (1986), L–2 (hereinafter cited as "Presiding Officer's Report").

[25] Bureau of Consumer Protection, Federal Trade Commission, Ophthalmic Practice Rulemaking: Final Recommendations (July 31, 1987), O–1(b) (hereinafter cited as "Staff's Final Recommendations").

[26] The participants were: The American Optometric Association (hereinafter cited as the "AOA"); The California Optometric Association (hereinafter cited as the "COA"); The National Association of Optometrists and Opticians (hereinafter cited as the "NAOO"); The Opticians Association of America; The American Association of Retired Persons; U.S.A. Lens, Inc.; and 20/20 Optical.

[27] See infra section III. A. for a discussion of the statutory basis and evolution of the Commission's unfairness authority.

[28] *American Financial Services Ass'n v. Federal Trade Commission*, 767 F.2d 957, 971 (1985); Rule on Sale of Used Motor Vehicles, Statement of Basis and Purpose, 49 FR 45692, 45703 (1984); Credit Practices Rule, Statement of Basis and Purpose, 49 FR 7740, 7742 (1984); Letter from Federal Trade Commission to Senators Wendell H. Ford and John C. Danforth (Dec. 17, 1980) (hereinafter cited as "Unfairness Statement"). In issuing the Credit Practices Rule, the Commission acknowledged that the evidence necessary to answer these questions will vary depending on the circumstances of each rulemaking and the characteristics of the industry involved. 49 FR 7740, 7742 n. 4.

As a matter of policy, the Commission has set an even higher standard for promulgation of a rule that directly challenges state law. Out of deference to the principles of federalism, the Commission will take such action as a remedy of last resort, appropriate only if substantial consumer injury is clearly shown; the benefits of the state laws are minimal or absent; and the states are not acting on their own to change the laws.[29]

In this proceeding, the record clearly supports affirmative answers to each of the above-mentioned questions. First, at least 44 states have one or more of the four types of restrictions at issue here. Second, comprehensive and reliable evidence shows that the restrictions cause significant harm to consumers by increasing prices and reducing the frequency with which consumers obtain care. Third, by declaring that such restrictions are unfair, the rule removes such restrictions and thereby eliminates the harm to consumers. Fourth, comprehensive and reliable evidence indicates that the restrictions do not provide consumer benefits since they fail to increase the quality of care received by consumers. Fifth, consumers cannot avoid the adverse effect of these state-imposed and state-enforced restrictions.[30]

The Commission has a responsibility to see that the best evidence reasonably available is included on a rulemaking record before promulgating a rule.[31] The best evidence will often be surveys or other methodologically sound quantitative analyses. The Commission may also consider other reliable evidence and expert testimony.

The quantity and quality of evidence in this proceeding supports promulgation of the rule under standards set by the Commission and the courts. The need for the rule is demonstrated by the BE and Contact Lens Studies.[32] The rule is further supported by additional studies, by documentary and testimonial evidence, and by the absence of any substantial or persuasive contrary evidence. The cumulative impact of this evidence persuades us that the rule is necessary and will provide substantial benefits to consumers.

[29] Letter from Federal Trade Commission to Senator Robert Packwood, Chairman, Committee on Commerce, Science and Transportation, United States Senate (March 5, 1982).

[30] See infra section VI.A.

[31] Trade Regulation Rule on Sale of Used Motor Vehicles, Statement of Basis and Purpose, 49 FR 45692, 45703 (1984); Credit Practices Rule, Statement of Basis and Purpose, 49 FR 7740, 7742 (1984).

[32] See infra section II.D. for a detailed discussion of the methodology used in these studies.

B. Evidence Regarding Harm to Consumers Caused by Commercial Practice Restrictions.

1. *Higher Prices.* The evidence on the record demonstrates that commercial practice restrictions raise prices for eye care goods and services.[33] By impeding competition from commercial firms, the restrictions result in higher average prices for both commercial and traditional practitioners and at all levels of quality. This conclusion is supported by a preponderance of the evidence, which shows: (1) That average prices for eye exams and eyeglasses are lower in markets with chain firms than in markets without chain firms; (2) that chain firms and other large-volume providers charge significantly lower prices than noncommercial providers; and (3) that each of the restrictions imposes unnecessary costs on commercial practice that impede its development and raise prices to consumers. No reliable evidence contradicts these conclusions.[34]

The BE Study found that prices for eye exams and eyeglasses were 18% higher in markets without chain firms than in markets with chain firms. In markets with chain firms, both traditional and commercial optometrists charged lower prices, and prices were lower at all levels of quality.[35] An earlier study by Professors Lee and Alexandra Benham also concluded that prices of eyeglasses were substantially higher in states with restrictions than in states without restrictions.[36]

Additional evidence demonstrating that commercial firms—generally chain firms or other large-volume providers—charge significantly lower prices for equivalent quality goods and services than noncommercial optometrists includes: (1) The Contact Lens Study, which found that commercial optometrists charged significantly less for cosmetic contact lens fitting than noncommercial optometrists; [37] (2) a survey submitted by the California Optometric Association, which found that chain optometric firms charged less for eye exams than private optometrists; [38] and (3) extensive documentary and other evidence demonstrating that large-volume providers frequently take advantage of economies of scale to charge lower prices for equivalent goods and services.[39]

Finally, as summarized below, the record demonstrates that each of the specific restrictions at issue here imposes unnecessary costs on optometric providers and hinders the development of high-volume practices, resulting in fewer such firms in the market, higher prices to consumers, and decreased access to eye care.

While the studies on the record do not separately describe the effects of each particular commercial practice restriction, the record contains an abundance of other evidence that supports a Commission finding that each of the four types of restrictions inhibits or restricts the formation and expansion of high-volume optometric practices.[40] In addition, the record establishes how the restrictions decrease efficiency and increase prices for volume practitioners that manage to enter the market in spite of the restrictions.

(1) Restrictions on lay associations prohibit optometrists from obtaining capital from nonoptometrists by entering into partnerships, joint ownership agreements or other associations with such persons or entities, a constraint which inhibits capital development. This, in turn, impedes the development of large-scale practices that can take advantage of volume purchase discounts and other economies of scale.[41] These

[33] See Final Staff Report, L-1, at 157-178.

[34] Id. at 165-178.

[35] Id. at 101-107.

[36] Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J. L. & Econ. 421 (1975), B-2-29. See Final Staff Report, L-1, at 164 for a further discussion of the Benhams' study. In the 1980 Staff Report and the Final Staff Report, staff acknowledged several potential methodological shortcomings with the Benham data which indicate that the study, standing alone, would not be sufficient to support this rulemaking. Final Staff Report, L-1, at 165; 1980 Staff Report, B-2-1, at 46, 58-59. Despite these potential shortcomings, the record indicates that the Benham data provides useful information to corroborate the findings of the BE Study. Final Staff Report, L-1, at 164-165. See also 1980 Staff Report, B-2-1, at 58-59.

[37] The results showed that commercial optometrists charged prices that were on average 20% lower than noncommercial optometrists and over 30% lower than ophthalmologists.

[38] Consumer Study of Optometric Practices in Metro-Atlanta Area, J-67(a) (Attachment to Statement of California Optometric Ass'n) (hereinafter cited as "Atlanta Survey"). The survey was conducted by John H. Thomas and Associates, Atlanta, Georgia. See Final Staff Report, L-1, at 161-163 for a further description of this survey.

[39] For example, in 1982, the California Department of Consumer Affairs estimated that the cost differences attributable to economies of scale during the first 10 years of practice between an independent solo practitioner and a corporation could range from $12 to $13 per customer. Department of Consumer Affairs, State of California, Commercial Practices Restrictions in Optometry 8-11, 13 (1982), J-24(b). See also Final Staff Report, L-1, at 59-67, 177-178.

[40] See Final Staff Report, L-1, at 49-100.

[41] The record indicates that the use of volume discounts by high-volume practices can reduce significantly the costs of equipment, material, and supplies. For example, the NAOO stated that through the use of volume discounts, an office could

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restrictions contribute to higher prices by excluding or deterring volume practitioners from entering the market and by preventing practitioners in the market from operating at the most efficient level.[42]

(2) Restrictions on practicing in mercantile locations, such as department or drug stores, also raise prices to consumers by inhibiting the formation of high-volume commercial practices. Mercantile locations, which are generally more convenient to consumers, generate a high volume of consumer traffic. Restrictions on practicing in mercantile locations may also impose unnecessary space, construction, or personnel costs that must be passed on to consumers.[43] These burdens fall both on optometric chain firms and on individual practitioners.

(3) Restrictions on branch offices create barriers to expansion both by individual optometrists and by lay optometric firms. These restrictions reduce the total volume of patients that a practice might otherwise be able to serve. This reduced volume of patients prevents optometrists from taking advantage of economies of scale that arise from volume purchasing discounts and reduced per office advertising costs. Also lost are the potential savings that multi-branch practices may achieve through more efficient management techniques.[44]

(4) Bans on trade name practice and advertising deprive consumers of valuable information and increase consumer search costs. Trade names are of value to consumers because, over time, the names come to reflect the cumulative experience that consumers have had with a particular firm. As a result, trade names are a valuable asset to firms, and restrictions on their use hinder the growth and development of optometric firms. Trade name bans also make it difficult for high-volume operators to advertise multiple outlets and to allocate advertising expenses over those outlets.[45]

The record also establishes [46] that state laws which require that all trade name advertisements include the names of all optometrists practicing at a given advertised location or practicing under the advertised trade name effectively ban much nondeceptive trade name advertising. Thus these restrictions have a similar detrimental effect on consumers as outright bans on trade name usage and advertising.

Many states have enacted more than one of these restrictions.[47] While each of these restrictions may impede the growth and efficiency of chain firms or volume practices, a combination of restrictions may completely bar their entry.

The Presiding Officer also found that the record demonstrated that prices for optometric goods and services are significantly lower in nonrestrictive markets than in restrictive markets.[48] Commenters did not seriously dispute the evidence that large-volume practitioners can achieve economies of scale unavailable to smaller practitioners,[49] nor did they submit any reliable studies that contradicted the price findings of the BE and Contact Lens Studies.[50]

2. *Less Care.* Commercial practice restrictions harm consumers not only by raising prices but also by decreasing the overall quality of care received by consumers. The record evidence indicates that, as a result of the higher prices in restrictive markets, consumers obtain eye care less frequently than they otherwise would.[51] Some consumers

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be equipped for about two-thirds of the standard retail price. Moreover, materials such as frames and lenses can be discounted as much as 25% when purchased in volume. See Final Staff Report, L–1, at 60–61.

[42] Id. at 57–67.

[43] For example, in those states that mandate a two-door or side-by-side arrangement, optometrists typically must maintain an office that is separate from the optical dispensary and that also has a separate entrance to a public street, corridor, or hallway. This results in higher construction costs, requires more space and thus more rent, and increases frontage costs.

The NAOO estimates that the cost of constructing, equipping, and fixturing a side-by-side office is 15–20% higher than for an equivalent one-door office. NAOO, H–78, at 35. This cost, which typically might amount to $10,000 per office, includes duplicating the heating, cooling, bathroom, waiting room, and other facilities. See also Final Staff Report, L–1, at 84–88.

[44] For example, branch office restrictions may prevent optometric firms from employing or entering into other business relationships with optometrists at more than the permitted number of locations. NAOO, H–78, at 60. Each office that the optometrist is scheduled to work in is considered a branch for purposes of these restrictions, so that firms cannot schedule an optometrist to practice in more than the permitted number of locations. This may prevent these firms from efficiently distributing their optometrists to best meet the needs of the firms' various offices. See Final Staff Report, L–1, at 74–77.

[45] See Final Staff Report, L–1, at 95–97.

[46] The evidence shows that the cost of disclosing the names of all optometrists practicing under a trade name is so burdensome as to preclude the effective use of trade names under many circumstances. Similarly, the cost of disclosing the names of all optometrists at particularly advertised locations effectively prevents nondeceptive trade name usage in such advertisements under some circumstances. See NAOO, H–78, at 84–87. G. Black, Arkansas Retail Merchants Ass'n, D–1 at 2; P. Zeidman, Counsel, International Franchise Ass'n, Tr. 617–620; NAOO Panel, Tr. 538; and Final Staff Report, L–1, at 88.

[47] At least 28 states have at least three of these restrictions. *See* charts in Final Staff Report, L–1, at 33–46.

[48] Presiding Officer's Report, L–2, at 182–186.

[49] Some commenters pointed to limited instances in which smaller-volume practitioners may achieve economies of scale. *See* e.g., Reponse of the COA to Dept. of Consumer Affairs Report, K–12, at 6 (attachment to Rebuttal of the COA) and Post-record comment of AOA, M–176, at 454. However, even if small discounts are available to small-scale practitioners, that does not contradict the fact that larger discounts may be available to high-volume practitioners.

[50] See Final Staff Report, L–1, at 165–171. Some survey evidence was presented by the COA and the AOA that ostensibly showed that commercial firms do not charge less and may even charge more than noncommercial optometrists. For instance, the COA claimed that the Atlanta Survey's findings on "mark-ups" showed that "alleged corporate efficiencies (*e.g.*, savings through volume discounts) were not being passed on to consumers" because all the provider groups had equivalent "mark-ups" on materials. However, this "mark-up" data provided no useful insight into the relative prices charged by the different provider groups because of considerable variation in the wholesale costs of the frames and lenses purchased for the survey. *Id* at 165–68. The AOA also attempted to rely on some data from a *20/20* magazine survey showing that average billings were higher for optometric practices with annual sales greater than $200,000 a year than for practices with lower annual sales. However, this survey fails to provide meaningful data about differences between chain and nonchain firms. *Id.* at 169–170. It also fails to provide meaningful data about differences between low-volume practices and high-volume practices, as that term has been used in this proceeding—*i.e.*, multi-optometrist, multi-office practice. See Rebuttal Statement of R. Bond, FTC economist, L–18, at 15 n. 6. As explained by the author of the *20/20* article, each group (both over $200,000 and under $200,000) most probably includes both chain and independent operations. It is unclear whether the reported gross sales volume refers to per-office volume or per-company volume. If the data is *per-office* gross sales, the data cannot be used to distinguish low-volume firms from those with a significantly larger volume since large chains may have per-office volume above or below $200,000, while private practitioners may also be in either category. (This data was calculated based upon figures in Rebuttal Statement of NAOO, H–78a, at 11 and in Ophthalmic Practice Rulemaking Statement and Exhibits—Robert R. Nathan Associates, Inc., J.–66(A), at Vol. II, Ex. 1, Appendix E at E–3 (hereinafter referred to as "Nathan Study"). If the data is *per company*, $200,000 is too low a figure to provide a meaningful distinction between high and low volume. Many solo practitioners have this volume, but some chain firms have annual sales in the billions. Further, the *20/20* article noted that in this sample, more smaller practices advertised than larger ones; only 40 percent of larger practices advertised. "One probable reason would be the infrequent advertising of many large ophthalmological and optometric practices which still deem advertising to be unprofessional." *20/20* Article; Nathan Study, J–66(a) at Vol. II, Ex. II, Appendix E, at E–2, E–6. This indicates that many traditional private practitioners and small group practices were included in the "over-$200,000" group.

[51] Professors James Begun and Lee Benham stressed the importance of frequency of eye care as an aspect of quality and stated that there can be little doubt that the restrictions result in reduced frequency of vision care purchases. *See* J. Begun, Professor, Virginia Commonwealth University, K–1,

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forego eye care entirely, while others delay the purchase of eyeglasses and eye exams.

Evidence of the rulemaking record shows that some consumers are not obtaining adequate vision care because of financial circumstances. Testifying in favor of Medicare coverage for eye care, the AOA told a Congressional committee in 1976 that many elderly persons go without adequate vision care because of its cost.[52] In that Congressional testimony, the AOA also provided evidence that uncorrected vision problems can lead to serious injury to older consumers. According to the AOA, 85 percent of all serious injuries sustained by persons 65 and older are caused by falls; 25 percent of these relate directly to uncorrected vision problems.

Survey evidence also demonstrates that higher prices result in reduced purchases of eye care. Based on the results of an extensive nationwide survey, Professors Lee and Alexandra Benham found that significantly fewer individuals purchased eyeglasses in a given year in states with higher prices than in states with lower prices.[53] In 1979, a survey of 1,254 families sponsored by General Mills found that families had cut back on annual medical checkups, new eyeglasses, dental treatment, and various preventive health care services because of inflation.[54] Finally, Public Health Service data indicate that annual purchase and repair of eyeglasses increases with family income.[55] This evidence indicates that economic considerations influence vision care expenditures, and that people are likely to cut back such expenditures as prices rise.

Very few proponents of the restrictions addressed the question of the frequency of eye care purchases. While some pointed to alleged shortcomings of the survey data discussed above, none of the alleged shortcomings prevent the Commission from concluding that commercial practice restrictions, which raise the price of eye care, lead to reduced purchases of eye care.[56]

A few commenters did state that no one is going without eye care since special assistance is available for the indigent.[57] However, no evidence was presented by these commenters to indicate how extensive such programs are or under what circumstances they would apply. Moreover, these commenters did not address the point that consumers not eligible for such assistance programs may be delaying or rationing purchases because of higher prices. On the other hand, we find persuasive the testimony of consumer groups that all but the poorest consumers must pay for vision care out of their own pocket without reimbursement by public assistance or private insurance.[58] A study by the Optical Manufacturers Association demonstrated that only 10–20 percent of all expenditures for eye examinations, eyeglasses, and contact lenses is paid for by insurers or other third-party payors. The remaining 80–90 percent is paid directly by the patient.[59]

Commercial practice restrictions also affect consumers' access to vision care by restricting the places where an optometrist may locate. The record indicates that commercial optometrists may be more conveniently located [60] and may be more frequently available on weekends and evenings.[61] These are additional reasons why restrictions on such firms tend to reduce accessibility and the frequency of purchase of vision care.

C. Countervailing Benefits of Commercial Practice Restrictions

The stated justification for commercial practice restrictions is that they are necessary to maintain high-quality vision care.[62] If this assertion were true, one would expect to find higher quality care in those markets where commercial practice is prohibited or limited. But the record is quite clear on this central issue: There is no difference in the average quality of care available to consumers in restrictive and

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Exhibit 12 (Attachment to Rebuttal Statement of NAOO); Rebuttal Statement of Lee Benham, Professor, Washington University, K–17, at 2; A. Beckenstein, Professor, University of Virginia, at A–7 (Appendix A to Rebuttal Statement of NAOO). Consumers Union stated that removal of the restrictions will allow more frequent eye exams and improve patient health because more consumers will be able to afford the vision care and eyeglasses they need. H. Snyder, West Coast Director, Consumers Union, J–24(a) at 2, citing, State of California, Department of Consumer Affairs, Commercial Practice Restrictions in Optometry (1982), J–24(a), at Exh. A at iii (Attachment to Statement of Consumers Union).

[52] Medical Appliances for the Elderly: Needs and Costs, Hearings Before the Subcomm. on Health and Long-term Care of the House Select Comm. on Aging, 94th Cong., 2d Sess. 155 (1976) (Statement of the AOA), B–2–36.

[53] Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421, 438 (1975), B–2–29. This survey consisted of interviews with 10,000 individuals in 1970. The sample was drawn to overrepresent elderly individuals and individuals living in inner cities and in rural areas. Id. at 428.

[54] Forty-eight percent of families said that they had cut back on such expenditures as a result of inflation; 56% of low-income families, 60% of minorities and 72% of single parents made this statement. M. Kernan, *U.S. Health Profile*, Washington Post, Apr. 28, 1979, B–2–37, at C–1, col. 4.

[55] Data for 1977 indicated that there was a 25% increase in the number of persons who purchased or repaired eyeglasses in that year as family income increased from less than $12,000 to $25,000 or more per year. Public Health Service, U.S. Dept. of Health and Human Services, National Health Care Expenditures Study, Eyeglasses and Contact Lenses: Purchases, Expenditures, and Sources of Payment 4 (1979), G–14.

[56] For example, some commenters criticized the methodology of the Benhams' survey and claimed that none of the surveys showed that commercial practice restrictions caused reduced eye care purchases. See Post-record comment of AOA, M–176, at 422–33. See also Nathan Study, J–66(a), Vol. I, Exh. 1, at 89 n. 1. However, we are not persuaded that the alleged flaws in the Benhams' survey undercut the findings that, in general, higher prices of eye care lead to reduced consumer purchases. *See* Staff's final Recommedations, 0–1(b), at 12–14. While the AOA acknowledged that the surveys showed that inflation, recession, and available income affect consumer decision-making, it claimed that the surveys did not show that commercial practice restrictions, in particular, result in reduced purchases of eye care. However, because these surveys show that, in general, higher prices of eye care lead to reduced consumer purchases and because other evidence on the record shows that commercial practice restrictions lead to higher prices in the market, we can conclude that commercial practive restrictions result in reduced purchases of eye care.

[57] See, e.g., Nathan Study, J–66(a), Vol. I, Ex. 1 at 109–110; J. Moye, Mississippi Optometrist, Tr. 428–29; J. Robinson, Secretary, North Carolina Board of Optometry, Tr. 3001.

[58] See, e.g., H. Snyder, West Coast Director, Consumers Union, J–24(a), at 2 and Tr. 1059–60; J. Denning, President-elect, American Ass'n of Retired Persons, Tr. 60; E. Eggan, Director, American Ass'n of Retired Persons, J–37(a), at 6. Medicare does not, in general, cover vision care.

[59] Optical Manufacturers Association, National Consumer Eyewear Study III (1984), cited in NAOO, H–78, at 2.

[60] See NAOO, H–78, at 4.

[61] Id. at 3; NAOO Panel, Tr. 383–84.

[62] We note that the majority of states where commercial practices exist did not testify in this proceeding. Many of these states submitted written comments, but did not allege abuses by commercial firms. See, e.g., G. Owen, Speaker of Michigan House of Representatives, E–3; L. Clarke, Executive Secretary, New York State Board of Optometry, E–6; S. Rimmiler, Executive Director, Missouri State Board of Optometry, E–9; B. Nichols, Secretary, Wisconsin Department of Regulation and Licensing, E–37. Some of these commenters supported promulgation of the proposed rule.

There is no apparent a priori reason why one would expect these restrictions on business practices to affect the quality of professional care. Both commercial and noncommercial optometrists have similar educational qualifications and must pass the same licensing examinations in order to practice. Commercial optometrists face the same incentives as noncommercial optometrists to satisfy consumer demand and provide an acceptable level of quality eye care. Private optometrists, like commercial firms, must earn a profit in order to stay in business and both types of practitioners seek to generate profits by selling eyewear. Practitioners in both groups must maintain a good reputation in order to attract and hold the loyalty of patients.

nonrestrictive markets.[63] Our conclusion that commercial practice restrictions do not increase the average quality of care provided [64] is based primarily on the results of the BE Study, and is also supported by the Contact Lens Study and by the absence of any substantial and reliable contrary evidence.

The BE Study compared eye care quality in markets with and without chain firms and found that the overall level of quality of eye care was not lower in markets where chain firms were allowed to operate.[65] The study provides reliable evidence covering major areas of eye care provided by optometrists, including the accuracy of prescriptions, the accuracy and workmanship of eyeglasses, the extent of unnecessary prescribing, and the ability to detect eye problems and pathologies.[66] The study found that there was no significant difference in any of these aspects of quality between markets with chain firms and those without chain firms.[67]

The BE Study did find significant variation in the extensiveness of eye examinations provided by optometrists in both restrictive and nonrestrictive markets. The evidence shows that an equal percentage of optometrists provide more extensive exams and less extensive exams in both types of markets.[68] In nonrestrictive markets, commercial optometrists, on average, provide more of the less extensive exams than noncommercial optometrists. In restrictive markets, where all optometrists are by definition noncommercial optometrists, an equal percentage of optometrists provide less extensive exams. These optometrists, like the commercial optometrists, provide less costly and less extensive exams, although their prices are significantly higher than those of the commercial optometrists in nonrestrictive markets.

These findings demonstrate that commercial practice restrictions do not affect the distribution of quality within a given market. Other factors such as the forces of supply and demand are most likely responsible for this distribution. At most, the evidence suggests that there is a group of optometrists in both types of markets that will meet the demand for lower-cost, less-extensive exams. Where commercial practice is restricted, noncommercial optometrists meet that demand, but charge higher prices than commercial practitioners in nonrestrictive markets. Even though commercial firms may, on average, provide less extensive exams than those provided by noncommercial optometrists in nonrestrictive markets, the overall quality of care is no lower in those markets.[69]

The findings of the BE Study on quality of care are supplemented by the Contact Lens Study's conclusion that, on average, commercial optometrists fitted cosmetic contact lenses at least as well as noncommercial optometrists.[70]

Proponents of the restrictions offered no evidence on differences in quality between restrictive and nonrestrictive markets, but instead attempted to show that commercial optometrists provide lower quality of care than noncommercial optometrists.[71] Much of this evidence was anecdotal and was often countered by other anecdotal testimony concerning poor quality of care provided by noncommercial optometrists.[72]

Moreover, the survey evidence that was presented by proponents of the restrictions was unreliable. The Nathan Study, commissioned by the AOA, was offered as evidence of quality differences between commercial and noncommercial optometrists in one market.[73] However, that study failed to employ generally accepted and recommended survey techniques in order to guard against bias. The record indicates that the procedures used created a significant potential that the bias of AOA representatives who were substantially involved in the survey could have affected the results. This renders the survey unreliable.[74] Furthermore, by focusing on only one market, the Nathan Study fails to address the central issue of whether there is a difference in overall quality between restrictive and nonrestrictive markets. Even if we were to assume that the evidence on quality presented by proponents of the restrictions were reliable or convincing, it would not contradict the findings of the BE Study that there is no difference in the quality of care between restrictive and nonrestrictive markets.[75]

D. Methodology of the BE and Contact Lens Studies.[76]

The findings of the BE and Contact Lens Studies are central to the Commission's conclusions that these restrictions injure consumers and diminish overall quality of care by limiting access to care. The studies drew a great deal of comment, both supportive and critical.[77] In discussing the significance of the comment on the studies, we will first describe the key components of each study, summarize the major points raised by commenters, and explain why we believe these studies provide the best evidence reasonably available on the quality of care and a sufficiently reliable and comprehensive evidentiary basis for this rule.

1. *The BE Study.* The BE Study was designed to measure the effects on consumers of commercial practice restrictions. The study was conceived and conducted by the Bureau of

[63] See Final Staff Report, L-1, at 108-113 (discussion of BE Study) and 188-206 (discussion of other quality evidence).

[64] In fact, as discussed *supra* at section II.B.2, the restrictions have some adverse effect on quality of care because the higher prices associated with restrictions cause consumers to seek eye care less frequently.

[65] The BE Study is discussed in detail in the Final Staff Report, L-1, at 101-122. See also infra section II.D.1 for a description of the study's methodology.

[66] See infra at section at II.D.1.

[67] See discussion of BE Study in Final Staff Report, L-1, at 112-113.

[68] Id. at 112.

[69] Moreover, the evidence shows that an increasing number of commercial firms are stressing high quality exams. *See* Final Staff Report, L-1, at 202-206. The evidence indicates that some commercial firms, just as some private optometrists, provide very thorough exams and treat a full range of patients, including those with complex problems.

[70] See infra section II.D.2. for a fuller discussion of the methodology of this study.

[71] See citations in Final Staff Report, L-1, at 190-96, 198-201. See also Post-record comment on AOA, M-176, at 400; Post-record comment of COA, M-178, at 5-6; and Presiding Officer's Report, L-2, at 174, 182.

[72] See Final Staff Report, L-1, at 199-206.

[73] In this survey, test subjects with a variety of eye conditions obtained eye examinations from a sample of commercial and noncommercial optometrists in New York City. The purpose of the survey was to determine whether commercial and noncommercial practitioners differed in their ability to detect the eye conditions of the subjects. Nathan reported that 32 percent of the commercial optometrists and 60 percent of the private optometrists detected the eye conditions. According to Nathan, these results showed that eye examinations in New York City given in commercial practice environment tended to be less comprehensive and lower in quality than those given in private practice settings. Nathan Study, J-66(A), Vol. I, Ex. 3, p. 5.

[74] See Final Staff Report, L-1, at 145-56 and Appendix C.

[75] No evidence presented by proponents of the restrictions compared quality of care provided in the two types of markets.

[76] A comprehensive analysis of comments devoted to methodological issues in this proceeding is found in Appendixes A and B of the Final Staff Report, L-1, and in Staff's Final Recommendations, 0-1(b), at 21-49.

[77] The most lengthy and technical of the comments about the studies was submitted by Robert R. Nathan and Associates, a firm of consulting economists hired by the AOA for the proceeding. Nathan's three-volume submission contains both comments on specific aspects of the BE and Contact Lens Studies and the results of a survey Nathan conducted of New York City optometrists in an effort to rebut the quality findings of the BE Study. See supra notes 71, 72. Appendix C of the Final Staff Report, L-1, contains a detailed description of, and expert comments on, the Nathan survey's methodology.

Economics with the expert advice of optometrists on the faculties of two major colleges of optometry (the College of Optometry of the State University of New York and the Pennsylvania College of Optometry) and the Director of the Optometric Service of the Veterans Administration. In the study, nineteen trained survey researchers [78] posed as consumers and purchased over 400 eye exams and over 230 pairs of eyeglasses from optometrists in twelve different metropolitan areas across the country.[79]

The twelve markets represented a range of competitive and regulatory environments. Cities were classified as markets where advertising was present if there was advertising of eyeglasses or eye exams in the newspapers or "Yellow Pages." Cities were classified as markets with commercial practice if eye examinations were available from large optical chain firms.[80]

Based on the data obtained by the survey subjects, the BE Study's authors calculated the average prices charged for an eye exam and eyeglasses [81] by each type of practitioner in each type of market (*e.g.*, chain firms in nonrestrictive markets, nonadvertisers in nonrestrictive markets). Then, using data regarding the number of optometrists of each type in a particular market, the study's authors calculated market-wide average prices for markets with both advertising and chain firms and for markets with neither.[82]

Subsequent to the study's publication, its principal author calculated market-wide average prices for markets with chain firms and markets without chain firms.[83] These calculations showed that the average prices charged by optometrists for eye exams and eyeglasses were 18% higher in markets without chain firms than in markets with chain firms.[84]

BE staff used multivariate regression analysis to analyze the data for: (1) Differences among markets in the advertising environment,[85] (2) differences among markets in the supply of optometrists; (3) differences among markets in the demand for optometric services; and (4) differences among subjects in prescriptive needs. Each of these factors might affect price, independent of the presence of chain firms. The price data were also adjusted for differences in the cost-of-living among cities.[86]

In order to measure any differences in quality between markets with chain firms and markets without chain firms, the study compared: (1) The accuracy of the eyeglass prescriptions; (2) the accuracy and workmanship of the eyeglasses; (3) the extent of unnecessary prescribing; and (4) the ability of the optometrist to detect eye problems and pathologies. Elaborate procedures were established to guarantee an accurate and unbiased assessment of these factors.[87]

On the first three dimensions of quality the study directly examined the optometrist's product or service or "output." For example, the optometrists who acted as consultants for the study performed eye examinations on each survey subject before the subjects went into the field. After examinations, prescriptions, and eyeglasses were obtained by the subjects, the consultants compared those prescriptions and eyeglasses to the prescriptions they had written. The consultants also assessed the eyeglasses for the quality of workmanship—e.g., scratches and imperfections on lenses, the quality of the edging and mounting of lenses, and the quality of materials used.

On the fourth aspect of quality, output was not directly examined. That is, the study did not directly examine whether or not optometrists detected eye pathologies since the study did not use subjects with such pathologies. Instead, the study used a "process" test that indirectly measured the likelihood that an optometrist would detect such pathologies by examining whether the optometrist performed the tests and procedures that are designed to detect complex eye problems and pathologies.

This process test was highly sophisticated and did detect meaningful differences in quality between optometrists. For example, the thoroughness index used in the BE Study included over twenty test procedures as well as other aspects of the examination.[88]

The evidence establishes that the use of this process test provided reliable information about differences in quality of care for two reasons. First, there is a close correlation between the use of a correct process and a correct outcome. During the rulemaking hearings, noncommercial optometrists were virtually unanimous in their assessment that more procedures and more time spent during an eye examination is indicative of a higher quality exam.[89] In fact, some of the same optometrists who criticized the BE Study's use of a process test, nevertheless used the results of that test to demonstrate the alleged differences in quality of care

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[78] With two exceptions, the survey subjects had relatively routine visual problems. Some commenters and the Presiding Officer questioned the study's validity because subjects with more complex problems and pathologies were not included. See Post-record comment of AOA, M–176, at 5–7, 227–230, 382–84; Post-record comment of COA, M–178, at 6, 9–14; and Presiding Officer's Report, L–2, at 176–177.

[79] BE defined the relevant geographical markets as Standard Metropolitan Statistical Areas (SMSA's). The 12 SMSA's were: Little Rock, Arkansas; Knoxville, Tennessee; Providence, Rhode Island; Columbia, South Carolina; Winston-Salem, North Carolina; Milwaukee, Wisconsin; Columbus, Ohio; Portland, Oregon; Baltimore, Maryland; Minneapolis-St. Paul, Minnesota; Seattle, Washington; and Washington, DC.

[80] The "most restrictive" markets in the study had neither advertising nor chain firms; in addition restrictive laws such as those at issue in this proceeding existed in these markets. Cities were classified as "least restrictive" if advertising and chain firms were present. In the least restrictive cities there was price advertising of eyeglasses and at least nonprice advertising of eye exams.

[81] This amount included any dispensing fees, as well as charges for glaucoma tests or any other exam procedures that were priced separately. In order to minimize variations in the eyeglasses frames, subjects were instructed to purchase a particular unisex metal frame, if possible. BE Study, B–2–31, at 46.

[82] BE Study, B–2–31, at 5.

[83] Rebuttal Statement of R. Bond, FTC economist, K–18, at Table A–3.

[84] See Final Staff Report, L–1, at 105.

[85] Some commenters noted that the BE Study did not discuss the independent effects of advertising and chain firms. See, e.g., Nathan Study, J–66(a) at 32, 38–39, 47; AOA, H–81, at 24. However, the BE Study did report that neither advertising nor chain firms had any effect upon quality in a market. Also, while the BE Study did not discuss the independent effects of chain firms and advertising upon price, the study was designed to examine these effects separately. R. Bond, FTC economist, Tr. 466; Rebuttal Statement of R. Bond, K–18, at 5. The separate effects of chain firms were derived by performing a simple calculation on the BE Study's underlying data. See Letter from R. Bond, FTC economist, to J. Greenan, Presiding Officer (May 29, 1985), J–76; Rebuttal Statement of R. Bond, FTC economist, at 5 and Appendix A. See also R. Bond, Tr. 466; J. Kwoka, Professor, George Washington Univ., Tr. 500–01. Dr. Kowka, a coauthor of the BE Study, stated his agreement with Dr. Bond's conclusions and methods of analysis. J. Kwoka, J–12(a), at 9 and Tr. 500–01.

[86] Be Study, B–2–31, at 48–55, 91–93.

[87] See Final Staff Report, L–1, at 108–112.

[88] Thus, we reject the assessment that the process test measured only a very simple and basic process. See Presiding Officer's Report, L–2, at 175; Post-record comment of AOA, M–176, at 227–49; Post-record comment of COA, M–178, at 9, 13. See also discussion in Staff's Final Recommendations, O–1(b), at 34–35.

[89] See, e.g., AOA Comment, H–81, at 42; B. Barresi, Professor, Center for Vision Care Policy, SUNY, J–13(a), at 10; COA Comment, J–67(a), at 4; J. Easton, President-elect, AOA, J–4, at 20; H. Glazier, President, Maryland Board of Optometry, J–21, at 2, Tr. 906, 916; J. Izydorek, optometrist, H–130, at 1; J. Kennedy, optometrist, J–26, at 1; D. Kuwabara, Chairman, Hawaii Board of Optometry, J–34, at 3; Nathan Study, J–66(a), Vol. I, Ex. 2 at 38–40 and Ex. 3 at 17–18; W. Scholl, optometrist, H–124, at 1; J. Scholles, optometrist, AOA trustee, J–31, at 7–8; Southern California College of Optometry, J–41(a), at 1; L. Strulowitz, member, New Jersey Board of Optometry, J–1, at 2; D. Sullins, optometrist, AOA trustee, J–39, at 11;

offered by optometrists in nonrestrictive markets.[90]

Second, the evidence shows that the use of a process test creates no bias in favor of chain firms.[91] Such a bias would exist only if commercial optometrists perform equivalent procedures less competently than other optometrists. In other words, it would have to be shown that any differences in quality were due to differences in competence rather than to differences in time spent and procedures performed. The evidence shows, however, that any differences in quality, if they exist, are likely due to time spent or procedures performed and not due to commercial optometrists performing given test procedures less competently than other optometrists.[92]

The Presiding Officer rejected the quality results of the BE Study. He apparently believed that only an outcome test, using subjects with a wide range of pathologies, would provide reliable evidence. We disagree with this conclusion for two reasons. First, it ignores the BE data discussed above, which permits conclusions about more complex eye problems, and it does not take into account the practical problems presented in conducting a methodologically sound outcome study. Individuals with pathologies in need of immediate treatment could not ethically be used in a lengthy series of field examinations. Finding a large enough sample of individuals who would be suitable survey subjects and who had pathologies not in need of immediate treatment would be prohibitively time-consuming and expensive. Second, there is a significant likelihood that the pathological conditions would change while the survey was being conducted, which would make it impossible to make valid comparisons among the optometrists examining the survey subjects. These obstacles cast serious doubt on the feasibility of conducting an outcome test on this aspect of quality.

The Commission also considered and rejected the assertion that the BE Study would have found that quality was lower in nonrestrictive markets than restrictive markets if its authors had calculated average quality based on the total number of exams given, rather than on number of practitioners. Dr. Kenneth Myers, Director of Optometry Services at the Veterans Administration and a former consultant to the FTC on the BE Study, asserted that the method for calculating average thoroughness of examinations on a market-wide basis was flawed. The BE Study calculated averages by simply averaging the thoroughness scores of all optometrists. Because some optometrists see more patients than others, Dr. Myers believed that the averages should have been weighted to account for the different number of exams performed by individual optometrists. He assumed that such a calculation would lead to a finding of lower average quality in markets with chain firms than the finding reported in the BE Study. However, if one uses Dr. Myers' methodology and his estimate that the typical commercial practitioner performs twice as many exams as the typical noncommercial practitioner, average quality scores for both restrictive and nonrestrictive markets would be lower, but the average score for nonrestrictive markets would still be about the same as that for restrictive markets.[93]

We find that the process test used in the BE Study to evaluate comparative examination thoroughness provides meaningful information about quality of care. Moreover, that test was only one of four factors used to evaluate quality of care. Our conclusions on the quality of care are based on the record as a whole, and not just individual components of any one study.

2. *The Contact Lens Study.* In this study, the eyes of over 500 cosmetic contact lens wearers in 18 urban areas across the country were examined for the presence of seven potentially pathological eye conditions commonly associated with improper contact lens fitting.[94] Each of the survey subjects had been fitted with contact lenses within the preceding three years and was still wearing contact lenses at the time the examinations were performed. The examination procedures were chosen after consultations with representatives of the major eye care professional organizations—the American Academy of Ophthalmology, the American Optometric Association, and the Opticians Association of America.[95] Those organizations also nominated the expert examiners who performed the eye examinations. Three examiners—an ophthalmologist, an optometrist, and an optician—examined each subject.

The examiners were instructed to determine which of the five illustrations of each potentially pathological condition in a grading manual most closely resembled the actual appearance of the subject's eyes. The grading manual, which had been designed by the group representatives, was used to minimize inconsistencies in grading by the several dozen examiners. The examiner then recorded a grade of 0, 1, 2, 3, or 4 for each condition. A grade of 0 meant that the condition was absent; a grade of 4 signified that the condition was present to an extreme degree. The number grades for each of the seven conditions for each eye were combined using a weighing formula to create a "summary quality score" for each subject, which would indicate the overall condition of the subject's eyes.[96]

In addition to analyzing the summary quality scores, the study also examined the relative presence of each of the seven eye conditions individually. A "higher quality" score was assigned if the examination revealed that a particular condition was totally absent (i.e., the grade was 0); a "lower quality" score was assigned if the examination revealed that a particular condition was present to any degree (i.e., the grade was 1, 2, 3, or 4).

In order to compare quality among the different providers, differences in the summary and individual quality scores were computed for commercial optometrists, noncommercial optometrists, opthalmologists, and opticians. Multiple regression estimation techniques were used in order to control

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[90] See e.g., Southern California College of Optometry Panel, J–41(a), at 16; AOA Comment, H–81, at 26; Final Staff Report, L–1, Appendix A at 9 n. 21.

[91] Those commenters who alleged bias in the process test provided no persuasive explanation for that assertion. See AOA Comment, H–81, at 27; Nathan Study, J–68(1), Vol. I, Ex. 1, at 79.

[92] The regression analysis that BE Staff performed on the Nathan survey data indicates that there is no such bias. The analysis found that the commercial firms in the Nathan survey did not exhibit a statistically significant lower pass rate than the private firms, holding constant the time spent on an exam and whether or not a case history was taken. This tends to show that commercial firms perform as well as noncommercial optometrists when they both spend equal time and perform equivalent procedures. See Final Staff Report, L–1, Appendix A at 5–6.

[93] See Staff's Final Recommendations, Addendum to Appendix A, O–1(b), at 8.

[94] These included epithelial and microcystic edema (intercellular accumulation of fluids which causes the cornea to swell); corneal staining (abrasions or lesions on the cornea); corneal neovascularization (impingement of blood vessels into the normally avascular cornea); corneal striae (ridges or furrows on the cornea); injection ("bloodshot" eyes); and corneal distortion or warpage (irregularity in the curvatures of the cornea). The subjects were also tested for visual acuity to determine whether their prescriptions were adequate. Contact Lens Study, B–5–1, at 20–21. Also, subjects' lenses were examined to determine their physical condition and cleanliness.

[95] There is evidence on the record that representatives of all three organizations reached a consensus on the methodology to be used in the study. See Final Staff Report, L–1, at 124 n. 296.

[96] Since all of the seven conditions are not necessarily equally serious, they were assigned different weights based on the relative severity of that condition.

for the effects of a number of factors other than fitter competence that could have affected the relative health of the study subjects' eyes. These additional factors included the wearers' age, sex, and wearing habits, and the physical condition of the lenses.

The survey subjects were also asked how much they paid for their lenses, the eye exam, follow-up care, and the initial lens care kit.[97] The final package price figures were then adjusted for cost-of-living differences in the 18 cities in the sample and to account for the fact that the subjects purchased their lenses in different years.

Two additional tests were later conducted by BE staff on the Contact Lens Study data which demonstrated that these price differences were, in fact, associated with the presence of commercial practice and were not due to the effects of advertising or other market forces that could also affect prices. These tests corroborated the general findings of the study that commercial optometrists charged less than noncommercial optometrists.[98]

The major concerns raised by some commenters about the methodology of the Contact Lens Study were that (1) former contact lens wearers (or "dropouts") were not examined; [99] (2) possible changes in the "k-readings" [100] of the subjects were not evaluated; [101] and (3) study subjects were not required to wear their lenses for at least four hours prior to the examination.[102]

In most instances, the failure to include the specified procedure was unavoidable. For example, consultants and staff wanted to evaluate the care given to former contact lens wearers and to evaluate changes in the k-readings. However, in both instances, the expert consultants could suggest no practical and meaningful way to do so.[103] The testimony of some witnesses suggests that some transient and less significant eye problems might have been more frequently apparent if subjects had been required to wear their lenses for at least four hours before they were examined.[104] But other more serious and long-term conditions do not disappear overnight and would still have been apparent even if a subject had inserted his or her lenses only an hour or two before being examined.

The Presiding Officer and some commenters appear to have concluded that the study's findings must be entirely rejected because of these alleged methodological shortcomings. Although the Contact Lens Study may fail to provide information on some types of patients, or some types of contact lenses, there is no evidence on the record indicating that the study results would have been different had this additional data been included, or that the absence of that data created a bias in favor of commercial optometrists that affected the overall results of the survey.

The BE and Contact Lens Studies provide reliable information about the relative cost and quality of eye care available in the marketplace. We conclude that the evidence provided by the studies—along with other evidence on the record—meets or exceeds the applicable legal standards. In seeking evidence on the need for a rule, the Commission must balance the benefits and costs of obtaining information that answers all questions with certainty.[105] In this proceeding, the studies were subjected to intense scrutiny, but none of the studies' critics offered evidence that materially discredited the studies' key findings. Our confidence in the soundness of the studies is buttressed by consideration of the record as a whole, which contains substantial testimony and economic analysis that support the conclusions of the authors of the BE and Contact Lens Studies.

III. Legal Issues

A. Introduction

A major issue in this proceeding is the extent of the FTC's authority to declare state laws to be unfair acts or practices. After careful consideration of the legal issues discussed below, we have concluded that the FTC can, in appropriate instances, proceed directly against unfair state restraints.

B. Unfairness

This rule declares certain state-imposed restrictions on commercial practice by optometrists to be unfair acts or practices. The Commission has authority under section 18 of the Federal Trade Commission Act to prescribe:

> [R]ules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce [within the meaning of * * * section 5(a)(1)].[106]

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[97] Some commenters noted that the price data collected is based on consumers' recall of the prices that they paid, at times, several years in the past. Nathan Study, J–66(a), Vol. 1, Exh. 2, at 14, 15, and 27. No bias is alleged, however, and there appears to be no reason why consumers would systematically recall paying lower prices at commercial firms than at noncommercial firms. Thus, even if there is some random error in the price data for both commercial and noncommercial optometrists, it would not affect the price differences which were found.

[98] See J. Mulholland, FTC economist, J–19(a), at 7–9, which explains in detail the additional tests which BE staff performed to control for the effect of other variables which could have affected price. See also J. Mulholland, Tr. 794–95.

[99] Presiding Officer's Report, L–2, at 177; Post-record comment of AOA, M–176, at 333–34; Post-record comment of COA, M–176, at 11. This criticism is discussed in the Final Staff Report, L–1, at 135–37.

[100] K-readings, taken with the use of a keratometer, measure the steepest and flattest curvatures of the corneal surface. Contact Lens Study, B–5–1, at 9, 22–23.

[101] Presiding Officer's Report, L–2, at 179, Post-record comment of AOA, M–176, at 315–24. This criticism is discussed in Staff's Final Recommendations, O–1(b), at 44–45.

[102] Presiding Officer's Report, L–2, at 179–180; Post-record comment of AOA, M–176, at 344–359. This criticism is discussed in the Final Staff Report, L–1, at 137–140.

Commenters also listed other alleged problems with the Study, which are discussed in the Final Staff Report, L–1, at 133–44 and in Appendix B. Some commenters stated that the study did not include a representative sample and distribution of difficult contact lens patients and fitting problems and that no difficult cases were included. See, e.g., Post-record comment of AOA, M–176, at 298–300, 302; Post-record comment of COA, M–178, at 14. The fact that the study may not contain a representative distribution of difficult cases does not, however, invalidate the data which the study does provide. While some difficult cases were undoubtedly included in the study, the study did not include an assessment of the relative ability of optometrists to fit more difficult lenses such as therapeutic lenses and the more recently available extended wear lenses, toric lenses, or bifocal lenses. See AOA Post-record comment, M–176, at 102. Also, by excluding patients who had previously worn or attempted to wear contact lenses within three years of the survey date, the study excluded many patients with more difficult eye problems who may have experienced prior problems with their lenses. See Contact Lens Study, B–5–1, at A–1. (Excluding these patients also significantly reduced the possibility of bias which could develop if patients who knew they had difficult eye problems tended to select one group of optometrists over another.) Staff determined that it was impractical to include therapeutic lenses, and other more complex lenses could not be included because they were not available at the time the study was conducted. See Final Staff Report, L–1, at 142–43. However, the failure to study these more difficult cases does not detract from the validity of the data which the study does provide on the relative ability of optometrists to fit the less-difficult cosmetic contact lens patient.

[103] See Staff's Final Recommendations, O–1(b), at 43–45.

[104] Id. at 47 n.166.

[105] Credit Practices Rule, Statement of Bias and Purpose, 49 FR 7740, 7742 (1984). In upholding the Credit Practices Rule, the court recognized the danger in insisting that all of the Commission's conclusions be based on rigorous, quantitative economic analysis, and quoted language from the legislative history of Magnuson-Moss indicating that the Commission is not required to undertake a full-scale economic investigation prior to promulgation of a rule. "To do so would inordinately delay FTC proceedings and deny relief to the consuming public while indefinite questions of economic prediction were resolved by the Commission." *American Financial Services v. FTC*, 767 F.2d 857, 986–87, citing H.R. Rep. No. 1107, 93rd Cong. 2d Sess. 47 (1974). The court quoted language from the legislative history indicating that the Commission should rely on "its best estimate" of the impact of the rule. Id. at 966–87 citing H.R. Rep. No. 1107, 93rd Cong. 2d Sess. 47 (1974), *U.S. Code Cong. & Admin. News* (1974) at 7729.

[106] 15 U.S.C. 57(a)(1)(B).

When Congress created the FTC in 1914 it gave the Commission power to determine and prevent "unfair methods of competition." From the beginning Congress intended this power to be interpreted very broadly.[107] Congress necessarily recognized that it would be impossible to define or even to predict the infinite ways in which the goals of the statute might be thwarted. Consequently, Congress gave the Commission the tools to deal with problems as they developed. Although the original language focused on competition, it was generally understood that the Act "gave the Commission considerable discretion in identifying unfair consumer practices."[108]

The Wheeler-Lea amendments of 1938[109] clarified the FTC's authority to reach acts and practices that injure the public as well as competitors. Those amendments added language to section 5 of the FTC Act to prohibit not only "unfair methods of competition," but also "unfair or deceptive acts or practices."[110] In passing that amendment Congress contemplated that the concept of unfairness would be a flexible doctrine, responsive to changing conditions in the marketplace. The courts have repeatedly recognized the breadth of this delegation and have given the Commission significant latitude in defining unfairness.[111] In its 1980 Unfairness Statement[112] the Commission set out the principles that currently guide the Commission in determining whether acts or practices are unfair.

Those principles were accepted by the D.C. Circuit in upholding the Credit Practices Rule.[113] The court's opinion noted that the consumer injury test described in the Commission's Unfairness Statement was "the most precise definition of unfairness articulated by either the Commission or Congress."[114]

The Unfairness Statement sets out three criteria that must be met in order to find consumer injury: (1) The injury must be substantial; (2) the injury must not be outweighed by offsetting consumer or competitive benefits; and (3) the injury must be one that consumers cannot reasonably avoid.[115] The rulemaking record demonstrates that the injury flowing from state restrictions on the commercial practice of optometry clearly meet these criteria.[116] As summarized *supra* in sections II. B. and C., these restrictions injure consumers by substantially raising the price of eye care, by limiting its accessibility, and by reducing the frequency with which consumers receive it. Further, no demonstrable benefits have been shown to flow from these restrictions, nor can consumers reasonably escape their injurious effect.

Like other rules promulgated under the Commission's unfairness authority, this rule seeks to halt practices that unreasonably create or take advantage of an obstacle to the free exercise of consumer decisionmaking and, in turn, to a well-functioning market.[117] Here, however, the obstacles are created by state governments rather than by private actors. This compels us to consider whether the actions of state governments can be unfair acts or practices.

Through the Magnuson-Moss amendments of 1975 Congress sought to bolster the Commission's existing authority to find acts or practices to be unfair.[118] During consideration of the rulemaking provisions, Congress repeatedly acknowledged that Commission rules would preempt inconsistent state law.[119] The legislative history of Magnuson-Moss reveals that both the sponsors and opponents of the bill recognized the potentially broad reach of the proposed rulemaking authority and contemplated that this power could be used to challenge existing laws directly.[120] A conclusion that harmful state restrictions could not be deemed "unfair" would be inconsistent with this Congressional understanding. Since the passage of the Magnuson-Moss amendments, Congress' attention has been drawn repeatedly to Commission rulemakings that would reach state laws. Each time the issue has arisen during debates over amendments to the FTC Act, Congress has declined to limit the reach of our unfairness authority under section 18. In fact, in 1985 both the House and Senate expressly stated their understanding that the Commission's unfairness authority extends to prohibiting state restraints through rules such as the proposed Eveglasses II rule.[121] Against this legislative background, we believe that the Commission's unfairness authority is broad enough to encompass state laws.

C. Preemption

Although the language of the FTC Act does not expressly address the preemptive effect of Commission rules, it is clear that Section 18 trade regulation rules preempt inconsistent state law. Under the Supremacy Clause of the U.S. Constitution (Art. VI, section 2), federal law supersedes inconsistent state law. Validly enacted regulations of federal agencies have the same preemptive effect on inconsistent state

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[107] Realizing that it would be impossible to define with specificity all unfair practices, Congress considered and chose not to enact a statutory definition of the term "unfair method of competition." See S. Rep. No. 596, 63d Cong. 2d Sess. 13 (1914) and H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1940), *cited in American Financial Services* v. *FTC*, 767 F.2d 957 (1985).

[108] See Averitt, *The Meaning of "Unfair Acts or Practices" in section 5 of the Federal Trade Commission Act*, 70 Geo L.J. 225, 230–231, 235.

[109] 52 Stat. 111 (1938) (15 U.S.C. 45(a)(1)).

[110] Id.

[111] See, e.g., *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965); *FTC v. R.F. Keppel & Bros.*, 291 U.S.. 304, 310 (1934); *FTC v. Raladom Co.*, 283 U.S. 643, 648 (1931).

[112] See Unfairness Statement, supra note 28.

[113] *American Financial Services v. FTC*, 767 F.2d 957 (D.C. Cir. 1985). The court found that the Commission had not exceeded its authority in promulgating the rule, given that the Commission's articulated rationale comported fully with the criteria set out in the Commission's Statement. Id. at 982.

[114] Id. at 972. The court noted further that Congress had reviewed the Statement and "ha[d] not seen fit to enact any more particularized definition of unfairness to limit the Commission's discretion." Id. at 982.

[115] Unfairness Statement, supra note 28 at 5–6.

[116] See Final Staff Report, L–1, at 306–26.

[117] Unfairness Statement, supra note 28, at 7–8. *See also American Fianncial Services, Inc. v. FTC*, 767 F.2d 957, 98, (DC Cir. 1985).

[118] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2183 (1975) (15 U.S.C. 57(a)). The amendments extended the FTC's unfairness jurisdiction by adding the "affecting" commerce language to section 5 of the FTCA and by granting rulemaking power through section 18.

Some commenters argued that nothing in the Wheeler-Lea amendments authorized the Commission to find state laws to be unfair, and nothing in the Magnuson-Moss Act broadened the preexisting definition of unfairness. *See* Post-record comment of AOA, M–176, at 25–27 and Post-record comment of COA, M–178, at 22–29. We read the legislative history of Wheeler-Lea as confirmation of the principle that the unfairness standard must be a broad one. That interpretation is then brought to the legislative history of Magnuson-Moss where Congress did express its understanding that Section 18 rules would preempt state laws.

[119] See Final Staff Report, L–1, at 330–37.

[120] 117 Cong. Rec. 39840 (1971). See also discussion in Final Staff Report, L–1, at 339–40.

[121] 126 Cong. Rec. 2069, 2076–77 (1980). H.R. Rep. No. 99–162, 99th Cong., 1st Sess., 9–10 (1985) and S. Rep. No. 99–81, 1st Sess., 4–5 (1985). The bills accompanying these reports went to conference committee, but were never voted out. Earlier, in 1980, the Senate expressly rejected an amendment sponsored by Senators McClure and Melcher designed to stop the Commission from challenging the kind of state laws at issue in the Eyeglasses Rule and in the Eyeglasses II proceeding. 126 Cong. Rec. 2066 (1980). In defeating the McClure-Melcher amendment, opponents argued that state regulation of professionals was an entirely appropriate subject of FTC trade regulation rulemaking. 126 Cong. Rec. 2069 (1980) (statement of Sen. Metzenbaum); 126 Cong. Rec. 2076–77 (1980) (statement of Sen. Javits); 126 Cong. Rec. 2077 (1980) (statement of Sen. Inouye).

laws as federal statutes, even in the absence of any explicit Congressional statement of intent to preempt.[122] Where there is irreconcilable conflict between federal and state regulation and no express langauge about preemption.[123] Here that presumption is statute or in the legislative history, the customary Presumption is in favor of preeption.[123] Here that presumption is bolstered by the legislative history of the Magnuson-Moss Act and by subsequent court interpretations of Commission rulemaking power.

Those commenters who have insisted that the Commission cannot preempt state laws absent a clear indication of Congressional intent have misunderstood the nature of the rulemaking authority delegated to the Commission by Congress in the Magnuson-Moss Act.[124] A showing of express Congressional intention to preempt is necessary only where Congress directs an agency to "occupy a field" of regulation.[125] In enacting the FTC Act and Title II of the Magnuson-Moss Act Congress did not intend that the Commission "occupy the field" of Consumer protection[126] or antitrust regulation. In fact, in proposed legislation preceding passage of the Magnuson-Moss amendments, Congress sought to clarify the preemptive effect of Commission rules promulgated under Magnuson Moss by stating that the FTC Act would not occupy the field and that only inconsistent state laws would be preempted.[127] Throughout the period when rulemaking legislation was being considered, the record shows that Congress was aware of the preemption issue, invariably assumed that Commission rules would preempt inconsistent state law, and took no action to limit that preemptive effect.[128]

Courts that have considered and ruled on the issue have also recognized that FTC rules preempt inconsistent state laws, relying both on general Supremacy Clause principles and on Congressional intent in enacting the Magnuson-Moss Act.[129]

D. State Action

The state action doctrine of *Parker v. Brown* [130] does not limit the Commission's power under section 18 rules.[131] In *Parker*, the Supreme Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a state acting through its legislature.[132] The doctrine has never been applied to the Commission's unfairness jurisdiction generally nor to our rulemaking authority in particular. Moreover, in enacting the Magnuson-Moss amendments, Congress considered the preemption issue and concluded that Commission rules should have broad preemptive effect. To apply the *Parker* doctrine to section 18 rulemaking would frustrate Congressional intent.[133]

Important differences between the Sherman and FTC Acts demonstrate that the policy reasons that led the Court to limit the reach of the Sherman Act do not apply to our rulemaking authority under section 18 of the FTC Act. In construing the Sherman Act, the Court recognized that, if the Act were to be applied to certain state actions, widespread and indiscriminate disruption of long-standing state economic legislation would occur. Well-established state economic regulation could be dismantled at the behest of private litigants with no consideration given to important state interests. Implicit in the Court's holding was the realization that if the Sherman Act were to apply to state action, private parties and state officials would be subject retroactively to treble damages and criminal sanctions for obeying otherwise valid state laws.[134] Given Congressional silence on the effect of the Sherman Act on state law, the *Parker* court concluded that Congress could not have intended such sweeping and possibly chaotic results.

Application of section 18 rulemaking to state legislation would not produce such dire consequences. First, challenges to state laws under section 18 can be initiated only by the FTC, a

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[122] See, e.g., Fidelity Federal Savings and Loan Ass'n v. De La Questa, 458 U.S. 141, 153–54 (1982). See also discussion in Final Staff Report, L–1, at 327–28.

[123] See, e.g., *Paul v. United States*, 371 U.S. 245 (1963); *Free v. Bland*, 369 U.S. 663 (1962).

[124] For example, both the AOA and the COA claimed that neither the language nor the legislative history of Magnuson-Moss show a clear manifestation of Congressional intent to grant FTC rules preemptive power. See Post-record comment of AOA, M–176, at 10–25 and Post-record comment of COA, M–178, at 22–28. They go on to note that Title I of Magnuson-Moss (i.e., warranty provisions) contains an express grant of preemptive power while Title II (i.e., section 18 rulemaking) contains no such express grant. However, in Title I Congress intended to occupy a portion of the field of warranty regulation and therefore needed to express the preemptive effect. Title II envisions only conflict preemption. The case law cited by these commenters unequivocally establishes that conflict preemption flows automatically from the Supremacy Clause, regardless of any express Congressional intent to preempt. See, e.g., *Fidelity Federal Savings and Loan Ass'n v. De La Questa*, 458 U.S. 141, 153–54 (1982); *Michigan Canners and Freezers Ass'n v. Agriculture Marketing and Bargaining Board*, 467 U.S. 461, 469–70 (1984; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

[125] In those instances any state regulation on the same subject as the federal regulation is preempted even if the state regulation does not conflict with the federal requirements. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In contrast, this rule displaces only four specified types of state restraints on the commercial practice of optometry. States continue to have broad authority to regulate the practice of optometry in order to safeguard the health of consumers. *See* discussion infra, section IV.

[126] The House Committee Report accompanying Magnuson-Moss noted that the FTC "should not intrude where cases of consumer fraud of a local nature are being effectively dealt with by State or local government." H.R. Rep. No. 93–1107, 93d Cong., 2d Sess. 45 (1974).

[127] S. 3201, 91st Cong., 2d Sess. 106 (1970). See S. Rep. No. 91–1124, 91st Cong., 2d Sess. 23 (1970).

[128] The Magnuson-Moss amendments were passed during the 93d Congress. However, similar measures had been introduced in the two previous Congresses. Language regarding preemption appeared in some, but not all, of the proposed bills and accompanying reports. As a consequence, arguments regarding Congress' ultimate purpose have been raised by a number of commenters. *See* Brief of the American Optometric Association, *AOA v. FTC*, H–81, App. A at 25–26 (Attachment to AOA comment). Our consideration of all of the evidence leads to the conclusion that Congress understood the traditional preemptive effect of federal rules and the presence or absence of statements in the various bills and reports reflects only Congressional efforts to clarify the scope of the existing preemptive authority. See Final Staff Report, L–1, at 330–37.

[129] In upholding the Credit Practices Rule, the Court of Appeals in *American Financial Services v. FTC* concluded that Congress intended FTC rules to have "that preemptive effect which flows naturally from a repugnancy between the Commission's valid enactments and state laws." 767 F. 2d 957, 989–90. The Court in *Katharine Gibbs School v. FTC*, 612 F.2d 658 (2d Cir. 1979), relied on similar reasoning on treating the preemption issue as settled. Although the Court remaded the rule in that case because the Commission had not defined with specificity the unfair acts and practices targeted by the rule, the court indicated that "questions of preemption could be answered with relatively little difficulty," if the Commission identified clearly the acts and practices encompassed by a rule. 612 F. 2d at 66. In the instant rulemaking, we have striven to define the unfair acts or practices with as much specificity as possible.

[130] 317 U.S. 341 (1942).

[131] Both the AOA and COA have contended that the state action doctrine applies to the federal antitrust laws generally, and therefore must apply to the FTCA. See Post-record comment of the AOA, M–176, at 29 and Post-record comment of the COA, M–178, at 29–30.

[132] 317 U.S. 341 (1942).

[133] The Commission has recognized that the *Parker* doctrine applies to adjudications brought under its unfair methods of competition authority, but only to the extent that the unfair methods of competition challenged consist of traditional Sherman Act violations. See *Massachusetts Furniture & Piano Movers Ass'n v. FTC*, 773 F.2d 391 (1st Cir. 1985); *Indiana Federation of Dentists*, 101 F.T.C. 57, 180 n. 24 (1983). In 1987, both the House and Senate passed versions of FTC authorizing legislation that would codify the Commission's application of the state action doctrine to its unfair methods of competition jurisdiction. In drafting this legislation, however, it is clear that Congress intended that the Commission's authority over unfair acts or practices not be limited by the state action doctrine. H.R. Rep. 271, 100th Cong. 1st Sess., 20 (1987).

[134] *See* Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 231; Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 Harv. Law Rev. 715, 734–736 (1976).

federal agency with a mandate to protect the public interest and subject to Congressional oversight. In contrast, private parties seeking to protect private rights or enrich private pockets may use the Sherman Act to challenge state laws. Second, FTC rules apply prospectively, eliminating the danger of imposing retrospective penalties, such as those available under the Sherman Act,[135] against state officials or against private parties who have acted in good faith reliance on otherwise valid state laws.[136] Third, rulemaking is a more appropriate vehicle for examining whether federal or state interests are served by regulatory schemes than adjudicative actions under the Sherman Act. Unlike a private action brought under the Sherman Act, rulemaking allows for participation by all interested parties (including state officials) and for development of a record that reflects a broader perspective than could be achieved in private litigation. Because it more closely resembles the legislative than the adjudicative model, rulemaking is more conducive to the formation of public consensus and compromise. Finally, the application of the unfairness criteria in a section 18 rulemaking requires the Commission to consider the prevalence of the acts or practices, the nature of the injury, and any countervailing benefits. Thus, a section 18 rulemaking permits a review of state law that is both more flexible and potentially more protective of important state interests[137] than is an action under the Sherman Act, where the focus is exclusively on competition issues. Thus, any disruption of long-standing state economic legislation will not occur unless careful review of the evidence shows that minimal or no benefits flow from that legislation.[138]

Moreover, to the extent that *Parker* is a doctrine based on statutory construction, the clear differences in the legislative histories of the Sherman and Magnuson-Moss Acts support our view that Congress did not intend that *Parker* apply to section 18 rulemaking. While the legislative history of the Sherman Act is devoid of indications that Congress gave any consideration to the effect the Sherman Act would have on state law,[139] the legislative history of Magnuson-Moss is replete with evidence that Congress considered the relationship between the Commission's section 18 authority and state law.[140]

E. State as a "Person"

In order to declare state laws to be unfair acts or practices, we must be able to conclude that a state or its officials are "persons" within the meaning of the Federal Trade Commission Act.

While no federal court has determined this issue within the context of the FTC Act,[141] the Supreme Court has found state entities to be persons for the purpose of the Robinson-Patman Act[142] and the Sherman and Clayton Acts.[143] The Supreme Court has also found states to be persons under selected provisions of the IRS Code.[144]

In determining whether states meet the statutory definition of "person," the Supreme Court has generally looked to the legislative environment of the statute, including such factors as the subject matter, content, legislative history, and executive interpretation of the statute.[145] In addition, the Court has also considered whether exclusion of states from the statutory class of persons would frustrate the purpose of the statute.[146]

We have weighed these factors and believe that to exclude states from the reach of the Commission's unfairness authority would defeat the purpose of the FTC Act. The legislative history of the FTC Act indicates that Congress intended an expansive meaning to be given to the word "person."[147] Furthermore, the finding that states are persons within the meaning of section 5 for the purposes of this rulemaking is consistent with recent Commission decisions[148] and our reading of the entire FTC Act and its amendments, including the broad scope of the Commission's unfairness authority, as discussed supra at section III.B.[149]

IV. Federalism Concerns

As discussed above in section III., we are persuaded that the Commission has the legal authority to prohibit the state restraints at issue in this proceeding. Judicious exercise of that power, however, prompts us to consider whether we should act in this instance. We are keenly aware that this proceeding raises important questions about the proper allocation of power between the states and the federal government. However, after careful consideration, we are convinced that this rule is a proper exercise of federal power and is consonant with the principles of federalism.

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[135] The retrospective penalties provided for under the Sherman Act are treble damages and criminal sanctions. Courts have considered the nature of the remedy and whether the suit is brought by a private litigant or by the federal government to be relevant factors in determining whether Congress intended particular statutory provisions to apply to the states. See *Employees of the Department v. Department of Public Health and Welfare*, 411 U.S. 279 (1973). *Cf. Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1977); *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 367 (9th Cir. 1974).

In *Employees*, the Court was construing the Fair Labor Standards Act, which clearly covered both private parties and state governments. The only question in that case was whether the various redress provisions of the statute were intended by Congress to apply to state governments. The Court concluded that Congress did not intend to allow private parties to seek penalties from state governments although Congress did intend to allow the federal government to sue state governments for violations of this act. In reaching this conclusion the court was influenced by the fact that the penalty provisions "may saddle the states with 'enormous fiscal burdens,' and that 'Congress, acting responsibly, would not be presumed to take such action silently.' " *Employees of the Department v. Department of Public Health and Welfare*, 411 U.S. 279, 304 (Brennan, J., dissenting, quoting majority opinion at 284, 285).

[136] The imposition of penalties under the FTC Act is guided by FTC discretion, which is informed by the public interest. In § 456.4(b) of this rule, the Commission has stated that it will not seek the imposition of civil penalties against states, state agencies or state officials for violation of this rule.

[137] Letter from Federal Trade Commission to Senator Robert Packwood, Chairman, Committee on Commerce, Science and Transportation, United States Senate, March 5, 1982.

[138] *See* discussion *infra* at section IV.

[139] In a subsequent case, the Court stated that the legislative history actually contains some statements expressing a Congressional intention not to invade the legislative authority of the states. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 56 n. 19 (1985).

[140] *See* discussion of unfairness *supra* at Section III. B. There is also evidence to suggest that, at the time it amended the FTC Act in 1975, Congress was aware that the Commission might use its rulemaking power to challenge state-imposed restrictions on drug price advertising. *See* 120 Cong. Rec. 36150–52 (1974) (statement of Commissioner Thompson).

[141] But see, *California ex rel. Christensen v. FTC*, 1974–2 Trade Cas. (CCH) ¶75,328 (N.D. Cal. 1974), vacated and remanded, 549 F.2d 1321 (9th Cir.), cert. denied sub nom. *California Milk Producers Advisory Board v. FTC*, 434 U.S. 878 (1977).

[142] *Jefferson Co. Pharm. Ass'n v. Abbott Labs*, 460 U.S. 150, 155–56 (9183).

[143] *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394–97 (1978).

[144] See, e.g., *Sims v. United States*, 359 U.S. 108, 112 (1958); *Ohio v. Helvering*, 292 U.S. 360 (1934).

[145] Sims, 359 U.S. at 112 and *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

[146] See, e.g., *Plumbers' Local 298 v. County of Door*, 359 U.S. 354 (1959); *Union Pacific R.R. Co. v. United States*, 313 U.S. 450 (1941); *United States v. California*, 297 U.S. 175 (1936).

[147] See 51 Cong. Rec. 14,928 (1914); H.R. Rep. No. 553, 63d Cong. 2d Sess. (1914); H.R. Rep. No. 1142, 63d Cong. 2d Sess. (1914). See also Final Staff Report, L–1, at 363–64.

[148] See *Massachusetts Board of Registration in Optometry*, Docket No. 9195 (Final Order, June 13, 1988) and *Indiana Federation of Dentists*, 93 F.T.C. 321 n. 1 (1979) (interlocutory order).

[149] The Commission took the same position when it promulgated the Eyeglasses Rule. Statement of Basis and Purpose for the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 43 FR 23992, 24004 (1978). On appeal of that rule, the court reserved judgment on the issue of whether the Commission could exercise jurisdiction over the states. *American Optometric Ass'n v. FTC*, 626 F.2d 896 (D.C. Cir. 1980).

Because we are dealing with state law, we have proceeded with extreme caution at each step of this rulemaking. Procedural safeguards are built into section 18 rulemakings to ensure that all interested parties have ample notice so that they have an opportunity both to present their views and evidence and to challenge the evidence and views submitted by other parties.[150] In deference to the significant state interests at stake, we solicited the views of state officials as well as industry members and consumers. We gave every consideration to claims that quality of care concerns justify these restrictions and would have deferred to any credible showing of countervailing benefits. In fact, when state laws are the subject of a section 18 rulemaking, the Commission has required that there be an even more rigorous showing of consumer injury and absence of countervailing benefits than is required under the Commission's unfairness standard.[151]

Nonetheless, as discussed above in section II.C., the record contains no persuasive evidence that commercial practice restrictions have any positive effect on the quality of care consumers receive or that they promote any other legitimate state interest. On the other hand, the record shows that state-imposed restraints on the commercial practice of optometry seriously hinder the provision of eye care to consumers. These restraints impose substantial costs on consumers. The primary effect of this regulation is to protect one category of providers, primarily solo practitioners, from competition from high-volume chain firms—at an annual cost to consumers of millions of dollars. This stifling of competition not only leads to higher prices and less eye care for consumers today, but delays the development of more innovative and cost-effective ways of providing services tomorrow.[152]

While we are convinced of the injury that these restrictions cause, we are also mindful of the states' traditional role in protecting the health and welfare of their citizens. Therefore, we have drafted this rule narrowly so as not to intrude gratuitously on the legitimate exercise of the police powers of the state.[153] The extent of our "intrusion" is carefully limited to those regulations that have been shown to be unfair, and should not interfere with the states' ability to protect their citizens from deceptive or abusive practices by optometrists or to ensure that high-quality optometric care is provided.

What the rule does challenge is state regulation that, in effect, insulates local optometrists from competition from large, price-competitive chain firms, most of which operate interstate.[154] Thus, this rule intrudes on no traditional state interest. Rather, it represents an appropriate exercise of the Commission's responsibility, grounded in the Commerce Clause, to protect markets from unfair or deceptive acts or practices.

By empowering the federal government to regulate commerce, the framers clearly sought to limit the extent to which states could restrict the development of interstate markets. Such limits were originally seen as necessary to protect the nascent national economy from the protectionist actions of the states, which the framers feared would lead to a destructive cycle of discrimination against out-of-state goods and the retaliation that would inevitably result.[155] That some policy of limiting state authority over interstate markets, underlying the Commerce Clause, favors Commission action here to prevent states from denying interstate ophthalmic providers access to local markets when the evidence demonstrates that the states' asserted basis for such actions—to protect citizens from poor-quality ophthalmic care—has no substantial basis in fact.[156]

In providing the Commission with Section 18 rulemaking authority, Congress has made a limited delegation to the FTC of its legislative authority to protect consumers from acts or practices that unreasonably interfere with the efficient functioning of interstate markets. We find that the existing restrictions on commercial practice are designed to and do impede the efficient flow of interstate commerce, and that they impose significant costs on consumers without providing any countervailing benefits. Thus, they constitute the kind of unfair acts or practices that Congress authorized the FTC to challenge in section 18 rulemaking.

We also believe that promulgation of this rule is consistent with a recent Executive Order on federalism.[157] That Order sets out certain policymaking criteria to guide executive agencies in the formulation of federal policy. In particular, the Order directs executive departments and agencies to act in strict adherence to constitutional principles and limit the policymaking discretion of states only where there is clear and certain constitutional authority and only where there is a problem not merely common to the states, but national in scope. In addition, the Order directs that any regulatory preemption of state law be limited to the minimum level necessary to achieve the objectives of the statute.

While the FTC is not bound by the requirements of this Order, we believe

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[150] The Magnuson-Moss amendments impose additional safeguards beyond those mandated by the Administrative Procedure Act. These include additional hearing requirements and expanded scope of review by the courts. 15 U.S.C. 57a. See also Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. at 242–43; Note, *The State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act*, 89 Harv. L. Rev. 715, 745–50 (1976).

[151] Letter from Federal Trade Commission to Senator Robert Packwood, Chairman, Committee on Commerce, Science and Transportation, United States Senate, March 5, 1982. Our decision to forego remedies normally available for violations of the FTC Act is a further indication of our recognition that the actions of states and their officials, as opposed to actions by private citizens, merit special consideration in an unfairness proceeding. *See* discussion of Commission's enforcement policy *infra* in section V.

[152] For over thirty years scholars have written at length of the various ways in which excessive state economic regulation—such as these restrictions on the commercial practice of optometry—distorts the operation of markets and harm consumers. See, e.g., P. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 Col. Law Rev. 328 (1975); G. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sc. 3 (1971); W. Gellhorn, *Individual Freedom and Governmental Restraints* (1956).

[153] In response to the cautionary message of the Court of Appeals in the Eyeglasses Rule, we have drafted this rule to focus narrowly on four specific areas of commercial practice. In remanding the advertising portions of the rule, the Court stated that the Commission had preempted the whole field of ophthalmic advertising, and so had "at least approached the outer boundaries of its authority." 628 F.2d 896, 910. The Court went on to state that answers to questions regarding preemption and state action "may depend . . . on the extent to which a federal regulation gratuitously intrudes on the exercise of police powers of the states." Id.

[154] While on their face these restrictions do not discriminate against out-of-state providers, they, in fact, have a disproportionately harmful effect on high-volume practices that operate interstate.

[155] Under the Articles of Confederation, some states engaged in protectionist activities that threatened to affect the development of a vital interstate economy. For example, New York imposed port fees and tonnage duties on vessels from Connecticut and New Jersey, increasing the cost of farm products coming from those two states. In retaliation, New Jersey taxed the property for the lighthouse at Sandy Hook that New York had built, while Connecticut merchants suspended commercial dealings with New York for one year and imposed fines on those who disregarded the boycott. A. Giesecke, *American Commercial Legislation Before 1789*, 134–135 (1910). See also C. P. Nettels, *The Emergence of a National Economy, 1775–1815*, 72–73 (1977).

[156] We take no position on whether the commercial practice restraints that are the subject of this rulemaking could be challenged successfully by private parties using a Commerce Clause theory and the evidence on this record.

[157] Exec. Order No. 12,612, 52 FR 41685 (1987).

this rule conforms to the policymaking criteria outlined in the Order. We have proceeded under the clear and enumerated power of Congress to protect interstate commerce. The legislative history of the Magnuson-Moss amendments and subsequent Congressional action provide clear authority for this rule. We have identified a serious problem amenable to solution only at the national level; we have carefully examined the proffered claims of state interest; and we have fashioned a narrowly drawn deregulatory response that does not intrude on the legitimate interests states have in protecting the health and safety of their citizens.

V. Section-by-Section Analysis

The following section-by-section analysis explains the intended scope and meaning of each of the rule provisions adopted by the Commission.

Section 456.1: Definitions

This section defines certain terms used in the rule. Many of these terms are contained in the Eyeglasses Rule and relate to the prescription release requirement. The rule makes some modifications to terms used in the Eyeglasses Rule and includes some new definitions.

Paragraph (a): The term "patient" has been substituted for the term "buyer" to conform more closely to industry usage. The term covers anyone who has undergone an eye examination.

Paragraphs (b), (c), and (d) remain unchanged from the original rule definitions.

Paragraphs (e) and (f) replace § 456.1(h) of the Eyeglasses Rule. The specific terms "ophthalmologist" and "optometrist" in paragraphs (e) and (f) have been substituted for the general word "refractionist" used in § 456.1(h) of the Eyeglasses Rule to define those categories of providers—Doctors of Medicine, Osteopathy and Optometry—who are qualified under state law to perform eye examinations. This change was made for two reasons. First, the use of the term "refractionist" in the Eyeglasses Rule has caused confusion because it is not generally used by consumers or by industry members. Second, the provisions of the Eyeglasses II Rule relating to commercial practice apply to optometrists, not ophthalmologists. The term "refractionist" has been deleted so that this distinction is clear.

Paragraph (g): The definition of the term "person" has been changed. This term was originally used in § 456.6 of the Eyeglasses Rule. That rule provision is no longer in effect, so the original definition of the term is no longer relevant. The term "person" is now used only in the rule provisions concerning commercial practice. The definition has been changed to make it clear that the term covers any individual, partnership, corporation or other entity, whether or not the FTC has jurisdiction over the "person."

Paragraph (h): The term "prescription" is defined as those specifications necessary to obtain lenses for eyeglasses. Thus, under the rule, the prescription that is released to the patient need only contain the data on the refractive status of the patient's eyes and any information, such as the date or signature of the examining optometrist or ophthalmologist, that state law requires in a legally fillable eyeglass prescription. The definition deletes all references to contact lenses. This change is intended to end the confusion generated by the definition in the Eyeglasses Rule concerning the obligation of optometrists and ophthalmologists to place the phrase "OK for contact lenses" (or similar words) on eyeglass prescriptions. No such obligation exists under the rule. This change will also clarify the fact that the prescription release requirement does not affect state laws regulating who is legally permitted to fit contact lenses. This change does not affect the requirement that optometrists and ophthalmologists offer prescriptions for lenses for eyeglasses to all patients whose eyes they examine, including those patients who wear or intend to purchase contact lenses.

Paragraph (i): The definition of "optometric services" is new. It is intended to cover the full range of services which may be provided by an optometrist under state law. The precise meaning of the term may vary slightly from state to state since states define the practice of optometry differently. The term only includes services provided by an optometrist, not by other professionals such as ophthalmologists who may also be licensed under state law to provide such services.

The new term is needed because the terms in the rule as originally proposed did not cover the full range of services which may be provided by optometrists. The term "ophthalmic services," as defined in § 456.1(d), covers only the measuring and fitting of eyeglasses or contact lenses subsequent to the eye exam. The term "eye examination," as defined in § 456.1(b), covers tests and procedures to determine the refractive status of the eyes. Optometrists are licensed to perform other services, however. For example, optometrists may prescribe eye exercises to deal with eye muscle problems or, in many states, prescribe topically applied prescription drugs to treat certain forms of eye disease. All such activities are included under the term "optometric services."

Section 456.2: Separation of Examination and Dispensing

This section requires that optometrists and ophthalmologists give prescriptions for eyeglass lenses to their patients immediately after completing an eye examination. Except for minor changes in terminology, this section is identical to the prescription release requirement contained in the Eyeglasses Rule (originally § 456.7).

Paragraph (d) addresses the use of waivers or disclaimers of liability. As the Commission makes clear in its declaration of intent (§ 456.5(c)), the rule does not impose liability on an ophthalmologist or optometrist for the ophthalmic goods and services dispensed by another individual pursuant to the ophthalmologist's or optometrist's prescription. By its terms, the rule proscribes only "waivers or disclaimers" of the physician's or optometrist's own responsibility. The Commission has interpreted this portion of the rule to permit nondeceptive affirmative statements concerning responsibility. For example, a written statement that "the person who dispenses your eyeglasses is responsible for their accuracy" would not violate § 456.2(d). However, such an affirmative statement cannot be coupled with a waiver or disclaimer of the optometrist's or ophthalmologists's own liability.[158]

Section 456.3: Federal or State Employees

This section (originally § 456.8 of Eyeglasses Rule) deletes references to the remanded portions of the Eyeglasses Rule and clarifies the intended effect of this section. This section exempts practitioners who work for any federal, state, or local government agency from the rule's prescription release requirements. If practitioners work only part-time for the government, the exemption only applies when they are engaged in their governmental duties.

Section 456.4: State Bans on Commercial Practice [159]

Paragraph (a)(1): Lay Association. The purpose of this section is to

[158] 43 FR 46296–46297 (1978).

[159] State bans may arise from a variety of sources: statutes, regulations, attorney general opinions, court opinions, and enforcement policy decisions by state boards and other state agencies. Regardless of the method used or the state entity involved, the rule prohibits such bans.

invalidate state prohibitions on optometrists' entering into certain designated business associations with nonoptometrists that make it possible to provide optometric services and ophthalmic goods and services to consumers in more efficient ways.

As originally proposed, § 456.4(a)(1) proscribed state prohibitions on "employer-employee or other business relationships" between optometrists and nonoptometrists. However, we realized that this language would leave some uncertainty in the minds of lawmakers and practitioners as to the scope of the rule.[160] We have narrowed the language of § 456.4(a)(1) to make it an unfair act or practice for states to prohibit those specific types of associations that the record demonstrates are critical to the development of commercial practice: (1) The employment of optometrists by lay persons or corporations to provide optometric services; (2) partnership agreements, joint-ownership or equity-participation agreements, profit-sharing agreements, or franchise agreements [161] between optometrists and nonoptometrists (including those that involve the sharing of revenues between optometrists and nonoptometrists) for the purpose of providing optometric services or ophthalmic goods or services; or (3) the leasing of office space by optometrists from nonoptometrists, including the payment of rentals on such leases based on a percentage of the optometrist's revenues.

The record also demonstrates that lay control over the business aspects of an optometric practice is an integral element of commercial practice. Subsection (v) invalidates those state regulations that prevent lay persons or corporations from controlling those business aspects of a practice that the record demonstrates have no effect on quality of care—e.g., setting of fees, salaries, or minimum office hours; location of the practice; choice of suppliers of material, equipment, services, and laboratory work; establishing minimum quantities of materials in stock and minimum equipment;[162] advertising, promotion, and marketing practices; accounting and financial practices; office design, decor, and maintenance; and other activities that involve business judgments to a similar degree.[163] As discussed more completely herein, this provision of the rule does not prevent states from passing regulations concerning these business aspects of optometry. It simply prevents the states from mandating that optometrists alone, and not lay persons or corporations, must make these decisions.

Finally, the language of this provision makes clear that the only affiliations covered by § 456.4(a)(1) are affiliations for the purpose of "providing optometric services" or "forming entities whose business, in whole or part, is providing optometric services or ophthalmic goods and services to the public." The inclusion of this language makes clear that affiliations for anything other than this stated purpose are not covered by the rule.[164]

The rule does not interfere with a state's ability to adopt or enforce any law or regulation that addresses specific harmful practices arising from lay association. For example, the rule does not interfere with a state's ability to prohibit improper lay control of the practice of optometry or the professional judgment of an optometrist, where the terms "practice of optometry" or "professional judgment" do not encompass those business aspects of a practice described in subsection (v).

The rule does not affect the ability of the states to prohibit the use of certain compensation schemes. For example, states could, if they were so inclined, prohibit employers of optometrists from setting quotas for the number of examinations that optometrists must perform. States could also choose to ban the payment of commission based on the number of examinations given or prescriptions written by optometrists. The evidence in this record does not establish that commission payments provide clear consumer benefits or that they result in no consumer injury.[165]

States may also establish minimum standards of competence or honesty and discipline those optometrists, commercial or not, who fail to meet those standards. In short, under the rule, states retain broad authority to regulate the commercial and traditional practice of optometry in order to protect the health and safety of their citizens and to prevent abuse of consumers.

Paragraph (a)(2): Branch Offices. The rule allows optometrists to own, operate, or practice in any number of offices. Corporations or other entities which offer optometric services through affiliations between optometrists and lay persons, as allowed by § 456.4(a)(1) of the rule, would also be permitted to own or operate any number of offices.

The rule also prohibits states from requiring optometrists to remain in personal attendance at each branch office for a specific percentage of the time the branch is open. Such a requirement effectively limits the number of branch offices that an optometrist may own and therefore is prohibited by the rule.

However, as § 456.5(a) makes clear, the states retain broad authority to regulate health and safety and to

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[160] For example, some commenters argued that the original language was broad enough to encompass regulations banning "capping and steering" and referral arrangements. While in some instances such regulations may be unconstitutional restraints on commercial speech, the rule language makes clear that the rule does not cover such prohibitions.

[161] Typically, under an optometric franchising arrangement, the optometrist pays the franchiser for a specified set of goods or services, which might include the use of the franchiser's trade name and trademarks, the benefits of its goodwill, proven method of doing business, volume discounts on equipment and inventory, financing available through the franchiser, and participation in the franchiser's advertising program. The franchiser retains control over many aspects of the franchisee's business organization, such as office design, items stocked, and minimum quality standards. J. Solish, Attorney, R.H. Teagle Corp., Tr. 1368–72; cf. P. Zeidman, Attorney, National Franchise Association, Tr. 591 (describing attributes of franchising agreements generally).

[162] Obviously, these minimum standards would have to accord with any state-imposed standards for optometric practice. Furthermore, under the rule, states could require that optometrists be permitted to have equipment and inventory above the minimum level established by the lay person or corporation.

[163] The record establishes that corporations which associate with optometrists—for example, by employing optometrists or entering into franchise agreements—where currently permitted, commonly control these aspects of the business. See, e.g., NAOO, H–78a, at 39–40 and Appendices J, K, L, and M. Other evidence on the record, see supra section II.C., demonstrates that associations between optometrists and lay persons have no adverse impact on the quality of care available in the market.

[164] For example, the rule was never intended to address commercial practices by ophthalmologists. The record evidence centers on commercial optometric practice; there is little evidence concerning commercial practice by opthalmologists. Under this provision, ophthalmologists also may enter into affiliations with optometrists for the purpose of providing optometric services or ophthalmic goods and services to the public.

The term "sellers" also appeared in the proposed language of § 456.4(a)(1). Sellers was defined to include opticians. As a result, the rule as originally proposed would have prohibited state restraints on lay persons employing (or otherwise affiliating with) "sellers." The record shows that the law of only one state prohibits such affiliations, and no evidence or comments were submitted about this restriction. Consequently we decline to extend the rule to such a restriction.

[165] In contrast to sa franchise or leasing arrangement, for example, where an optometrist pays a percentage of his gross revenue to the franchiser or lessor, commission payments entail a payment to an optometrist which varies depending upon the number of eyeglasses sold or revenue generated by the optometrist. The former creates no incentive for the optometrist to overprescribe while the latter arguably does.

prevent consumer abuses. For example, states could require that optometric services or ophthalmic goods or services provided at each office be supplied only by a person qualified to do so. As another example, states could regulate the services provided at each office by requiring minimum eye examination procedures, minimum office equipment, or a specific level of sanitation.

Paragraph (a)(3): Mercantile locations. This provision allows optometrists to locate their practices inside retail optical stores, department stores, or other mercantile establishments. Optometrists can also locate in shopping malls or adjacent to optical retailers. Under the rule corporations and other entities that offer optometric services by employing optometrists or otherwise affiliating with optometrists, pursuant to § 456.4(a)(1) of the rule, can also locate in mercantile locations.

Consequently, the rule also eliminates so-called "two-door" or "side-by-side" requirements, which are frequently used to prohibit optometrists from locating directly inside mercantile establishments. These requirements mandate separate offices for the optometrist and the optician, including, in some instances, separate doors and duplicate facilities and partitions between the two offices. Under the rule, states could not require separate offices, separate entrances, duplicate facilities, or partitions.

Finally, as § 456.5(a) makes clear, the rule is not intended to interfere with the state's ability to enforce general zoning laws or any law, rule, or regulation which prohibits the location of an optometric practice in an area which would create a public health or safety hazard.

Paragraph (a)(4): Trade Names.[166] The rule invalidates state prohibitions on optometrists' practicing under any nondeceptive trade name. Thus, for example, optometrists employed by a chain firm could practice under the name of the chain firm as long as the name was not deceptive. Optometrists working for other optometrists could practice under the name used by their employer. Optometric franchisees could practice under the franchise name. Solo practitioners could adopt any nondeceptive trade name. Corporations and other entities which offer optometric services through affiliations with optometrists, pursuant to § 456.4(a)(1) of the rule, could also practice under any nondeceptive trade name.

Some states, for example, require that any trade name include the name of one or more of the optometrists practicing under the trade name.[167] Such requirements would violate the rule since they prohibit use of a wide variety of nondeceptive trade names, including some that are well-established in other states. Other states require that all trade names used by optometrists include the word "optometric" or "optometrist."[168] Trade names which do not include these terms, such as "Smith Optical Center," are not in general, deceptive. Such a requirement would also be prohibited under the rule, since it would prohibit the use of all other nondeceptive trade names.[169]

The rule also allows optometrists to advertise under a trade name in a nondeceptive manner. For example, optometrists could display their trade names on signs and use the trade name in media advertising. Similarly, chain firms offering eye exams could advertise optometric services under the trade name.

The rule also prohibits states from mandating that any trade name advertisement disclose the names of all optometrists practicing at a given advertised location or practicing under the advertised trade name.

However, as § 456.5(a) (3) and (4) make clear, the rule does not infringe on the state's ability to enforce any law, rule, or regulation which requires that the identity of an optometrist be disclosed to a patient before, during, or after the time optometric services are provided or ophthalmic goods are dispensed or from enforcing any state law, rule, or regulation that is reasonably necessary to prevent the deceptive use of trade names in advertising. Also, the rule would not prevent states from imposing reasonable disclosure requirements on any trade name advertising.

Sections 456.4(b) and 456.5(b): Enforcement Policy

The Commission expects that the states will comply voluntarily with the rule. If, however, a state or local governmental agency or official attempts to enforce a state law or regulation that conflicts with the rule, § 456.5(b), while not creating a private right of action, recognizes that individuals can interpose the rule as a defense in any proceeding brought by the state. In such a situation, a person could correctly assert that the rule preempts the state law or regulation and therefore there is no basis on which any enforcement action could be brought. Because the Commission expects the states to comply voluntarily with the rule, it does not anticipate bringing any law enforcement actions against state or local governmental agencies or officials. Section 456.4(b) of the rule also provides that no state or local governmental agency or official is liable for civil penalties, consumer redress, or other monetary relief that would ordinarily be available under the FTC Act for violations of this rule.

Section 456.5: Declaration of Commission Intent

Paragraph (a): Section 456.5(a) is intended to make clear that the rule does not affect any state regulation as long as the state does not engage in the specific practices enumerated in § 456.4(a) (1)–(4). Thus, the rule does not interfere with a broad range of state regulation that safeguards the health and safety of eye care consumers, or prevents unfair or deceptive practices or anticompetitive conduct by eye care providers, including commercial practitioners. For example, many states specify that particular procedures must be performed each time an optometrist performs an eye examination or that every optometrist's office must have particular equipment. Many states require that optometrists refer cases of suspected pathology to ophthalmologists, or require that optometrists verify the accuracy of lenses prepared according to their prescriptions. All states prohibit fraud and deception in the practice of optometry and virtually all require that optometrists practice "competently."[170] The rule does not interfere with a state's ability to regulate optometry, including commercial practice, through such regulations.

We also acknowledge that a state or local government can enact regulation that may have an incidential impact on the ability of optometrists to engage in the specific practices covered by the rule, as long as the regulation does not distinguish between commercial and

[166] Section 456.1(j) of the rule as originally proposed defined the term "trade name ban." The rule incorporates the substance of this definition in this section, which bars states from prohibiting the use of trade names. Thus, a separate definition is unnecessary.

[167] See, e.g., La. Rev. Stat. Ann. section 1112 (West 1952); Mo. Admin. Code Tit. 4, CSR 210-2.060(4)(E) (1984); Or. Admin. R. section 852-300-010 (1984).

[168] See, e.g., Minn. R. 6500.0800, Subp. 3 (1987).

[169] In fact, use of the term "optometric" in the trade names of large chain firms could well be confusing to consumers since the term may imply that optometric services are available at all the chain's retail locations when, in fact, this may not be the case.

[170] See Final Staff Report, L-1, at 45-46.

noncommercial optometrists or optometric firms. Thus, the rule does not invalidate state labor laws, antitrust laws, zoning laws, or other state or local regulation that may have an incidential impact on the ability of optometrists to engage in the conduct protected by the rule.

Paragraph (b): See analysis of § 456.4(b) for a discussion of the Commission's views regarding the ways in which the Commission intends the rule to be enforced.

Paragraph (c): See analysis of waivers and disclaimers of liability in § 456.2(d).

VI. Alternatives Considered

During the course of this proceeding the Commission carefully considered alternative approaches to the promulgation of a rule. We also considered adopting a broader prohibition on commercial practice restraints—one that would reach indirect as well as direct bans—and considered various proposed modifications to the existing prescription release provisions. Each of these alternatives is discussed below.

A. Alternatives to Promulgation of a Rule

1. *Take no action; defer to the states.* The Commission could leave to the states the decision whether or not to eliminate these restrictions. The Commission could continue to make its staff studies and other evidence available to state legislatures and regulatory agencies, or could develop a model state law, in the hope that states would take corrective action in this area. However, the prospects for significant change are dim. The BE Study has been available since 1980, and staff has testified or submitted comments in support of deregulation of commercial practice in a significant number of states.[171] Nevertheless, the record indicates that such restrictions are still widespread.[172] Based on this record we have no reason to expect that more than a few states will voluntarily repeal commercial practice restrictions in the foreseeable future.

2. *Case-by-case approach.* A second alternative would be to issue complaints and proceed on a case-by-case basis against particular states or state regulatory boards.[173] Rulemaking appears to be the more appropriate vehicle for a number of reasons, especially since nearly all of the states would be affected. Rulemaking procedures permit all affected and interested parties, including all potentially affected states, to participate in a full and open discussion of the issues and to present evidence for and against the proposal. In a rulemaking proceeding, the Commission can assess the implications of the proposal on a nationwide basis more readily than in a case against one state. In addition, promulgation of a rule would provide more complete protection for consumers. Even if an order were issued against a particular state or state regulatory board, that order would not extend to other states with similar restrictions. Thus, significant numbers of consumers would be left without relief in other states. Case-by-case adjudication against a number of states would be more time-consuming and costly than rulemaking.

B. Alternative Rule Provisions

1. *Commercial Practice—Direct and Indirect Bans.* The rule as proposed at the start of this proceeding covered state restraints that directly or indirectly prohibited commercial practice.[174] Such a formulation would have given the Commission the greatest flexibility in reaching indirect attempts to prohibit commercial practice. At the same time, the Commission was mindful that such an approach arguably would invalidate many laws and regulations not specifically enumerated in the rule. We chose to promulgate a more limited rule that defines the invalidated restrictions very clearly in order to eliminate any uncertainty regarding which laws or regulations are affected by this rule. The rule sets out four types of state laws that act as direct restraints on the commercial practice of optometry: (1) Bans on lay association; (2) limitations on branch officies; (3) bans on mercantile locations; and (4) bans on trade names.

Additionally, we have clearly identified and incorporated into the rule four other types of restraints that interfere with activities essential to the functioning of commercial practice: (1) Bans on the sharing of profits (§ 456.4 (a)(1) (i)); (2) bans on lay control over the business aspects of a practice (§ 456.4 (a)(1) (v)); (3) requirements that specify that owners of branch offices remain in personal attendance at each branch for a specific percentage of the time that the branch is open (§ 456.4 (a)(2)); and (4) requirements that mandate the disclosure in advertising of the names of all optometrists practicing at a given advertised location or practicing under a trade name (§ 456.4 (a)(4)).

The rule is now much narrower. It proscribes only those specified types of state laws and regulations that the record demonstrates create serious barriers to the formation and operation of commercial optometric firms and thereby cause significant consumer injury.

2. *Prescription Release.* On June 2, 1978, the Commission promulgated the Eyeglasses Rule.[175] That rule, in pertinent part, requires optometrists and ophthalmologists to release to their patients copies of their eyeglass prescriptions immediately following eye examinations regardless of whether or not the patient requests the prescription.[176]

The Commission found that many consumers were being deterred from comparison shopping for eyeglasses because optometrists and ophthalmologists refused to release eyeglass prescriptions even when requested to do so, or charged an additional fee for release of the prescription.[177] The Commission promulgated an automatic release requirement based on a finding of "consumers' lack of awareness that the purchase of eyeglasses need not be a unitary process"—i.e., that purchasing eyeglasses can be separated from the process of obtaining an eye exam.[178] The automatic release provision was thus imposed as a remedial measure.

In this proceeding the Commission considered whether or not the prescription release requirement should be modified or extended. The major modification considered was amendment of the rule to require that prescriptions be provided only upon request of the patient. In addition, the Commission asked for comment on five

[171] Comments regarding restrictions on the commercial practice of optometry have been submitted to at least nine states, including California, Delaware, Kansas, Mississippi, New Jersey, North Dakota, Oregon, Texas, and Virginia.

[172] See Final Staff Report, L-1, at 33-46.

[173] Proceeding against private associations would not be effective since it would do nothing to remove the state-imposed restraints at issue in this proceeding.

[174] See 50 FR 598 (1985). This intention was specifically stated in proposed §§ 456.5 (b) and (c).

[175] 43 FR 23,992 (1978) (codified at 16 CFR 456).

[176] The rule also prohibits optometrists and ophthalmologists from charging additional fees for the prescriptions, from conditioning the availability of eye examinations on the purchase of ophthalmic goods, or from including waivers of liability on the prescription. These provisions were upheld by the U.S. Court of Appeals in 1980. *American Optometric Assoc. v. FTC*, 626 F.2d 896 (DC Cir. 1980).

[177] In addition, some practitioners refused to conduct an examination unless the patient agreed to purchase eyeglasses from the practitioner or included potentially intimidating disclaimers of liability on the prescription itself. 43 FR 23992, 23998 (June 2, 1978).

[178] See Final Staff Report, L-1, at 251-52.

other possible changes in the rule.[179] The Commission considered the record evidence on each of these proposals and chose not to adopt any of them for the reasons outlined below.

a. *Automatic Release.* The Commission decided to retain the remedial aspect of the prescription release requirement after consideration of two surveys[180] placed on the rulemaking record, as well as numerous comments and testimony offered by optometrists, opticians, professional associations, state boards, and consumer groups.

Our reading of the record reveals that there is significant non-compliance with the automatic release requirement[181] and that there continues to be a lack of consumer awareness about prescription rights. Given that the record does not contain sufficient evidence to conclude that the remedial aspects of the rule are no longer needed, we decline to modify or repeal the rule.[182]

b. *Contact Lens Prescription Release.* The NPR requested comment on whether significant numbers of consumers were refused copies of their contact lens prescriptions, whether consumers could reasonably avoid these refusals, and what are the costs and benefits of extending the prescription release rule to contact lenses.[183] While the record suggests that it is not uncommon for practitioners to refuse to give patients copies of their contact lens prescriptions,[184] and that the resulting costs to consumers could be significant,[185] we do not believe that the record contains sufficient reliable evidence to permit a conclusion that the practice is prevalent.

Moreover, even if the evidence on prevalence of refusal to release contact lens prescriptions and resulting injury to consumers were satisfactorily documented, we would have to consider if any countervailing benefits justified the refusal. Some commenters suggested that refusal to release is necessary to permit the fitter to verify the fit of the lens[186] on the eye because there is some danger that lenses may not conform to the eye as expected.[187] According to these commenters, it would be inappropriate to require them to release contact lens specifications to their patients, since patients could then obtain replacement lenses from dispensers that do not verify the fit.[188]

Because the record evidence is insufficient to evaluate this claim fully, the Commission cannot conclude that a refusal to release a contact lens prescription is an unfair act or practice.

c. *Other Prescription Release Matters.* The Commission received no substantial evidence showing that practitioners refuse to release duplicate copies of prescriptions to patients who lose or misplace their original copies, or that eyeglass dispensers refuse to return prescriptions to patients after filling the prescription.[189] Because we do not have sufficient evidence to show that either of these practices is prevalent, rulemaking in these areas would be inappropriate.

VII. Other Matters

A. Cost-Benefit Analysis

Before the Commission determines that an act or practice is legally unfair, we analyze the act or practice in terms of the scope and nature of the injury it causes and in light of any offsetting benefits it provides. In sections II. B. and C., we set out a detailed summary of the injury imposed by commercial practice restrictions and the absence of any countervailing benefits that might justify the restrictions. However, we also must consider the projected benefits and effects of the rule that we are promulgating.[190]

1. *Effect on Consumers.* The primary benefit to consumers from the removal of commercial practice restrictions is that they will be able to purchase vision care goods and services at lower prices without any compromise in quality of care. The record evidence indicates that (1) Prices are significantly lower in markets where commercial practice is not restricted; (2) commercial optometrists charge lower prices than noncommercial optometrists; (3) noncommercial optometrists who operate in markets where commercial practice is permitted charge less than their counterparts in markets where commercial practice is prohibited; and (4) overall quality of care is no lower in nonrestrictive than in restrictive markets. As restrictions on commercial practice are removed, competition among optometrists should increase. Lower prices should then result from this increased competition and from economies of scale achieved by larger optometric providers. Lower prices will also increase the availability of ophthalmic goods and services to consumers who before could afford such services infrequently, or in some instances, not at all.

Implementation of the rule will have no adverse effect on consumers. They will be able to obtain the same overall quality of care, but at lower prices. Finally consumers will benefit from their ability to choose, if they wish, the convenience of one-stop service (eye examinations plus eyeglass or contact lens dispensing) from optometrists or retail optical firms who employ optometrists.

2. *Effect on Industry Members.* The rule will directly affect all opthalmologists and optometrists who perform eye examinations and all optometrists, opticians, and others who desire to engage in commercial ophthalmic practice. In 1982, there were approximately 12,000 ophthalmologists, 22,000 optometrists, and 26,000 opticians in active practice in the United States. Most ophthalmologists and optometrists are self-employed. The majority of

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[179] (1) Should the rule require optometrists and ophthalmologists only to offer, rather than give, eyeglass prescriptions to their patients? (2) Should the requirement be repealed altogether? (3) Should the rule be extended to require the release of contact lens prescriptions to patients? (4) Should the rule be extended to require optometrists and ophthalmologists to release duplicate copies of prescriptions to patients who lose or misplace their original copies? and (5) Should the rule require dispensers of eyeglasses to return the eyeglass prescription to patients after filling the prescription? 50 FR 602–03 (1985).

[180] The Market Facts Study, supra note 18, developed by staff in conjunction with the Market Facts Public Sector Research Group, was designed to measure eye doctors' compliance with the prescription release requirement and consumer knowledge and experience with prescriptions. The American Association of Retired Persons also submitted a survey conducted in 1985. That survey polled older consumers to determine their familiarity with eyeglass prescriptions. AARP Survey, J–37(b) (Attachment to Statement of E. Eggan, Director, American Ass'n. of Retired Persons).

[181] The Market Facts Study concludes that 44% of refractionists are not in compliance with the rule and that an additional 19% are only in partial compliance. See also Presiding Officer's Report, L–2, at 24–25, which concludes that noncompliance remains a problem and recommends that the rule not be modified.

[182] Little evidence was presented in response to the Commission's question regarding an "offer" requirement. Comments from parties on opposing sides of the release upon request or repeal issues generally opposed the use of an offer in lieu of their favored position.

[183] 50 FR 603 (1960).

[184] See Final Staff Report, L–1, at 283–87.

[185] Id. at 288–89.

[186] This need varies somewhat between hard and soft contact lenses. Hard lenses are ordered according to the fitter's specifications and, in many cases, are then modified or finished by the fitter on a custom basis.

[187] E. McCrary, Vice President, Maryland Optometric Ass'n, Tr. 182; G. Easton, President-elect, American Optometric Ass'n, Tr. 154; H. Haneln, Pennsylvania Optometrist, Tr. 2316–18; T. Vail, Illinois Optometrist, H–115, at 9.

[188] Some optometrists expressed fear that they could be held responsible for damage caused by lenses dispensed by others pursuant to their prescriptions and specifications. R. Saul, Florida Optometrist, H–93, at 3–4; A. Gossan, Michigan Optometrist, H–1.

[189] See Final Staff Report, L–1, at 297–99.

[190] Federal Trade Commission, Rules of Practice, § 1.14(2)(iii).

opticians are self-employed or employed in "independent" retail optical establishments.

The rule will give members of the optometric industry greater freedom to provide goods and services in the most cost-effective manner. They will be able to enter into business affiliations with nonoptometrists, own and operate several branch offices, use a trade name for their practice, and locate their practices in retail or mercantile settings. In a less-restrictive regulatory environment, they will have greater opportunity to develop innovative ways of offering services and goods to consumers. Corporations or other business entities presently selling opthalmic goods would be able to hire, lease space to, or associate with optometrists in order to offer one-stop shopping to consumers.

No direct costs would be imposed on optometrists, ophthalmologists, or opticians by the removal of state bans on commercial forms of practice. The rule would only permit, not require, providers to operate branch offices, maintain offices in mercantile locations, use trade names, or affiliate with lay corporations and individuals.

The only "costs" borne by industry members would be those created by doing business in a market where greater consumer choice stimulates more competition. The indirect effects of the rule on various industry members cannot be determined with any degree of precision, and will depend at least in part on how individual providers respond to the changing market conditions. For example, some noncommercial optometrists may be forced to adopt more cost-effective business practices or lower their prices in order to meet increased competition. In markets where commercial practice is now prohibited, it can be anticipated that commercial firms will enter.

3. *Effect on Small Entities.* The primary impact of the rule on small entities will stem from the increased competition in the vision care industry which can be anticipated as a result of the rule's deregulatory effects. The economic impact on individual small entities from increased competition in the vision care industry, although difficult to determine, could be substantial. However, the provisions of the rule that remove certain governmental restraints on commercial ophthalmic practice would permit small entities (i.e., optometrists and opticians) to engage in alternate modes of practice, including commercial practice, or to expand, should they desire to do so.

The rule could hurt some small entities and benefit others, depending on how they respond to a more competitive market. In states that currently restrict commercial practice, for example, the market will become more flexible and capable of responding to consumer demand. Those small entities that have been denied the opportunity to engage in more efficient business practices will now be able to do so.

Date from studies of the ophthalmic market indicate that this market is price elastic: that is, as prices of eye examinations and eyeglasses decline, there is a proportionately greater increase in consumption. Thus, we anticipate an increase in total expenditures for vision care products and services. However, the market will be a more competitive one. Some less efficient providers will undoubtedly lose business.

4. *Effect on Government Entities.* The rule invalidates state statutes and regulations that ban commercial forms of practice. Thus, state and local regulatory agencies would not have to bear the costs of enforcing these bans. However, other indirect costs might arise should state or local officials decide to enact new regulations in areas not covered by the rule. In addition to the costs involved in enacting such regulations, the regulatory agencies might incur additional enforcement costs.

B. Final Regulatory Analysis

The final regulatory analysis [191] of the rule has been integrated into the Statement of Basis and Purpose, as allowed by statute.[192]

Accordingly, Title 16, Part 456 of the Code of Federal Regulations is revised to read as follows:

PART 456—OPHTHALMIC PRACTICE RULES

Sec.

Authority: Section 18(a), 88 Stat. 2193, as amended 93 Stat. 95. (15 U.S.C. 57a); 80 Stat. 383; 81 Stat. 54; 88 Stat. 1561–1564; 90 Stat. 1247 (5 U.S.C. 552).

[191] The statute requires that the analysis contain (1) A statement of the need for and objectives of the rule; (2) a summary of the issues raised by public comments, a summary of the agency's assessment of such issues, and a statement of changes made in the rule as a result of these comments; and (3) a description of the significant alternatives to the rule considered and reasons for rejecting each alternative. 5 U.S.C. 604.

[192] 5 U.S.C. 605(a).

§ 456.1 Definitions.

(a) A "patient" is any person who has had an eye examination.

(b) An "eye examination" is the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.

(c) "Ophthalmic goods" are eyeglasses, or any component of eyeglasses, and contact lenses.

(d) "Ophthalmic services" are the measuring, fitting, and adjusting of ophthalmic goods subsequent to an eye examination.

(e) An "ophthalmologist" is any Doctor of Medicine or Osteopathy who performs eye examinations.

(f) An "optometrist" is any Doctor of Optometry.

(g) A "person" is any individual, partnership, corporation, association or other entity.

(h) A "prescription" is the written specifications for lenses for eyeglasses which are derived from an eye examination, including all of the information specified by state law, if any, necessary to obtain lenses for eyeglasses.

(i) "Optometric services" are any acts or practices which are included within the definition of the practice of optometry under state law.

§ 456.2 Separation of examination and dispensing.

It is an unfair act or practice for an ophthalmologist or optometrist to:

(a) Fail to provide to the patient one copy of the patient's prescription immediately after the eye examination is completed. Provided: An ophthalmologist or optometrist may refuse to give the patient a copy of the patient's prescription until the patient has paid for the eye examination, but only if that ophthalmologist or optometrist would have required immediate payment from that patient had the examination revealed that no ophthalmic goods were required;

(b) Condition the availability of an eye examination to any person on a requirement that the patient agree to purchase any ophthalmic goods from the ophthalmologist or optometrist;

(c) Charge the patient any fee in addition to the ophthalmologist's or optometrist's examination fee as a condition to releasing the prescription to the patient. Provided: An ophthalmologist or optometrist may charge an additional fee for verifying ophthalmic goods dispensed by another seller when the additional fee is imposed at the time the verification is performed; or

(d) Place on the prescription, or require the patient to sign, or deliver to the patient a form or notice waiving or disclaiming the liability or responsibility of the ophthalmologist or optometrist for the accuracy of the eye examination or the accuracy of the ophthalmic goods and services dispensed by another seller.

§ 456.3 Federal or State employees.

This rule does not apply to ophthalmologists or optometrists employed by any federal, state or local governmental entity.

§ 456.4 State bans on commercial practice.

(a) It is an unfair act or practice for any state or local governmental entity to:

(1) Prevent or restrict optometrists from entering into associations with lay persons or corporations by:

(i) Prohibiting persons other than optometrists from employing optometrists to provide optometric services to the public;

(ii) Prohibiting optometrists and persons other than optometrists from entering into partnership agreements, joint-ownership or equity-participation agreements, or profit-sharing agreements for the purpose of forming entities to provide optometric services or ophthalmic goods and services to the public;

(iii) Prohibiting optometrists and persons other than optometrists from entering into franchise agreements (including those that provide for the sharing of revenues) for the purpose of forming entities to provide optometric services or ophthalmic goods and services to the public;

(iv) Prohibiting optometrists from leasing space from persons other than optometrists to provide optometric services to the public or prohibiting optometrists from entering into leases for such space where rental payments under such leases are based on a percentage of revenues; or

(v) Prohibiting lay control over the business aspects of an optometric practice or an entity formed to provide optometric services or ophthalmic goods and services to the public;

(2) Limit the number of offices that may be owned or operated by optometrists or by entities formed by any of the agreements covered by § 456.4(a)(1) of the rule; or require that an owner of branch offices remain in personal attendance at each branch office for a specific percentage of time;

(3) Prohibit optometrists, or any entities formed by any of the agreements covered by § 456.4(a)(1) of the rule, from practicing in a pharmacy, department store, shopping center, retail optical dispensary or other mercantile location;

(4) Prohibit optometrists, or any entities formed by any of the agreements covered by § 456.4(a)(1) of the rule, from practicing or holding themselves out to the public, by advertising or otherwise, under any nondeceptive trade name, including a name other than the name shown on their licenses or certificates of registration; or require the disclosure in advertising of the names of all optometrists practicing at a given advertised location or practicing under a trade name.

(b) If any state or local governmental entity or officer violates any of the provisions of § 456.4(a)(1)–(4), that person will not be subject to civil penalty, redress, or other monetary liability under any section of the Federal Trade Commission Act.

§ 456.5 Declaration of Commission intent.

(a) The provisions of § 456.4(a)(1)–(4) are not intended to interfere with the exercise of state or local governmental authority to protect the health and welfare of the public. In exercising its authority to safeguard the health and safety of eye care consumers or to protect the public from unfair or deceptive practices or anticompetitive conduct, a state or local government can enact regulation that has the incidental effect of preventing an individual optometrist or optometric firm from engaging in a specific agreement or activity covered by § 456.4(a)(1)–(4), as long as such regulation does not distinguish between optometrists or optometric firms that engage in any of the agreements or activities enumerated in § 456.4(a)(1)–(4) and optometrists or optometric firms that do not engage in such agreements or activities. For example, the rule does not prevent states or local governments from prohibiting the location of an optometric practice in an area that could create a public health or safety hazard, or from enforcing a general zoning regulation, even though such prohibition or regulation had the incidental effect of preventing an optometrist from locating in some specific commercial location. While the rule affects state or local regulation of the business aspects of the practice of optometry, it is not intended to interfere with the authority of a state or local government to:

(1) Prohibit improper lay interference in the ophthalmic care provided a patient by an optometrist;

(2) Require that the optometric services provided at a branch office be supplied by a person qualified to do so under state or local law;

(3) Require that the identity of an optometrist be disclosed to a patient before, after, or at the time optometric services are performed;

(4) Prevent the deceptive use of trade names or prevent trade name infringement; or

(5) Establish and maintain minimum quality standards for ophthalmic goods or services.

(b) The Commission intends that this rule may be used as a defense to any proceeding of any kind that may be brought against any optometrist, or any entity formed by any agreement covered by § 456.4(a)(1) of the rule, for using a trade name, working for or affiliating with a person who is not an optometrist, operating branch offices or practicing in a mercantile location.

(c) In prohibiting the use of waivers and disclaimers of liability in § 456.2(d), it is not the Commission's intent to impose liability on an ophthalmologist or optometrist for the ophthalmic goods and services dispensed by another seller pursuant to the ophthalmologist's or optometrist's prescription.

(d) The rule, each subpart, and the Declaration of Commission Intent and their application are separate and severable.

Separate Statement of Chairman Daniel Oliver, Ophthalmic Practice Rule Statement of Basis and Purpose

When the Commission voted to promulgate the Ophthalmic Practice Rule, I questioned the use of the Federal Trade Commission rulemaking authority to strike down state laws that restrict competition in the eye care market. Based on principles of federalism, I voted against the proposed rule.

The restraints at issue are clearly anticompetitive and adversely impact consumers. They illustrate what I have said a thousand times: it is government that is the primary source of restraints on competition.

Nevertheless, I continue to believe that this harmful effect on consumers does not allow us to strike down anticompetitive state activities that are protected by the "state action" doctrine. I reiterate my conclusion that the Commission lacks the authority to promulgate the Ophthalmic Practice Rule.

[FR Doc. 89–5429 Filed 3–10–89; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 240, 249, 270, and 274

[Release Nos. 33-6823; 34-26589; IC-16845; FR-35; File No. S7-8-88]

Reporting Requirements for Issuer's Change of Fiscal Year; Financial Reporting Changes; Period To Be Covered by First Quarterly Report After Effective Date of Initial Registration Statement

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Securities and Exchange Commission ("Commission") today announced the adoption of amendments to Regulations 13A and 15D under the Securities Exchange Act of 1934 that revise the reporting and filing requirements when a domestic or foreign private issuer changes its fiscal year end or a successor issuer has a different fiscal year than its predecessor. The Commission also is adopting amendments to Form 8-K to require reporting of a change in fiscal year. New Rule 30b1-3 under the Investment Company Act of 1940 is being adopted to govern the reporting requirements for investment companies that change their fiscal year end. In addition, a new accounting Rule 3-06 and other amendments to the accounting and proxy rules relating to financial reporting are being adopted. Finally, the Commission is adopting amendments to the quarterly reporting rules that modify the period to be covered in a new registrant's first quarterly report.

EFFECTIVE DATE: April 12, 1989. The amendments to Exchange Act Rules 12b-25, 13a-10, and 15d-10, Forms 8-K, 10-K, 10-Q, 20-F, 12b-25, and N-SAR, and new Investment Company Act Rule 30b1-3 are effective for an issuer's decision to change a fiscal year end made on or after April 12, 1989. All other amendments are effective for filings made on or after April 12, 1989.

FOR FURTHER INFORMATION CONTACT: Howard P. Hodges or Joseph S. Aleknavage, (202) 272-2553, Office of the Chief Accountant of the Division of Corporation Finance, or Barbara J. Green, (202) 272-2589, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. After the effective date, contact Joseph S. Aleknavage, (202) 272-2553, Office of the Chief Accountant of the Division of Corporation Finance, or Emanuel D. Strauss or Mark W. Green, (202) 272-2573, Office of Chief Counsel, Division of Corporation Finance. With respect to investment companies, contact Lawrence A. Friend, (202) 272-2106, Office of Disclosure, Division of Investment Management.

SUPPLEMENTARY INFORMATION: The Commission today announced the adoption of amendments to Rules 12b-25,[1] 13a-10,[2] 13a-13,[3] 14a-3,[4] 15d-10,[5] and 15d-13 [6] under the Securities Exchange Act of 1934 ("Exchange Act"),[7] as well as revisions to Forms 8-K,[8] 10-K,[9] 10-Q,[10] 20-F,[11] and 12b-25.[12] The Commission also is adopting a new accounting Rule 3-06 and amendments to Rule 3-12 [13] of Regulation S-X.[14] With respect to investment companies, new Rule 30b1-3 and amendments to Rules 8b-16 [15] and 30b1-2 [16] and Form N-SAR [17] under the Investment Company Act of 1940 ("Investment Company Act") [18] are being adopted.

I. Executive Summary

A. The Proposals

On June 2, 1988 the Commission issued a release proposing amendments to Exchange Act Rules 13a-10 and 15d-10, which set forth reporting requirements applicable when an issuer changes its fiscal year end.[19] The proposals were designed to update the rules, integrate them with other current periodic reporting requirements, codify staff rule interpretations, and clarify issuers' quarterly reporting obligations in change of fiscal year circumstances. The Commission also proposed a new item to Form 8-K to require reporting of a change in fiscal year and a new Investment Company Act rule to govern the reporting requirements for investment companies that change their fiscal year end. In addition, to codify staff practices, amendments were proposed to the proxy and accounting rules regarding financial reporting. Proposals also were made to amend the quarterly reporting rules to eliminate a reporting gap by modifying the period for which a new registrant's first quarter report must be filed.

A majority of the commentators on the Proposing Release were accounting firms and an accounting association.[20] All but one of the commentators expressed general support for the proposals, in whole or in part.[21] While commentators generally approved of the revision of issuers' reporting obligations in change of fiscal year circumstances, or codification of staff practices, most also had suggestions on specific aspects of the proposals.

The Commission is adopting the amendments substantially as proposed. The changes from the proposals are mainly in response to commentators' suggestions. All substantive changes from the proposals are noted and explained in the detailed discussion of the amendments in Part II below.

B. The Amendments

Prior to the amendments, Rules 13a-10 and 15d-10 required an issuer changing its fiscal year end to file an "interim report" with the Commission containing financial and other information about the "interim period" from the end of the most recently concluded fiscal year to the opening date of the new fiscal year if that period covered three or more months. Such reports were required to be filed on the form used for the issuer's annual report.

To avoid confusion with other reports, such as quarterly reports, which commonly are referred to as interim reports, under the amendments, interim reports are referred to as "transition reports" and interim periods called "transition periods." The amendments also include the following substantive revisions:

(1) Transition Reporting on Forms 10-Q and 10-K

Separate transition reports are required for all transition periods, except those of one month or less. Issuers will continue to file a transition

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[1] 17 CFR 240.12b-25.
[2] 17 CFR 240.13a-10.
[3] 17 CFR 240.13a-13.
[4] 17 CFR 240.14a-3.
[5] 17 CFR 240.15d-10.
[6] 17 CFR 240.15d-13.
[7] 15 U.S.C. 78a *et seq.*
[8] 17 CFR 249.308.
[9] 17 CFR 249.310.
[10] 17 CFR 249.308a.
[11] 17 CFR 249.220f.
[12] 17 CFR 249.322.
[13] 17 CFR 210.3-12.
[14] 17 CFR 210.1-01-.12-29.
[15] 17 CFR 270.8b-16.
[16] 17 CFR 270.30b1-2.
[17] 17 CFR 274.101.
[18] 15 U.S.C. 80a-1 *et seq.*
[19] Release No. 33-6778 (June 2, 1988) (53 FR 21670) ("Proposing Release"). Attention is directed to the Proposing Release for a detailed discussion of the proposals and their objectives.

[20] The nine comment letters received are available for public inspection and copying at the Commission's Public Reference Room (File No. S7-8-88). The commentators included five accounting firms, one accounting association, one bar association, one law firm, and one public utility holding company.

[21] The other commentator made recommendations on specific parts of the proposals but expressed neither general support nor opposition to the proposals.

report on the annual reporting form, usually Form 10–K, including audited financial statements, for transition periods of six or more months. For a transition period shorter than six months, issuers are given an option to file a transition report on either Form 10–Q, including unaudited financial statements, or Form 10–K, including audited financial statements. Information for a transition period of one month or less may be included in the issuer's report on Form 10–Q for the first quarter of the newly adopted fiscal year that ends after the date on which the issuer determined to change its fiscal year, if separate audited statements of income and cash flows covering the transition period are filed with the first annual report for the newly adopted fiscal year. If the issuer's next report is the first annual report for the newly adopted fiscal year, instead of a quarterly report, a transition period of one month or less may be covered in that annual report.

(2) Conforming the Filing Requirements of Transition Reports to the Current Requirements for Forms 10–Q and 10–K

To conform to the current filing periods for reports on Forms 10–K and 10–Q, the filing period for transition reports on Form 10–K is 90 days after the close of the transition period or the date of the determination to change the fiscal year, whichever is later, and for transition reports on Form 10–Q 45 days after the later of these two events.

(3) Codification of Staff Rule Interpretations of the Quarterly Reporting Requirements When an Issuer Changes Its Fiscal Year End

Consistent with staff practice, issuers will continue to have the option of filing quarterly reports for the transition period on the basis of either the old or new fiscal year. Also, consistent with staff rule interpretations, issuers, in most cases, will continue to be required to file a quarterly report for any quarter of the old fiscal year that ended before the date of the issuer's determination to change its year end. The amendments specify that the requirement to file quarterly reports on the new basis begins with the first quarter in the new fiscal year that ends after the issuer determined to change its year end.

(4) Clarification of Transition Reporting for Successor Issuers

Amendments to Rules 13a–10 and 15d–10 require transition reporting for all successor issuers, but only where they have a different fiscal year end from that of the predecessor. Successor issuers are required to file a transition report concerning the predecessor for any transition period between the close of the fiscal year covered by the last annual report of the predecessor and the date of succession. For a transition period of six or more months, the successor issuer must file the transition report on Form 10–K, including audited financial statements. For a transition period of less than six months, the successor issuer may opt instead to file the transition report on Form 10–Q, including unaudited financial statements. Just as for changes in fiscal year, where the transition period is one month or less, the successor issuer need not file a separate transition report, provided that the required information for the transition period is contained in a subsequent quarterly report, or if the next report is an annual report, in that annual report.

(5) Separate Transition Reporting Rules for Foreign Private Issuers

Separate provisions require a foreign private issuer with a transition period longer than six months to file a Form 20–F containing responses to all items required when the Form is used as an annual report, and including audited financial statements. For a transition period of six or fewer months, a foreign private issuer may opt instead to file a transition report on Form 20–F that includes responses to only a limited number of specified items and unaudited financial statements. Where the transition period is one month or less, a foreign private issuer is not required to file a separate transition report if the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year.

(6) Reporting a Change in Fiscal Year on Form 8–K

New Item 8 of Form 8–K requires an issuer to report its new fiscal year end, the Form (10–K or 10–Q) on which the report covering the transition period will be filed, and the date of the determination to change its fiscal year end. The Form 8–K must be filed within 15 days after that date.

(7) Specific Provisions Regarding Filing Fees and Extensions of Time

No filing fee is required for transition reports. Amended Rule 12b–25 and amended Form 12b–25 add transition reports to those reports for which an extension of time for filing is available.

(8) Separate Rule for Transition Reporting of Investment Companies

New Investment Company Act Rule 30b1–3 provides transition reporting requirements specifically tailored to the semi-annual and annual reporting obligations of investment companies. The new Rule codifies the staff practice of requiring investment companies that change their fiscal year end to file a report on Form N–SAR within 60 days of either the close of the resulting transition period or the date of the determination to change the fiscal year end, whichever is later.

(9) Codification of Staff Practice of Permitting Reliance on Nine Months Statements

New accounting Rule 3–06 and a parallel note to Rule 14a–3(b)(1) [22] of the proxy rules codify the staff practice of accepting, under specified circumstances such as a change in fiscal year, financial statements covering a 9 to 12 month period in satisfaction of a requirement for financial statements for either one year or one year of a multiple year period.

(10) Codification of Staff Practice on Age of Audited Financial Statements in A *First-Time Registrant's Registration Statement*

To assure that timely financial statements for first-time registrants are available, amended accounting Rule 3–12 codifies the staff practice of requiring that the most recent audited financial statements in a registration statement under the Securities Act of 1933 ("Securities Act") [23] or on Form 10 [24] filed by a non-reporting company be no more than 1 year and 45 days old.

(11) Period to be Covered by First Report on Form 10–Q for First-Time Registrants

To avoid reporting gaps, amended Rules 13a–13 and 15d–13 governing quarterly reporting require a new registrant to file its first report on Form 10–Q for the first fiscal quarter following the most recent fiscal year or full quarter for which financial statements were included in its registration statement.

Examples illustrating the application of the amendments to typical reporting situations are contained in the Appendix in Part V of this Release. The examples have been modified where appropriate to reflect changes from the proposals.

[22] 17 CFR 240.14a–3(b)(1).

[23] 15 U.S.C. 77a *et seq.*

[24] 17 CFR 249.210.

II. Discussion

A. Reporting Fiscal Year Changes

1. Transition Reporting on Forms 10–Q and 10–K

The Commission is adopting amendments to Rules 13a–10 and 15d–10 [25] requiring an issuer to file separate transition reports for all transition periods, except those of one month or less. Under the prior rules, a separate transition report was not required for a transition period shorter than three months. In the Proposing Release, the Commission solicited comment on a proposed requirement of separate transition reports for all transition periods, including transition periods shorter than three months. Three commentators criticized the proposed requirement as not useful, necessary or justified by the costs, and recommended that information on such shorter transition periods be included in the issuer's next report on Form 10–Q.

The Commission has decided not to require a separate transition report for transition periods of one month or less. Where the transition period is one month or less, the Commission believes that the cost associated with filing a separate report for such a short time span outweigh the limited benefit of such reports to investors.[26] The amendments instead permit information about a transition period of one month or less to be included in the issuer's report on Form 10–Q for the first quarter of the newly adopted fiscal year that ends after the date on which the determination was made to change the fiscal year.[27] If the issuer's next report is the first annual report for the newly adopted fiscal year, the transition period may be covered in that annual report.

Separate transition reports are required for all transition periods longer than one month. As the transition period becomes longer, the investor's interest in the prompt disclosure of financial information about the transition period increases. The Commission believes that requiring transition reports for all transition periods longer than one month strikes the appropriate balance between the investment community's need for disclosure and the desire of issuers to minimize the costs of compliance.

Under the amendments, as under the prior rules, use of Form 10–K will continue to be required for transition reports for transition periods of six or more months.[28] For transition periods shorter than six months, amended Rules 13a–10 and 15d–10 give issuers the option to file transition reports on either Form 10–Q, including unaudited financial statements, or Form 10–K, including audited financial statements.[29] All information requested in the textual items of the reporting forms, as well as the required financial information, must be provided. Technical changes are being adopted, as proposed, to make the descriptions and cover sheets of and General Instructions to Forms 10–K and 10–Q consistent with the amendments.

In the Proposing Release, comment was invited on the six month cutoff. The three commentators addressing the six month cutoff favored it.[30] While the proposals would have required use of Form 10–Q for transition periods shorter than six months, two commentators favored affording issuers an option to file on either Form 10–Q or Form 10–K for such shorter transition periods so that issuers could furnish audited financial statements in the first instance. The Commission has adopted this suggested option, enabling issuers that opt to use Form 10–K to avoid the possibility of later revisions of previously published unaudited financial statements for the transition period.

Because the amendments afford issuers the option to use Form 10–K or 10–Q, the Commission has added a requirement, not contained in the proposals, that an issuer state in its Form 8–K reporting the change in fiscal year the Form (Form 10–Q or 10–K) on which the report covering the transition period will be filed.[31] This requirement will enable investors and the Commission staff to determine when information on the transition period will be available.

2. Filing Requirements for Transition Reports

To parallel the current filing requirements for Form 10–K, the amendments change the time for filing a transition report on Form 10–K from 120 to 90 days after the close of the transition period or the date of the determination to change the fiscal year, whichever is later.[32] The 90 day filing period applies to all transition reports filed on Form 10–K, regardless of the length of the transition period, and should give issuers sufficient time to have audited financial statements prepared covering transition periods of any length. To parallel the current filing requirements for Form 10–Q, an issuer that chooses to file a separate transition report on Form 10–Q must file that report within 45 days after the later of the close of the transition period or the date of the determination to change the fiscal year.[33]

3. Requirements for Changing a Fiscal Year After the Year End

Amended Rules 13a–10(a) and 15d–10(a) codify current staff rule interpretations by requiring an issuer to file an annual report for any fiscal year that ended before the date on which the issuer determined to change its fiscal year end. An issuer is required to report this date in the Form 8–K reporting its change in fiscal year.[34] In most cases, the date would be evidenced by minutes of the issuer's board of directors or an authorized committee thereof.[35] The amendments also codify the staff interpretive position that a transition report can be used only for periods of less than 12 months. Transition reports are not permitted for periods longer than 12 months because of the difficulties of constructing data for comparable periods that would be useful in understanding trends in a business.

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[25] Rule 13A–10 applies to issuers with securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*). Rule 15d–10 applies to issuers with securities registered under the Securities Act and filing Exchange Act reports pursuant to section 15(d) of the Exchange Act (15 U.S.C. 88o(d)).

[26] A change from a fiscal year ending as of the last day of the month to a 52–53 week fiscal year commencing within seven days of the month end (or from a 52–53 week to a month end) is not deemed a change in fiscal year for purposes of reporting subject to Rule 13a–10 or 15d–10 if the new fiscal year commences with the end of the old fiscal year. In such cases, a transition report would not be required. Either the old or new fiscal year could, therefore, be as short as 359 days, or as long as 371 days (372 is a leap year).

[27] *See* Part II.A.4., *infra*, amended Rules 13a–10(d) and 15d–10(d), and Appendix Examples 1.a. & 1.e.

[28] *See* amended Rules 13a–10(b) and 15d–10(b) and Appendix Examples 1.d., 1.g., & 1.h.

[29] *See* amended Rules 13a–10(c) and 15d–10(c) and Appendix Examples 1.b., 1.c., & 1.f.

[30] With a six month cutoff, the amendments allow 17 months between filing audited financial statements in the case where an issuer changes its fiscal year end with a resulting transition period of five months. For example, an issuer with a December 31 year end that changes its fiscal year in 1990 to May 31, 1990 will be permitted to file a Form 10–Q, including unaudited financial statements, covering the transition period from January 1, 1990 through May 31, 1990. The issuer will not be required to file audited financial statements until August 29, 1991, the due date for its next annual report covering the newly adopted fiscal year from June 1, 1990 through May 31, 1991. Compliance with the requirements for financial statements under the transition reporting rules will be deemed to satisfy the updating obligations under section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)].

[31] For a discussion of new Item 8 of Form 8–K, *see* II.A.8., *infra*.

[32] *See* amended Rules 13a–10(b) and 15d–10(b).

[33] *See* amended Rules 13a–10(c) and 15d–10(c).

[34] *See* discussion of new Item 8 of Form 8–K at II.A.8., *infra*.

[35] Other evidence of the date could include a contemporaneous public announcement or press release.

4. Financial Reporting Requirements for Transition Periods

Under the amendments, financial statements in transition reports on Form 10–K must be audited. In contrast, unaudited financial statements are permitted in transition reports on Form 10–Q.

Under the amendments, a transition report on Form 10–K must include either financial statements, which may be unaudited, for the comparable period of the prior year, or a footnote, which may be unaudited, giving specified information for the comparable period of the prior year.[36] The prior year footnote information must state, at a minimum, revenues, gross profits, income taxes, income or loss from continuing operations before extraordinary items and cumulative effect of a change in accounting principles, and net income or loss. The effects of any discontinued operations and/or extraordinary items as classified under the provisions of generally accepted accounting principles also must be shown, if applicable. Per share data based upon such income or loss and net income or loss is required to be presented in conformity with applicable accounting standards.[37]

One commentator recommended that the amendments address whether the financial statements or footnote information for the comparable period of the prior year must be included in subsequent filings. The amendments as adopted have been changed to specify that, where called for by the time span covered, subsequent filings must include such statements or information.

Consistent with existing requirements for Form 10–Q, a transition report on Form 10–Q also is required to include financial information about the comparable period of the prior year.[38] As suggested by one commentator, the amendments as adopted state that schedules need not be filed in transition reports on Form 10–Q.[39] When an issuer files a transition report on Form 10–Q, separate audited statements of income and cash flows covering the transition period are required to be filed as part of the first annual report for the newly adopted fiscal year.[40] The annual report also must contain a separate audited balance sheet for a transition period of less than six months, if an audited balance sheet as of the end of the prior fiscal year is not filed. Further, the amendments specify that notes to the financial statements for the transition period included in the annual report may be integrated with the notes for the full fiscal period.

As discussed above, pursuant to amended Rule 13a–10(d) or 15d–10(d), in specified circumstances, an issuer may include information about a transition period of one month or less in its first quarterly report on Form 10–Q for the newly adopted fiscal year after the date of determination to change its year end, rather than in a separate transition report. If this is done, the financial statements required by Part I, which may be unaudited, must be furnished separately for the transition period as part of the Form 10–Q.[41] In addition, the issuer must file with the first annual report of the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period. If the issuer's next report is a Form 10–K rather than a Form 10–Q, all of the required information for the transition period must be included in the Form 10–K.

Commentators asked for clarification of the application of the requirements of Item 303, "Management's Discussion and Analysis of Financial Condition and Results of Operations," [42] of Regulation S–K [43] to transition periods. Consistent with new Rule 3–06 of Regulation S–X, as discussed below,[44] for a transition period of nine or more months, the information for full fiscal years set forth in Item 303(a) [45] will be required. For transition periods shorter than nine months, the information for interim periods set forth in Item 303(b) [46] will be required.

Similarly, when responding to Item 301 of Regulation S–K, "Selected Financial Data," [47] a transition period of nine or more months will be deemed to meet the requirement for one year of selected financial data if the data for all other periods covers the full time span required to be reported. Transition periods of less than nine months may be shown in the table of selected financial data for the last five fiscal years of the issuer (or for the life of the issuer if less) or may be shown in a footnote. The table of selected financial data should report on all periods within the time span for which information is required to be furnished, including any transition periods.

5. Quarterly Reporting When an Issuer Changes Its Fiscal Year

The amendments to Rules 13a–10 and 15d–10 are intended to clarify the requirements for filing quarterly reports in change of fiscal year circumstances.[48] The amendments codify the current staff practice of requiring issuers to file quarterly reports during the transition period. Under the amendments, companies continue to have the option of filing such quarterly reports based on the quarters of either the old or newly adopted fiscal year.[49] Under either option, an issuer still is required to file a quarterly report for any quarter of the old fiscal year that ended before the date on which the issuer determined to change its fiscal year end, except where the last day of the quarter also is the last day of the transition period.[50]

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[36] *See* amended Rules 13a–10(b) and 15d–10(b).

[37] The prior year footnote information tracks Rule 1–02(aa)) of Regulation S–X (17 CFR 210.1–02(aa), except that disclosure of income taxes is required under the amendments because such information is pertinent to understanding the fluctuations in earnings and earnings trends.

[38] *See* II.A.5., "Quarterly Reporting When an Issuer Changes Its Fiscal Year," *infra*, for a discussion of the new Note to paragraphs (c) and (e) of Rules 13a–10 and 15d–10 that addresses difficulties in providing comparable period financial information.

[39] However, schedules for such transition periods are required to be filed in subsequent annual reports on Form 10–K pursuant to Rules 5–04 (17 CFR 210.5–04), 7–05 (17 CFR 210.7–05), and 9–07 (17 CFR 210.9–07) of Regulation S–X where the income statements covering the transition period are required to be audited.

[40] *See* amended Rules 13a–10(c) and 15d–10(c).

[41] The information covering the transition period required by Part II and Item 2 of Part I, "Management's Discussion and Analysis of Financial Condition and Results of Operations," may be combined with the information regarding the quarter.

[42] 17 CFR 229.303.

[43] 17 CFR 229.10–.802.

[44] *See* "Amendments to the Accounting and Proxy Rules to Permit Reliance on Nine Month Statements," Part II.B.1., *infra*.

[45] 17 CFR 229.303(a).

[46] 17 CFR 229.303(b).

[47] 17 CFR 229.301.

[48] *See* amended Rules 13a–10(e) and 15d–10(e).

[49] *See* amended Rules 13a–10(e)(2) and 15d–10(e)(2). Thus, an issuer with a December 31 year end that decides on February 1, 1990 to change its year end to October 31, 1990 has the option of filing quarterly reports either for the quarters of the old fiscal year ending March 31, June 30, and September 30, 1990 or for the periods coinciding with quarters of the new fiscal year ending January 31, April 30, and July 31, 1990. If the same issuer had decided on June 1, 1990 to change its year end to October 31, 1990, the issuer already would have filed a quarterly report for the quarter ending March 31, 1990 but still would have the option to file the quarterly reports either for the quarters of the old fiscal year ending June 30 and September 30, 1990 or for the period coinciding with the quarter of the new fiscal year ending July 31, 1990.

[50] *See* amended Rules 13a–10(e)(1) and 15d–10(e)(1). For example, an issuer with a December 31 year end that decides on October 15, 1990 to change its year end to November 30, 1990 is required to file by November 14, 1990 a quarterly report on Form 10–Q for the quarter ending September 30, 1990 of the old fiscal year. If the same issuer decided on October 15, 1990 to change its year end to September 30, 1990, the issuer is not required to file a quarterly report on Form 10–Q for the quarterly period ending September 30, 1990 of the old fiscal year, because the last day of the quarter would be the same as the last day of the transition period. In

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The amendments also specify the time by which an issuer must begin filing quarterly reports on the basis of the newly adopted fiscal year. An issuer is required to begin filing quarterly reports on the new basis with the quarterly report for the first quarter of the new fiscal year ending after the issuer determined to change its fiscal year end.[51] With respect to quarterly periods ending before the issuer's determination to change its year end, no reporting on the new basis is required.

The switch in quarterly reporting from the old to the new fiscal year may result in a period of less than three months that is not covered by a separate report on Form 10–Q. The Proposing Release stated that such a period would be covered on a cumulative basis in the next report on either Form 10–Q, Form 10–K or in a transition report, depending on when the switch occurred. One commentator noted that, under the proposals, the disclosure of some non-financial information about such a period might not be required in the next Form 10–Q and thus might be delayed, and further that it might be difficult for investors to derive financial information about such a period from cumulative financial information disclosed in the next Form 10–Q or other later reports.

The amendments as adopted have been modified to specify that, unless such a period of less than three months is or will be covered in the issuer's transition report or in the first annual report on Form 10–K for the newly adopted fiscal year, information (*e.g.*, legal proceedings, changes in securities) about such period must be included in the issuer's initial report on Form 10–Q for the newly adopted fiscal year.[52] Separate financial statements covering such period, which may be unaudited, must be furnished therewith.[53] These modifications do not require any additional reports, only that the financial information also be set out separately, and not just cumulatively.

The amendments also specify when recasting of prior year quarterly financial information is not required for an issuer that changes to a new fiscal year end that does not coincide with the end of a quarter of the previous fiscal year. A new Note to paragraphs (c) and (e) of Rules 13a–10 and 15d–10 permits an issuer to file quarterly reports for the quarters of the new fiscal year without recasting data for the prior fiscal year, where recasting either is not practicable or cannot be cost-justified, if the issuer furnishes (1) financial statements for the quarters of the preceding fiscal year most nearly comparable to the quarters in the newly adopted fiscal year; (2) an adequate discussion of seasonal and other factors that could affect the comparability of information or trends reflected; (3) an assessment of the comparability of the data; and (4) a representation as to the reason the recasting has not been undertaken. The Note also applies to prior year information in transition reports on Form 10–Q.[54]

6. Transition Reporting for Successor Issuers

Amended Rules 13a–10(f) and 15d–10(f) specify transition reporting requirements for successor issuers with a different fiscal year end from that of the predecessor. No transition report is required where the successor issuer and the predecessor have the same fiscal year end. Under such circumstances, the successor issuer continues to report on the same reporting schedule as that of the predecessor.[55]

While former Rule 13a–10 specified reporting requirements only for successor issuers with securities registered on Form 8–B,[56] the amendments cover all successor issuers.[57] Although former Rule 15d–10 had no provision covering transition reporting for successor issuers, the amendments add such a provision to cover companies with reporting obligations pursuant to section 15(d).[58]

Under the amendments, the transition reporting requirements for successor issuers correspond generally to the transition reporting rules applicable when other issuers change their fiscal year. The principal difference is the period to be covered in the transition report. The period to be reported on by a successor issuer ends on the date of the succession, rather than on the day prior to the beginning of the newly adopted year, in order to reflect the predecessor's operations separately from those of the successor.[59]

For a transition period of six or more months, the amendments require a successor issuer to file a transition report on Form 10–K, including audited financial statements, within 90 days after the date of the succession.[60] For a transition period shorter than six months, the successor issuer has the option to file the transition report on either Form 10–K, including audited financial statements, within 90 days after the date of the succession, or Form 10–Q, including unaudited financial statements, within 45 days after the date of the succession.[61] If the transition report is filed on Form 10–Q, the next annual report of the successor issuer must include audited statements of income and cash flows for the transition period. For a transition period of one month or less, no separate transition report is required, provided that information on the transition period is included in the successor issuer's report on Form 10–Q for the first quarter that ends after the date of the succession, or if the successor issuer's next report is an annual report, in that annual report.

These amendments, which give an issuer the option to use either Form 10–K or Form 10–Q for transition periods

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the event, a transition report on Form 10–K is required to be filed within 90 days after October 15, 1990 to cover the transition period from January 1, 1990 through September 30, 1990.

[51] See amended Rules 13a–10(e)(3) and 15d–10(e)(3). In the first example in footnote 50, a Form 10–Q is required for the first quarter (ending February 28, 1991) of the new fiscal year.

[52] The information covering the transition period required by Part II and Item 2 of Part I, "Management's Discussion and Analysis of Financial Condition and Results of Operations," may be combined with the information regarding the quarter.

[53] *See* amended Rules 13a–10(e)(4) and 15d–10(e)(4) and Appendix Example 1.e. For example, an issuer with a December 31 year end decides on June 1, 1990 to change its year end to October 31, 1990 and begins filing quarterly reports based on the quarters of the new fiscal year with the quarterly report for the quarter ending July 31, 1990. Under the amendments, the period from April 1 through April 30, 1990 would not be covered by a separate report on Form 10–Q. That period would be required to be covered in the quarterly report filed for the quarter ending July 31, 1990, and separate financial statements covering April 1 through April 30, 1990 would be required to be filed with that quarterly report.

[54] The amendments do not require an issuer that decides to change its year end after having filed quarterly reports based on the old fiscal year to file new Form 10–Qs for those quarters of the new fiscal year already concluded. However, pursuant to Item 302(a)(5) of Regulation S–K [17 CFR 229.302(a)(5)], specified issuers must provide selected financial data for each full quarter of the two most recent fiscal years in their annual reports on Form 10–K. Accordingly, the first annual report on Form 10–K of such an issuer after a fiscal year change would be required to contain historical quarterly information on the basis of the new fiscal year.

[55] *See* Rules 12g–3 (17 CFR 240.12g–3) and 15d–5 (17 CFR 240.15d–5).

[56] 17 CFR 249.208b. Form 8–B is a registration form principally used for the securities of an issuer that has no registered securities but has succeeded to an issuer with registered securities.

[57] Thus, successions reported on Form 8–K, as well as on Form 8–B, are covered. *See* Release No. 34–9072 (February 10, 1971) (36 FR 3804). Rule 12b–2 (17 CFR 240.12b–2) defines succession and, correlatively, successor.

[58] *See* amended Rule 15d–10(f).

[59] Where the successor issuer and the predecessor have a different fiscal year end and the succession is solely for the purpose of forming a holding company or changing the state of incorporation, the succession will be viewed as any change in fiscal year and not subject to the provisions of amended Rules 13a–10(f) and 15d–10(f).

[60] *See* amended Rules 13a–10(f) and 15d–10(f) and Appendix Example 2.b.

[61] *See* amended Rules 13a–10(f) and 15d–10(f) and Appendix Example 2.a.

shorter than six months, differ from the proposals, which would have required a successor issuer to file a transition report on Form 10–Q for such shorter transition periods. Like the option afforded other issuers that change their fiscal year, the option is available to successor issuers so that they may furnish audited financial statements covering the transition period in the first instance, and avoid the possibility of revision in a later audit of previously released unaudited financial information about the transition period.[62]

7. Transition Reporting for Foreign Private Issuers

The Commission is adopting separate transition reporting provisions for foreign private issuers. The separate provisions provide specific guidelines for foreign private issuers in change of fiscal year circumstances and are consistent with other separate reporting requirements and separate reporting forms for such issuers. In addition, given the varied reporting requirements and practices in foreign jurisdictions, in appropriate cases, the Commission staff will consider requests to modify the transition reporting requirements for foreign private issuers to take account of varying domicile country reporting requirements and practices.

Under amended Rules 13a–10(g) and 15d–10(g), a foreign private issuer is required to file a Form 20–F to report on all transition periods, except those of one month or less. Where the transition period is longer than six months, such issuer is required to file a transition report on Form 20–F that contains responses to all items required when the form is used as an annual report and includes audited financial statements.[63] For transition periods of six or fewer months, the amendments give a foreign private issuer an option similar to that given domestic issuers. The foreign private issuer may file its transition report on Form 20–F, either with responses to all items required when Form 20–F is used as an annual reporting form and including audited financial statements, or, in the alternative, with responses to a limited number of specified items and including unaudited financial statements.[64] The Commission has determined not to require a foreign private issuer to file a separate transition report for a transition period of one month or less if the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year. As with domestic issuers, the costs associated with filing separate transition reports for such limited periods of one month or less are not justified by the minimal benefit to investors.

In the Proposing Release, the Commission proposed the same cutoff for foreign private issuers as domestic issuers. The Commission, however, has determined to adopt for foreign private issuers a different cutoff from that used for domestic issuers. While domestic issuers have the option to file transition reports on Form 10–Q with unaudited financial statements only for transition periods shorter than six months, foreign private issuers have the option of filing an abbreviated Form 20–F with unaudited financial statements for transition periods of six or fewer months. The different cutoff for foreign private issuers is adopted to be consistent with the reporting practices of some foreign private issuers, which develop interim financial statements that cover semi-annual periods pursuant to the laws or practices of their domicile country or rules of exchanges upon which their securities are traded.[65]

Under the amendments, a transition report on Form 20–F with responses to only the selected items and unaudited financial statements is required to be filed within three months after the close of the transition period or the date of the determination to change the fiscal year, whichever is later. A transition report on Form 20–F with responses to all items required when the form is used as an annual report and including audited financial statements must be filed within six months after the later of these two events. This six-month filing period parallels the filing period for annual reports on Form 20–F.

In the Proposing Release, the Commission solicited comment on whether foreign private issuers should be excused from providing unaudited financial statements in transition reports if they are not required to develop such statements under the laws or practices of their domicile country, or any exchange upon which their securities trade. While two commentators agreed with the exception, the Commission is not adopting the exception as part of Rules 13a–10(g) and 15d–10(g). Because the financial reporting practices of foreign private issuers vary, the Commission had determined that requests for such an exception will be considered by the staff in appropriate circumstances, particularly where an issuer can demonstrate that developing such financial data would not be practicable or cost-justified.[66]

8. Reporting Fiscal Year Changes on Form 8–K

The Commission also is adopting amendments to require an issuer to report on a Form 8–K its decision to adopt a new fiscal year in response to a new Item 8. Formal notice of a change in reporting periods should eliminate confusion and misapprehension as to the reasons for issuer's financial reports not being filed and provide an orderly and reliable mechanism for getting news of the change to investors.

Under the amendments, the issuer must report both the date of its determination to change its fiscal year end and the date of its new fiscal year end.[67] In addition, to accommodate the option to file either a Form 10–K or Form 10–Q covering a transition period shorter than six months,[68] the amendments as adopted are modified to require the issuer to state in its Form 8–K the particular Form on which the report covering the transition period will be filed. This information should be available at the time of filing the Form 8–K because of the planning required for an audit.[69] The report on Form 8–K must

[62] Other current reporting requirements for successor issuers and the Division's current interpretive positions respecting disclosures by successor issuers are not affected. As noted in the Proposing Release, when there is a change in accounting basis between the successor and predecessor, the quarterly or annual report for the period in which the succession occurs is required to present separately the statements of income and cash flows to reflect the periods prior and subsequent to the succession.

[63] Form 20–F generally is used by foreign private issuers as a registration statement, as well as an annual report. General Instruction G(b) of Form 20–F specifies that an annual report on Form 20–F shall include the information specified in Parts I, III and IV of the Form.

[64] The items, which cover most of the subjects covered in a Form 10–Q, are: Item 3, "Legal Proceedings;" Item 9, "Management's Discussion and Analysis of Financial Condition and Results of Operations;" Item 15, "Defaults Upon Senior Securities;" Item 16, "Changes in Securities and Changes in Security for Registered Securities;" and either Item 17 or 18, "Financial Statements."

[65] *Cf.* Release No. 34–24634 (June 23, 1987) (52 FR 24230) in which the Commission approved proposed rule changes by the American and New York Stock Exchanges permitting the exchanges to waive or modify specified listing standards for foreign securities. The Commission noted that the proposals would permit some foreign companies to report interim earnings on a semi-annual rather than quarterly basis.

[66] *See* Rule 3–13 of Regulation S–X (17 CFR 210.3–13), which allows the Commission to waive the filing of financial statements upon informal written request of an issuer and where consistent with the protection of investors.

[67] *See* discussion of the provisions of changing a fiscal year after the end of that particular year at II.A.3., *supra.*

[68] *See* discussion at II.A.1., "Transition Reporting on Forms 10–Q and 10–K," *supra.*

[69] If the issuer decides later to file the report covering the transition period on a form different from the form specified in its Form 8–K reporting the change in fiscal year, the issuer should file an amended Form 8–K stating the change.

be filed within 15 days after the date of the issuer's determination to change its fiscal year end.

9. Filing Fees and Extensions of Time

Amendments to Rules 13a–10 and 15d–10 make it explicit that no filing fee is required for a transition report.[70] Amendments to Rule 12b–25, Form 12b–25, and the description of the Form also are being adopted that add transition reports to those reports for which an extension of time for filing is available.[71] Consistent with the extension periods for Forms 10–K and 10–Q, the extension for a transition report on Form 10–K or 20–F is 15 calendar days after the due date and extension for a transition report on Form 10–Q is five calendar days after the due date.

10. Transition Reporting for Investment Companies

Instead of filing annual and quarterly reports on Forms 10–K and 10–Q, registered management investment companies file semi-annual reports on Form N–SAR, while unit investment trusts file only annual reports on Form N–SAR.[72] Therefore, the Commission is (1) exempting registered investment companies from Rules 13a–10 and 15d–10,[73] and (2) adopting a new Rule under the Investment Company Act specifying their transition reporting obligations.[74] The new Rule requires investment companies that change their fiscal year end to file a report on Form N-SAR within 60 days after either the close of the resulting transition period or the date of the determination to change the fiscal year end, whichever is later.[75]

Under the amendments, the transition report filed by a management investment company must cover a period no longer than six months, which is the period ordinarily covered by a report on Form N–SAR.[76] The new Rule does not specify the period the transition report must cover and, in certain circumstances, an investment company has a choice between two periods.[77] Like the amendments to Rules 13a–10 and 15d–10, new rule 30bl–3 specifies that no filing fee is required for a transition report.[78]

B. Other Financial Reporting Changes

1. Amendments to the Accounting and Proxy Rules to Permit Reliance on Nine Month Statements

The Commission is adopting new Rule 3–06 of Regulation S–X, which provides that, where the issuer has changed its fiscal year, the filing of financial statements covering a period of nine to 12 months will be deemed to satisfy a requirement for one year of financial statements.[79] The new Rule also provides that, where there is a requirement for filing financial statements for a multiple year period that does not exceed three consecutive years,[80] the filing of financial statements that include one period of nine to 12 months will be deemed to satisfy a filing requirement of one year, if for all other years in the time period financial statements covering the full years are provided.[81] The new Rule applies to financial statements in proxy and information statements, registration statements and Exchange Act reports. A parallel provisions is added to the proxy rules in the form of a new Note 2 to Rule 14a–3(b)(1).[82] The note, which tracks the language of new Rule 3–06,[83] provides that separate audited financial statements covering two years and one period of nine to twelve months fulfill the requirement for statements of income and cash flows for the three most recent fiscal years.[84] Registered investment companies, however, are not covered by the proposed new Rule and Note because they are subject to different reporting requirements.[85]

2. Amendment to Rule 3–12

To assure more timely financial statements of first-time issuers, the Commission is adopting an amendment to Rule 3–12 of Regulation S–X.[86] The amendment, which codifies staff practice, specifies that the registrant's most recent audited financial statements in a registration statement filed under the Securities Act or on Form 10 under the Exchange Act that relates to the securities of a non-reporting issuer may not be more than one year and 45 days old at the date of effectiveness of the registration statement.[87] Prior to the amendments, by changing its fiscal year end, an issuer that was not a reporting company before filing a registration statement could have attempted to file and have declared effective a registration statement with financial

[70] *See* amended Rules 13a–10(i) and 15d–10(i).

[71] *See* amended Rule 12b–25(a) and (b)(2)(ii).

[72] *See* Rules 30a–1 and 30bl–1 under the Investment Company Act (17 CFR 270.30a–1 and 270.30bl–1). Form N–SAR is filed under both the Exchange Act and the Investment Company Act.

[73] *See* amended Rules 13a–10(h) and 15d–10(h).

[74] *See* new Investment Company Act Rule 30bl–3. Investment companies electing to be regulated as business development companies must comply with the Exchange Act periodic reporting requirements applicable to entities other than investment companies, including the filing of Forms 10–K and 10–Q. Accordingly, such companies are subject to the provisions of Exchange Act Rules 13a–10 and 15d–10 rather than new Investment Company Act Rule 30bl–3.

[75] Investment companies filing Form N–SAR must do so within 60 days of the end of the reporting period. *See* Rule 30bl–1.

[76] The rule does not provide for a transition report for unit investment trusts which, regardless of their fiscal year ends, are required to file Form N–SAR for a 12-month period ending December 31.

[77] A management investment company making a determination on January 15 to change its fiscal year end from December 31 to February 28 cannot file a report for the period from July 1 to February 28 because the period would be longer than six months. Rather, the investment company must file a report, no later than 60 days after January 15, either (1) covering the transition period beginning July 1 and ending August 31 or (2) covering the period from July 1 to December 31, and then file, no later than 60 days after February 28, a report for the transition period from January 1 to February 28.

[78] Form N–SAR is amended to provide an instruction for transition reporting. In addition, the Commission is adopting technical amendments to Rules 8b–16 and 30bl–2 and Form N–SAR under the Investment Company Act to correct erroneous references to Rule 30bl–3. The references are changed to Rule 30b1–1 which, until 1985, was designated as Rule 30bl–3. *See* Release No. 33–6591 (July 1, 1985) (50 FR 27940).

[79] See Rule 3–05(b) of Regulation S–X (17 CFR 210.3–05(b)) and Rule 14a–3(b)(1) of the proxy rules. Rule 3–05(b) is referred to in Form 8–K under the Exchange Act and applicable to the Securities Act registration statement forms (except Form S–18 (17 CFR 239.28) and those forms filed by investment companies).

[80] See Rules 3–02(a) (17 CFR 210.3–02(a)) and 3–05(b) of Regulation S–X, Rule 14a–3(b)(1) of the proxy rules, and Item 21(d) of Form S–18. The Securities Act registration statement forms (except Form S–18) and Exchange Act Forms 8–K, 10, and 10–K all require financial statements prepared in accordance with Regulation S–X.

[81] Where there has been a significant acquisition by the issuer, new Rule 3–06 also permits the filing of financial statements of the company being acquired covering a period of nine to 12 months in satisfaction of a requirement for one year of financial statements, if the required financial statements for all other periods cover the full time span. In addition, under the amendments, the filing of financial statements covering a period of nine to 12 months satisfies a requirement for one year of financial statements where the Commission so permits pursuant to Rule 3–13 of Regulation S–X.

[82] This provision also applies to information statements. See Rule 14c–3(a)(1) (17 CFR 240.14c–3(a)(1)), which requires that the information specified in Rules 14a–3(b)(1) through (b)(11) (17 CFR 240.14a–3(b)(1)—(11)) also be given to shareholders who receive information statements.

[83] The wording of the amendment has been changed from the proposals to parallel new Rule 3–06 more closely.

[84] Three commentators raised the issue of restatement of prior period financial statements. As in the past, the staff will continue to accept in annual reports on Form 10–K and annual reports to shareholders the restatement of prior period financial statements to conform with an issuer's newly adopted fiscal year, although such restatement will not be required.

[85] See Rule 3–18 of Regulation S–X (17 CFR 210.3–18).

[86] *See* new paragraph (d); former paragraphs (d) and (e) have been redesignated.

[87] The wording of the amendment has been modified to clarify that the one year and 45 day rule does not apply to financial statements other than those of the registrant.

statements up to 18 and one-half months old.[88]

The amendment applies only to companies not yet in the Exchange Act reporting system because their financial and business history is not available to investors and the marketplace. As noted in the Proposing Release, the one year and 45 day cutoff for the age of non-reporting company financial statements is consistent with those requirements of Rule 3–01 of Regulation S–X that limit the age of the financial statements in a registration statement of a company that previously has not been reporting pursuant to the requirements of the Exchange Act.[89]

C. Quarterly Reporting: First Report to be Filed on Form 10–Q

Finally, the Commission is adopting amendments to Rules 13a–13 and 15d–13 to eliminate any gap in the reporting period between the financial information included in a registration statement and the first report on Form 10–Q.[90] Under the amendments, the requirement to file quarterly reports commences with the first fiscal quarter following the most recent fiscal year or full quarter for which financial statements were included in the registration statement.[91] A first-time registrant is required to file its first Form 10–Q the later of 45 days after the effectiveness of the registration statement, or the date on which such report would have been required to be filed if the issuer had been a reporting company as of its last fiscal quarter. Prior to the amendments, an issuer's first report on Form 10–Q was required to be filed commencing with the first quarter ending after the effective date of its first registration statement.[92]

As is currently the case, first-time registrants generally will continue to be required to commence filing quarterly reports at the time specified, regardless of whether they have operations during this period.[93]

III. Cost-Benefit Analysis

In the Proposing Release, the Commission requested commentators to provide views and data as to the costs and benefits associated with the proposed amendments to Exchange Act Rules 12b–25, 13a–10, 14a–3, and 15d–10, Forms 8–K, 10–K, 10–Q, 20–F, and 12b–25, proposed new Investment Company Act Rule 30b1–3, the proposed amendments to Investment Company Act Rules 8b–16 and 30b1–2 and Form N–SAR, proposed new Rule 3–06 and the proposed amendment to Rule 3–12 of Regulation S–X.

Four commentators expressed views specifically on the costs and benefits associated with the reporting requirements for transition periods shorter than three months. One commentator believed that the requirement of separate transition reports for such shorter transition periods would not be cost beneficial as data concerning such periods would not be accompanied by similar disclosure for comparable historical periods. Another commentator that found the requirement unnecessary stated that the additional costs of such reports would not be substantial, but that the benefits would decrease as the transition period becomes shorter. As noted above in Part II.A.1., the amendments as adopted do not require a separate transition report for transition periods of one month or less.

Two other commentators expressed concerns that the costs of presenting audited financial statements covering shorter transition periods of less than three months in the first annual report of the newly adopted fiscal year would outweigh the benefits because of the short period covered and because such audited financial statements would be over one year old when presented. The amendments have not modified substantially the former rules in this regard.

The Commission also requested views and data as to the costs and benefits associated with amending Rules 13a–13 and 15d–13 to require a new registrant to file its first report on Form 10–Q for the first quarterly period other than the fourth quarter ending after the annual or quarterly period covered by the most recent financial statements included in its effective registration statement. The Commission noted that this revision should benefit investors by providing more timely and complete financial information about a first-time registrant for the period following the latest financial information in an effective registration statement. No comments were received on the costs and benefits associated with these amendments.

IV. Final Regulatory Flexibility Analysis

A Final Regulatory Flexibility Analysis in accordance with 5 U.S.C. 604 has been prepared concerning the proposed amendments to Exchange Act Rules 12b–25, 13a–10, 13a–13, 14a–3, 15d–10, and 15d–13, Forms 8–K, 10–K, 10–Q, 20–F, and 12b–25, proposed new Investment Company Act Rule 30b1–3 and the proposed amendments to Investment Company Act Rules 8b–16 and 30b1–2 and Form N–SAR, proposed new Rule 3–06 and the proposed amendment to Rule 3–12 of Regulation S–X. Members of the public who wish to obtain a copy of the Final Regulatory Flexibility Analysis should contact Barbara J. Green, (202) 272–2589, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. A summary of the corresponding Initial Regulatory Flexibility Analysis appears at 53 FR 21670 (Release No. 33–6778).

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[88] Rule 3–01(b) of Regulation S–X (17 CFR 210.3–01(b)) has permitted specified registrants to use unaudited financial statements that are at least as current as the third fiscal quarter of the most recently completed fiscal year if their registration statement is filed within 45 days after the end of the most recent fiscal year. Thus, under the former rules, a first-time registrant under the Securities Act with a December 31, 1986 year end that changed its year end in 1987 to May 31, 1987 could have filed unaudited financial statements covering the transition period from January 1, 1987 through May 31, 1987 and unaudited financial statements covering the subsequent nine months ending February 29, 1988 in a registration statement and attempted to have that registration statement declared effective on July 14, 1988. The most recently audited financial statements in the registration statement would have covered the year ending December 31, 1986.

[89] Rule 3–01(b) provides that the audited financial statements of the prior fiscal year may not be used more than 45 days after the end of the current fiscal year, unless the specified circumstances in Rule 3–01(c) (17 CFR 210.3–01(c)) exist, which include the requirement that the registrant be filing reports pursuant to Section 13 (15 U.S.C. 78m) or 15(d). In addition, Rule 3–01(a) (17 CFR 210.3–01(a)) requires a registrant that has been in existence for less than one fiscal year to file audited financial statements within 135 days of the date of filing the registration statement.

[90] *Cf.* Rule 15d–2 (17 CFR 240.15d–2), which eliminates a similar reporting gap by requiring an issuer whose registration statement becomes effective after a fiscal year end without audited financial statements as of such fiscal year end in the prospectus to file a special report within 90 days of effectiveness on the form appropriate for annual reports of the registrant. The special report must include audited financial statements for the last full fiscal year.

[91] *See* amended Rules 13a–13(a) and 15d–13(a).

[92] For example, under the amendments, a registrant with a December 31 year end whose registration statement became effective on April 14, 1990 including financial statements as of December 31 of the prior year, is required to file a quarterly report for the quarter ending March 31, 1990. The quarterly report is not due until 45 days after April 14, 1990, the date of effectiveness. Under the former rules, the same registrant would not have been required to file a quarterly report for the quarter ending on March 31, 1990. The former rules only would have required its first quarterly report for the quarter ending June 30, 1990.

[93] Generally, the staff has taken the position that registrants under the Securities Act whose registration statements are declared effective shortly before the end of their fiscal year, thereby creating Exchange Act reporting requirements pursuant to section 15(d), are required to file annual and quarterly reports even where the registrant has not commenced operations; for example, where the registrant is in the process of a best efforts offering and has not yet met the minimum, or where an acquisition by the registrant has not yet been completed pending regulatory approval.

V. Appendix

1. Examples of Reporting Under the Amendments for a Domestic Issuer with a Dec. 31 Year End that Files Periodic Reports Pursuant to Section 13 or 15(d) of the Exchange Act

a. Decision made early in year to change year end to date already past with resulting transition period of one month or less:

On March 1, 1990 the issuer decides to change year end to Jan. 31, 1990
—15 days after March 1, 1990 files an 8–K
—90 days after Dec. 31, 1989 files a 10–K covering full year from Jan. 1, 1989 through Dec. 31, 1989
—At the option of the issuer, it may file a separate transition report on Form 10–Q 45 days after March 1, 1990 covering the transition period from Jan. 1, 1990 through Jan. 31, 1990
—At the option of the issuer, it may file a separate transition report on Form 10–K 90 days after March 1, 1990 covering the transition period from Jan. 1, 1990 through Jan. 31, 1990
—45 days after April 30, 1990 files a 10–Q covering the first quarter ending April 30, 1990 of the new fiscal year; if the issuer has not opted to file a separate transition report on either Form 10–Q or 10–K, the 10–Q for the quarter ending April 30, 1990 must cover the transition period from Jan. 1, 1990 through Jan. 31, 1990 and include separate financial statements, which may be unaudited, for the transition period from Jan. 1, 1990 through Jan. 31, 1990
—45 days after July 31, 1990 and Oct. 31, 1990 files 10–Qs covering the quarters ending July 31, 1990 and Oct. 31, 1990 of the new fiscal year, respectively
—90 days after Jan. 31, 1991 files a 10–K covering the full year from Feb. 1, 1990 through Jan. 31, 1991, with regular timing of quarterly and annual reporting continuing thereafter; if the issuer filed a separate transition report on Form 10–Q or the transition period information was included in 10–Q for the quarter ending April 30, 1990, the 10–K must include separate audited financial statements covering the transition period from Jan. 1, 1990 through Jan. 31, 1990

b. Decision made early in year to change year end to date already past with resulting transition period shorter than six months but longer than one month:

On March 1, 1990 the issuer decides to change year end to Feb. 28, 1990
—15 days after March 1, 1990 files an 8–K
—90 days after Dec. 31, 1989 files a 10–K covering full year from Jan. 1, 1989 through Dec. 31, 1989
—Either 45 days after March 1, 1990 files a transition report on Form 10–Q or 90 days after March 1, 1990 files a transition report on Form 10–K covering the transition period from Jan. 1, 1990 through Feb. 28, 1990
—45 days after May 31, 1990 files a 10–Q covering the first quarter ending May 31, 1990 of the new fiscal year, with regular timing of quarterly and annual reporting continuing thereafter; if the transition report was filed on Form 10–Q, the 10–K covering the full year from March 1, 1990 through Feb. 28, 1991 must include separate audited financial statements covering the transition period from Jan. 1, 1990 through Feb. 28, 1990

c. Decision made early in year to change year end to future date with resulting transition period shorter than six months but longer than one month:

On Feb. 1, 1990 the issuer decides to change year end to May 31, 1990
—15 days after Feb. 1, 1990 files an 8–K
—90 days after Dec. 31, 1989 files a 10–K covering full year from Jan. 1, 1989 through Dec. 31, 1989
—Either 45 days after Feb. 28, 1990 files a 10–Q covering the period ending Feb. 28, 1990 coinciding with a quarter of the new fiscal year or 45 days after March 31, 1990 files a 10–Q covering the quarter ending March 31, 1990 of the old fiscal year
—Either 45 days after May 31, 1990 files a transition report on Form 10–Q or 90 days after May 31, 1990 files a transition report on Form 10–K covering the transition period from Jan. 1, 1990 through May 31, 1990
—45 days after Aug. 31, 1990 files a 10–Q covering the first quarter ending Aug. 31, 1990 of the new fiscal year, with regular timing of quarterly and annual reporting continuing thereafter; if the transition report was filed on Form 10–Q, the 10–K covering the full year from June 1, 1990 through May 31, 1991 would include separate audited financial statements covering the transition period from Jan. 1, 1990 through May 31, 1990

d. Decision made early in year to change year end to future date with resulting transition period six months or longer:

On Feb. 1, 1990 the issuer decides to change year end to Sept. 30, 1990
—15 days after Feb. 1, 1990 files an 8–K
—90 days after Dec. 31, 1989 files a 10–K covering full year from Jan. 1, 1989 through Dec. 31, 1989
—45 days after March 31, 1990 and June 30, 1990 files 10–Qs covering the quarters ending March 31, 1990 and June 30, 1990, respectively
—90 days after Sept. 30, 1990 files a transition report on Form 10–K covering the transition period from Jan. 1, 1990 through Sept. 30, 1990
—45 days after Dec. 31, 1990 files a 10–Q covering the first quarter ending Dec. 31, 1990 of the new fiscal year, with regular timing of quarterly and annual reporting continuing thereafter

e. Decision made late in year to change year end to date already past with resulting transition period of one month or less:

On Sept. 1, 1990 the issuer decides to change year end to Jan. 31, 1990
—15 days after Sept. 1, 1990 files an 8–K
—At the option of the issuer, it may file a separate transition report on Form 10–Q 45 days after Sept. 1, 1990 covering the transition period from Jan. 1, 1990 through Jan. 31, 1990
—At the option of the issuer, it may file a separate transition report on Form 10–K 90 days after Sept. 1, 1990 covering the transition period from Jan. 1, 1990 through Jan. 31, 1990
—45 days after Oct. 31, 1990 files a 10–Q covering the quarter ending Oct. 31, 1990 of the new fiscal year; if the issuer has not opted to file a separate transition report on either Form 10–Q or 10–K, the 10–Q for the quarter ending Oct. 31, 1990 must cover the transition period from Jan. 1, 1990 through Jan. 31, 1990 and include separate financial statements, which may be unaudited, covering the transition period from Jan. 1, 1990 through Jan. 31, 1990; the 10–Q for the quarter ending Oct. 31, 1990 also must cover and include separate financial statements for the period from July 1, 1990 through July 31, 1990
—90 days after Jan. 31, 1991 files a 10–K covering the full year from Feb. 1, 1990 through Jan. 31, 1991, with regular timing of quarterly and annual reporting continuing thereafter; if the issuer filed a separate transition report on Form 10–Q or the transition period information was included in the 10–Q for the quarter ending Oct. 31, 1990, the 10–K must include audited financial statements covering the transition period from Jan. 1, 1990 through Jan. 31, 1990

f. Decision made late in year to change year end to date already past with resulting transition period shorter than six months but longer than one month:

On Nov. 1, 1990 the issuer decides to change year end to Feb. 28, 1990
—45 days after Sept. 30, 1990 files an 10–Q covering the quarter ending Sept. 30, 1990 of the old fiscal year
—15 days after Nov. 1, 1990 files an 8–K
—Either 45 days after Nov. 1, 1990 files a transition report on Form 10–Q or 90

days after Nov. 1, 1990 files a transition report on Form 10–K covering the transition period from Jan. 1, 1990 through Feb. 28, 1990
—45 days after Nov. 30, 1990 files a 10–Q covering the quarter ending Nov. 30, 1990 of the new fiscal year
—90 days after Feb. 28, 1991 files a 10–K covering full year from March 1, through Feb. 28, 1991, with regular timing of quarterly and annual reporting continuing thereafter; if the transition report was filed on Form 10–Q, the 10–K must include separate audited financial statements covering the transition period from Jan. 1, 1990 through Feb. 28, 1990

g. Decision made late in year to change year end to date already past with resulting transition period six months or longer:

On Nov. 1, 1990 the issuer decides to change year end to Sept. 30, 1990
—15 days after Nov. 1, 1990 files an 8–K
—90 days after Nov. 1, 1990 files a transition report on Form 10–K covering the transition period from Jan. 1, 1990 through Sept. 30, 1990
—45 days after Dec. 31, 1990 files an 10–Q covering the first quarter ending Dec. 31, 1990 of the new fiscal year, with regular timing of quarterly and annual reporting continuing thereafter

h. Decision made late in year to change year end to date already past with resulting transition period six months or longer where fiscal quarters of newly adopted year do not coincide with those of old fiscal year:

On Nov. 20, 1990 the issuer decides to change year end to Aug. 31, 1990
—15 days after Nov. 20, 1990 files an 8–K
—45 days after Nov. 30, 1990 files a 10–Q covering the first quarter ending Nov. 30, 1990 of the new fiscal year
—90 days after Nov. 20, 1990 files a transition report on Form 10–K covering the transition period from Jan. 1, 1990 through Aug. 31, 1990 with regular timing of quarterly and annual reporting continuing thereafter

2. Examples of Reporting Under the Amendments for a Successor Issuer that has a Fiscal Year Different from the December 31 Year End of the Predecessor

a. Succession with resulting transition period shorter than six months but longer than one month:

The date of succession is April 30, 1990
—15 days after April 30, 1990 files an 8–K
—Either 45 days after April 30, 1990 files a transition report regarding the predecessor on Form 10–Q or 90 days after April 30, 1990 files a transition report regarding the predecessor on Form 10–K covering the transition period from Jan. 1, 1990 through April 30, 1990
—If the transition report was filed on Form 10–Q, the next annual report of the successor issuer must include audited statements of income and cash flows for the transition period

b. Succession with resulting transition period six months or longer:

The date of succession is July 31, 1990
—15 days after July 31, 1990 files an 8–K
—90 days after July 31, 1990 files a transition report regarding the predecessor on Form 10–K covering the transition period from Jan. 1, 1990 through July 31, 1990

3. Examples of Reporting Under the Amendments for a Management Investment Company Issuer With a December 31 Year End that Changes its Fiscal Year

a. On Feb. 1, 1990 decides to change the year end to April 30
—60 days after April 30 files Form N–SAR covering the period from Jan. 1 to April 30
b. On Feb. 1, 1990 decides to change the year end to Sept. 30
—60 days after March 31 files Form N–SAR covering the period from Jan. 1 to March 31
c. On April 1, 1990 decides to change the year end to Jan. 31
—60 days after April 1 files Form N–SAR covering the period from Jan. 1 to Jan. 31
d. On Oct. 1, 1990 decides to change the year end to Nov. 30
—60 days after Nov. 30 files Form N–SAR covering the period from July 1 to Nov. 30
e. On Nov. 1, 1990 decides to change the year end to Jan. 31
—60 days after Nov. 1 files Form N–SAR covering the period from July 1 to July 31
f. On Nov. 1, 1990 decides to change the year end to Sept. 30
—60 days after Nov. 1 files Form N–SAR covering the period from July 1 to Sept. 30

VI. Codification Update

The "Codification of Financial Reporting Policies" announced in Financial Reporting Release No. 1 (April 15, 1982) (47 FR 21028) is updated to:

1. Add a new § 102.05, "Issuer's Change of Fiscal Year."

2. Include in § 102.05 the text in Part I.B. of this Release, "The Amendments," and the examples set forth in Part V. "Appendix," which are cross-referenced to that text.

The Codification is a separate publication of the Commission. It will not be published in the Federal Register/Code of Federal Regulations Systems.

VII. Statutory Basis

The amendments are being adopted by the Commission pursuant to sections 7 and 19(a) of the Securities Act of 1933, sections 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, and sections 8, 30, and 38 of the Investment Company Act of 1940.

List of Subjects in CFR Parts 210, 240, 249, 270, and 274

Reporting and recordkeeping requirements, Securities.

VIII. Text of Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 continues to read, in part, as follows:

Authority: Secs. 6, 7, 8, 10, 19 and Schedule A of the Securities Act of 1933 (15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77aa(25) (26)) * * *

2. By adding new § 210.3–06 to read as follows:

§ 210.3–06 Financial statements covering a period of nine to twelve months.

Except with respect to registered investment companies, the filing of financial statements covering a period of 9 to 12 months shall be deemed to satisfy a requirement for filing financial statements for a period of 1 year where:

(a) The issuer has changed its fiscal year;

(b) The issuer has made a significant business acquisition for which financial statements are required under § 210.3–05 of this chapter and the financial statements covering the interim period pertain to the business being acquired; or

(c) The Commission so permits pursuant to § 210.3–13 of this chapter.

Where there is a requirement for filing financial statements for a time period exceeding one year but not exceeding three consecutive years (with not more than 12 months included in any period reported upon), the filing of financial

statements covering a period of nine to 12 months shall satisfy a filing requirement of financial statements for one year of that time period only if the conditions described in either paragraph (a), (b), or (c) of this section exist and financial statements are filed that cover the full fiscal year or years for all other years in the time period.

3. By amending § 210.3–12 by redesignating current paragraphs (d) and (e) as paragraphs (e) and (f), respectively, and adding new paragraph (d) to read as follows:

§ 210.3–12 Age of financial statements at effective date of registration statement or at mailing date of proxy statement.

* * * * *

(d) The age of the registrant's most recent audited financial statements included in a registration statement filed under the Securities Act of 1933 or filed on Form 10 (17 CFR 249.210) under the Securities Exchange Act of 1934 shall not be more than one year and 45 days old at the date the registration statement becomes effective if the registration statement relates to the security of an issuer that was not subject, immediately prior to the time of filing the registration statement, to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: Sec. 23, 48 Stat. 901, as amended (15 U.S.C. 78w) * * *

2. By amending § 240.12b–25 by revising paragraphs (a) and (b)(2)(ii) to read as follows:

§ 240.12b–25 Notification of inability to timely file all or any required portion of a Form 10–K, 20–F, 11–K, N–SAR or 10–Q.

(a) If all or any required portion of an annual or transition report on Form 10–K, 20–F, 11–K or a quarterly or transition report on Form 10–Q required to be filed pursuant to section 13 or 15(d) of the Act and the rules thereunder or if all or any portion of a semi-annual, annual or transition report on Form N–SAR required to be filed pursuant to section 30 of the Investment Company Act of 1940 and the rules thereunder is not filed within the time period prescribed for such report, the registrant, no later than one business day after the due date for such report, shall file a Form 12b–25 (17 CFR 249.322) with the Commission which shall contain disclosure of its inability to file the report timely and the reasons therefor in reasonable detail.

(b) * * *

(2) * * *

(ii) Either the subject annual report, semi-annual report or transition report on Form 10–K, 20–F, 11–K or N–SAR, or portion thereof, will be filed no later than the fifteenth calendar day following the prescribed due date or the subject quarterly report or transition report on Form 10–Q, or portion thereof, will be filed no later than the fifth calendar day following the prescribed due date; and

* * * * *

3. By revising § 240.13a–10 to read as follows:

§ 240.13a–10 Transition reports.

(a) Every issuer that changes its fiscal closing date shall file a report covering the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year; *Provided, however,* that an issuer shall file an annual report for any fiscal year that ended before the date on which the issuer determined to change its fiscal year end. In no event shall the transition report cover a period of 12 or more months.

(b) The report pursuant to this section shall be filed for the transition period not more than 90 days after either the close of the transition period or the date of the determination to change the fiscal closing date, whichever is later. The report shall be filed on the form appropriate for annual reports of the issuer, shall cover the period from the close of the last fiscal year end and shall indicate clearly the period covered. The financial statements for the transition period filed therewith shall be audited. Financial statements, which may be unaudited, shall be filed for the comparable period of the prior year, or a footnote, which may be unaudited, shall state for the comparable period of the prior year, revenues, gross profits, income taxes, income or loss from continuing operations before extraordinary items and cumulative effect of a change in accounting principles and net income or loss. The effects of any discontinued operations and/or extraordinary items as classified under the provisions of generally accepted accounting principles also shall be shown, if applicable. Per share data based upon such income or loss and net income or loss shall be presented in conformity with applicable accounting standards. Where called for by the time span to be covered, the comparable period financial statements or footnote shall be included in subsequent filings.

(c) If the transition period covers a period of less than six months, in lieu of the report required by paragraph (b) of this section, a report may be filed for the transition period on Form 10–Q (§ 249.308a of this chapter) not more than 45 days after either the close of the transition period or the date of the determination to change the fiscal closing date, whichever is later. The report on Form 10–Q shall cover the period from the close of the last fiscal year end and shall indicate clearly the period covered. The financial statements filed therewith need not be audited but, if they are not audited, the issuer shall file with the first annual report for the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period. The notes to financial statements for the transition period included in such first annual report may be integrated with the notes to financial statements for the full fiscal period. A separate audited balance sheet as of the end of the transition period shall be filed in the annual report only if the audited balance sheet as of the end of the fiscal year prior to the transition period is not filed. Schedules need not be filed in transition reports on Form 10–Q.

(d) Notwithstanding the foregoing in paragraphs (a), (b), and (c) of this section, if the transition period covers a period of one month or less, the issuer need not file a separate transition report if either:

(1) The first report required to be filed by the issuer for the newly adopted fiscal year after the date of the determination to change the fiscal year end is an annual report, and that report covers the transition period as well as the fiscal year; or

(2)(i) The issuer files with the first annual report for the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period; and

(ii) The first report required to be filed by the issuer for the newly adopted fiscal year after the date of the determination to change the fiscal year end is a quarterly report on Form 10–Q; and

(iii) Information on the transition period is included in the issuer's quarterly report on Form 10–Q for the first quarterly period (except the fourth quarter) of the newly adopted fiscal year that ends after the date of the determination to change the fiscal year. The information covering the transition period required by Part II and Item 2 of Part I may be combined with the information regarding the quarter. However, the financial statements

required by Part I, which may be unaudited, shall be furnished separately for the transition period.

(e) Every issuer required to file quarterly reports on Form 10–Q pursuant to § 240.13a–13 of this chapter that changes its fiscal year end shall:

(1) File a quarterly report on Form 10–Q within the time period specified in General Instruction A.1. to that form for any quarterly period (except the fourth quarter) of the old fiscal year that ends before the date on which the issuer determined to change its fiscal year end, except that the issuer need not file such quarterly report if the date on which the quarterly period ends also is the date on which the transition period ends;

(2) File a quarterly report on Form 10–Q within the time specified in General Instruction A.1. to that form for each quarterly period of the old fiscal year within the transition period. In lieu of a quarterly report for any quarter of the old fiscal year within the transition period, the issuer may file a quarterly report on Form 10–Q for any period of three months within the transition period that coincides with a quarter of the newly adopted fiscal year if the quarterly report is filed within 45 days after the end of such three month period, provided the issuer thereafter continues filing quarterly reports on the basis of the quarters of the newly adopted fiscal year;

(3) Commence filing quarterly reports for the quarters of the new fiscal year no later than the quarterly report for the first quarter of the new fiscal year that ends after the date on which the issuer determined to change the fiscal year end; and

(4) Unless such information is or will be included in the transition report, or the first annual report on Form 10–K for the newly adopted fiscal year, include in the initial quarterly report on Form 10–Q for the newly adopted fiscal year information on any period beginning on the first day subsequent to the period covered by the issuer's final quarterly report on Form 10–Q or annual report on Form 10–K for the old fiscal year. The information covering such period required by Part II and Item 2 of Part I may be combined with the information regarding the quarter. However, the financial statements required by Part I, which may be unaudited, shall be furnished separately for such period.

Note to paragraphs (c) and (e): If it is not practicable or cannot be cost-justified to furnish in a transition report on Form 10–Q or a quarterly report for the newly adopted fiscal year financial statements for corresponding periods of the prior year where required, financial statements may be furnished for the quarters of the preceding fiscal year that most nearly are comparable if the issuer furnishes an adequate discussion of seasonal and other factors that could affect the comparability of information or trends reflected, an assessment of the comparability of the data, and a representation as to the reason recasting has not been undertaken.

(f) Every successor issuer with securities registered under Section 12 of this Act that has a different fiscal year from that of its predecessor(s) shall file a transition report pursuant to this section, containing the required information about each predecessor, for the transition period, if any, between the close of the fiscal year covered by the last annual report of each predecessor and the date of succession. The report shall be filed for the transition period on the form appropriate for annual reports of the issuer not more than 90 days after the date of the succession, with financial statements in conformity with the requirements set forth in paragraph (b) of this section. If the transition period covers a period of less than six months, in lieu of a transition report on the form appropriate for the issuer's annual reports, the report may be filed for the transition period on Form 10–Q not more than 45 days after the date of the succession, with financial statements in conformity with the requirements set forth in paragraph (c) of this section. Notwithstanding the foregoing, if the transition period covers a period of one month or less, the successor issuer need not file a separate transition report if the information is reported by the successor issuer in conformity with the requirements set forth in paragraph (d) of this section.

(g)(1) Paragraphs (a) through (f) of this section shall not apply to foreign private issuers authorized to use Form 20–F (§ 249.220f of this chapter) for annual reports required by Rule 13a–1 (§ 240.13a–1 of this chapter).

(2) Every foreign private issuer that changes its fiscal closing date shall file a report covering the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year. In no event shall a transition report cover a period longer than 12 months.

(3) The report for the transition period shall be filed on Form 20–F responding to all items to which such issuer is required to respond when Form 20–F is used as an annual report. Such report shall be filed within six months after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later. The financial statements for the transition period filed therewith shall be audited.

(4) If the transition period covers a period of six or fewer months, in lieu of the report required by paragraph (g)(3) of this section, a report for the transition period may be filed on Form 20–F responding to Items 3, 9, 15, 16, and 17 or 18 within three months after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later. The financial statements required by either Item 17 or Item 18 shall be furnished for the transition period. Such financial statements may be unaudited and condensed as permitted in Article 10 of Regulation S–X (§ 210.10–01 of this chapter), but if the financial statements are unaudited and condensed, the issuer shall file with the first annual report for the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period.

(5) Notwithstanding the foregoing in paragraphs (g)(2), (g)(3), and (g)(4) of this section, if the transition period covers a period of one month or less, a foreign private issuer need not file a separate transition report if the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year.

(h) The provisions of this rule shall not apply to investment companies required to file reports pursuant to Rule 30b1–1 (§ 270.30b1–1 of this chapter) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*).

(i) No filing fee shall be required for a transition report filed pursuant to this section.

Note.—In addition to the report or reports required to be filed pursuant to this section, every issuer, except a foreign private issuer authorized to use Form 20–F for annual reports required by Rule 13a–1 or an investment company required to file reports pursuant to Rule 30b1–1 under the Investment Company Act of 1940, that changes its fiscal closing date is required to file a report on Form 8–K responding to Item 8 thereof within the period specified in General Instruction B.1. to that form.

4. By amending § 240.13a–13 by revising paragraph (a) to read as follows:

§ 240.13a–13 Quarterly reports on Form 10–Q (§ 249.308a of this chapter).

(a) Except as provided in paragraphs (b) and (c) of this section, every issuer that has securities registered pursuant to section 12 of the Act and is required to file annual reports pursuant to section 13 of the Act on Form 10–K (§ 249.310 of this chapter) or U5S (§ 259.5s of this chapter) shall file a quarterly report on Form 10–Q (§ 249.308a of this chapter)

within the period specified in General Instruction A.1. to that form for each of the first three quarters of each fiscal year of the issuer, commencing with the first fiscal quarter following the most recent fiscal year for which full financial statements were included in the registration statement, or, if the registration statement included financial statements for an interim period subsequent to the most recent fiscal year end meeting the requirements of Article 10 of Regulation S–X, for the first fiscal quarter subsequent to the quarter reported upon in the registration statement. The first quarterly report of the issuer shall be filed either within 45 days after the effective date of the registration statement or on or before the date on which such report would have been required to be filed if the issuer has been required to file reports on Form 10–Q as of its last fiscal quarter, whichever is later.

* * * * *

5. By amending § 240.14a–3 by redesignating the Note to paragraph (b)(1) as Note 1 and adding Note 2 to paragraph (b)(1) to read as follows:

§ 240.14a–3 Information to be furnished to security holders.

(b) * * *

(1) * * *

Note 2.—For purposes of complying with § 240.14a–3, if the registrant, other than a registered investment company, has changed its fiscal closing date, financial statements covering two years and one period of 9 to 12 months shall be deemed to satisfy the requirements for statements of income and cash flows for the three most recent fiscal years.

* * * * *

6. By revising § 240.15d–10 to read as follows:

§ 240.15d–10 Transition reports.

(a) Every issuer that changes its fiscal closing date shall file a report covering the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year; *Provided, however,* that an issuer shall file an annual report for any fiscal year that ended before the date on which the issuer determined to change its fiscal year end. In no event shall the transition report cover a period of 12 or more months.

(b) The report pursuant to this section shall be filed for the transition period not more than 90 days after either the close of the transition period or the date of the determination to change the fiscal closing date, whichever is later. The report shall be filed on the form appropriate for annual reports of the issuer, shall cover the period from the close of the last fiscal year end and shall indicate clearly the period covered. The financial statements for the transition period filed therewith shall be audited. Financial statements, which may be unaudited, shall be filed for the comparable period of the prior year, or a footnote, which may be unaudited, shall state for the comparable period of the prior year, revenues, gross profits, income taxes, income or loss from continuing operations before extraordinary items and cumulative effect of a change in accounting principles and net income or loss. The effects of any discontinued operations and/or extraordinary items as classified under the provisions of generally accepted accounting principles also shall be shown, if applicable. Per share data based upon such income or loss and net income or loss shall be presented in conformity with applicable accounting standards. Where called for by the time span to be covered, the comparable period financial statements or footnote shall be included in subsequent filings.

(c) If the transition period covers a period of less than six months, in lieu of the report required by paragraph (b) of this section, a report may be filed for the transition period on Form 10–Q (§ 249.308a of this chapter) not more than 45 days after either the close of the transition period or the date of the determination to change the fiscal closing date, whichever is later. The report of Form 10–Q shall cover the period from the close of the last fiscal year end and shall indicate clearly the period covered. The financial statements filed therewith need not be audited but, if they are not audited, the issuer shall file with the first annual report for the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period. The notes to financial statements for the transition period included in such first annual report may be integrated with the notes to financial statements for the full fiscal period. A separate audited balance sheet as of the end of the transition period shall be filed in the annual report only if the audited balance sheet as of the end of the fiscal year prior to the transition period is not filed. Schedules need not be filed in transition reports on Form 10–Q.

(d) Notwithstanding the foregoing in paragraphs (a), (b), and (c) of this section, if the transition period covers a period of one month or less, the issuer need not file a separate transition report if either:

(1) the first report required to be filed by the issuer for the newly adopted fiscal year after the date of the determination to change the fiscal year end is an annual report, and that report covers the transition period as well as the fiscal year; or

(2)(i) the issuer files with the first annual report for the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period; and

(ii) the first report required to be filed by the issuer for the newly adopted fiscal year after the date of the determination to change the fiscal year end is a quarterly report on Form 10–Q and

(iii) Information on the transition period is included in the issuer's quarterly report on Form 10–Q for the first quarterly period (except the fourth quarter) of the newly adopted fiscal year that ends after the date of the determination to change the fiscal year. The information covering the transition period required by Part II and Item 2 of Part I may be combined with the information regarding the quarter. However, the financial statements required by Part I, which may be unaudited, shall be furnished separately for the transition period.

(e) Every issuer required to file quarterly reports on Form 10–Q pursuant to § 240.15d–13 of this chapter that changes its fiscal year end shall:

(1) File a quarterly report on Form 10–Q within the time period specified in General Instruction A.1. to that form for any quarterly period (except the fourth quarter) of the old fiscal year that ends before the date on which the issuer determined to change its fiscal year end, except that the issuer need not file such quarterly report if the date on which the quarterly period ends also is the date on which the transition period ends;

(2) File a quarterly report on Form 10–Q within the time specified in General Instruction A.1. to that form for each quarterly period of the old fiscal year within the transition period. In lieu of a quarterly report for any quarter of the old fiscal year within the transition period, the issuer may file a quarterly report on Form 10–Q for any period of three months within the transition period that coincides with a quarter of the newly adopted fiscal year if the quarterly report is filed within 45 days after the end of such three month period, provided the issuer thereafter continues filing quarterly reports on the basis of the quarters of the newly adopted fiscal year;

(3) Commence filing quarterly reports for the quarters of the new fiscal year no later than the quarterly report for the first quarter of the new fiscal year that ends after the date on which the issuer

determined to change the fiscal year end; and

(4) Unless such information is or will be included in the transition report, or the first annual report on Form 10–K for the newly adopted fiscal year, include in the initial quarterly report on Form 10–Q for the newly adopted fiscal year information on any period beginning on the first day subsequent to the period covered by the issuer's final quarterly report on Form 10–Q or annual report on Form 10–K for the old fiscal year. The information covering such period required by Part II and Item 2 of Part I may be combined with the information regarding the quarter. However, the financial statements required by Part I, which may be unaudited, shall be furnished separately for such period.

Note to paragraphs (c) and (e): If it is not practicable or cannot be cost-justified to furnish in a transition report on Form 10–Q or a quarterly report for the newly adopted fiscal year financial statements for corresponding periods of the prior year where required, financial statements may be furnished for the quarters of the preceding fiscal year that most nearly are comparable if the issuer furnishes an adequate discussion of seasonal and other factors that could affect the comparability of information or trends reflected, an assessment of the comparability of the data, and a representation as to the reason recasting has not been undertaken.

(f) Every successor issuer that has a different fiscal year from that of its predecessor(s) shall file a transition report pursuant to this section, containing the required information about each predecessor, for the transition period, if any, between the close of the fiscal year covered by the last annual report of each predecessor and the date of succession. The report shall be filed for the transition period on the form appropriate for annual reports of the issuer not more than 90 days after the date of the succession, with financial statements in conformity with the requirements set forth in paragraph (b) of this section. If the transition period covers a period of less than six months, in lieu of a transition report on the form appropriate for the issuer's annual reports, the report may be filed for the transition period on Form 10–Q not more than 45 days after the date of the succession, with financial statements in conformity with the requirements set forth in paragraph (c) of this section. Notwithstanding the foregoing, if the transition period covers a period of one month or less, the successor issuer need not file a separate transition report if the information is reported by the successor issuer in conformity with the requirements set forth in paragraph (d) of this section.

(g)(1) Paragraphs (a) through (f) of this section shall not apply to foreign private issuers authorized to use Form 20–F (§ 249.220f of this chapter) for annual reports required by Rule 15d–1 (§ 240.15d–1 of this chapter).

(2) Every foreign private issuer that changes its fiscal closing date shall file a report covering the resulting transition period between the closing date of its most recent year and the opening date of its new fiscal year. In no event shall a transition report cover a period longer than 12 months.

(3) The report for the transition period shall be filed on Form 20–F responding to all items to which such issuer is required to respond when Form 20–F is used as an annual report. Such report shall be filed within six months after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later. The financial statements for the transition period filed therewith shall be audited.

(4) If the transition period covers a period of six or fewer months, in lieu of the report required by paragraph (g)(3) of this section, a report for the transition period may be filed on Form 20–F responding to Items, 3, 9, 15, 16, and 17 or 18 within three months after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later. The financial statements required by either Item 17 or Item 18 shall be furnished for the transition period. Such financial statements may be unaudited and condensed as permitted in Article 10 of Regulation S–X (§ 210.10–01 of this chapter), but if the financial statements are unaudited and condensed, the issuer shall file with the first annual report for the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period.

(5) Notwithstanding the foregoing in paragraphs (g)(2), (g)(3), and (g)(4) of this section, if the transition period covers a period of one month or less, a foreign private issuer need not file a separate transition report if the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year.

(h) The provisions of this rule shall not apply to investment companies required to file reports pursuant to Rule 30b1–1 (§ 270.30b1–1 of this chapter) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*).

(i) No filing fee shall be required for a transition report filed pursuant to this section.

Note:—In addition to the report or reports required to be filed pursuant to this section, every issuer, except a foreign private issuer authorized to use Form 20–F for annual reports required by Rule 15d–1 or an investment company required to file reports pursuant to Rule 30b1–1 under the Investment Company Act of 1940, that changes its fiscal closing date is required to file a report on Form 8–K responding to Item 8 thereof within the period specified in General Instruction B.1. to that form.

7. By amending § 240.15d–13 by revising paragraph (a) to read as follows:

§ 240.15d–13 Quarterly reports on Form 10–Q (§ 249.308a of this chapter).

(a) Except as provided in paragraphs (b) and (c) of this section, every issuer that has securities registered pursuant to the Securities Act of 1933 and is required to file annual reports pursuant to section 15(d) of the Securities Exchange Act of 1934 on Form 10–K (§ 249.310 of this chapter) or U5S (§ 259.5s of this chapter) shall file a quarterly report on Form 10–Q (§ 249.308a of this chapter) within the period specified in General Instruction A.1. to that form for each of the first three quarters of each fiscal year of the issuer, commencing with the first fiscal quarter following the most recent fiscal year for which full financial statements were included in the registration statement, or, if the registration statement included financial statements for an interim period subsequent to the most recent fiscal year end meeting the requirements of Article 10 of Regulation S–X, for the first fiscal quarter subsequent to the quarter reported upon in the registration statement. The first quarterly report of the issuer shall be filed either within 45 days after the effective date of the registration statement or on or before the date on which such report would have been required to be filed if the issuer had been required to file reports on Form 10–Q as of its last fiscal quarter, whichever is later.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 249 continues to read, in part, as follows:

Authority: The Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.* * * *

2. By amending § 249.220f by revising the section heading and paragraphs (a) and (b), and adding a new paragraph (d) as set forth below.

Form 20–F is amended by revising the cover sheet above the line beginning with the words "Commission file

number" and revising paragraphs (a) and (b) of, and adding a new paragraph (d) to General Instruction A as set forth below.

Note:—The text of Form 20–F does not appear in the Code of Federal Regulations.

§ 249.220f Form 20–F, registration of securities of foreign private issuers pursuant to section 12(b) or (g) and annual and transition reports pursuant to sections 13 and 15(d).

(a) Any non-Canadian foreign private issuer may use this form as a registration statement under section 12 of the Securities Exchange Act (the "Exchange Act"), or as an annual or transition report filed under section 13(a) or 15(d) of the Exchange Act.

(b) A Canadian foreign private issuer may use this form as a registration statement under section 12(g) of the Exchange Act or as an annual or transition report under section 13(a) for a class of securities registered under section 12(g) only if such issuer does not have or has not had during the 12 months prior to the filing of the registration statement or annual or transition report any class of securities registered under section 12(b) of the Exchange Act or a reporting obligation (suspended or active) under section 15(d) of the Exchange Act and if such issuer has not issued its securities in a transaction to acquire by merger, consolidation, exchange of securities or acquisition of assets another issuer that filed or was required to file an annual report on Form 10–K (§ 240.310 of this chapter).

* * * * *

(d) A transition report on this form shall be filed in accordance with the requirements set forth in § 240.13a–10 or § 240.15d–10 applicable when the issuer changes its fiscal year end.

United States
Securities and Exchange Commission
Washington, DC 20549
Form 20–F
(Mark One)
[ ] Registration statement pursuant to section 12(b) or (g) of the Securities Exchange Act of 1934 [*Fee Required*] or
[ ] Annual report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 [*Fee Required*]
For the fiscal year ended _____ or
[ ] Transition report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 [*No Fee Required*]
For the transition period from _____ to _____

* * * * *

General Instructions

A. Rule as to Use of Form 20–F.

(a) Any non-Canadian foreign private issuer may use this form as a registration statement under section 12 of the Securities Exchange Act of 1934 (the "Exchange Act") or as an annual or transition report filed under section 13(a) or 15(d) of the Exchange Act.

(b) A Canadian foreign private issuer may use this form as a registration statement under section 12(g) of the Exchange Act and as an annual or transition report under section 13(a) for a class securities registered under section 12(g) only if such issuer does not have or has not had during the 12 months prior to the filing of the registration statement or annual or transition report any class of securities registered under section 12(b) of the Exchange Act or a reporting obligation (suspended or active) under section 15(d) of the Exchange Act and if such issuer has not issued its securities in a transaction to acquire by merger, consolidation, exchange of securities or acquisition of assets another issuer that filed or was required to file an annual report on Form 10–K (§ 249.310 of this chapter).

* * * * *

(d) A transition report on this form shall be filed in accordance with the requirements set forth in § 240.13a–10 or § 240.15d–10 applicable when the issuer changes its fiscal year end.

* * * * *

3. By amending Form 8–K (§ 249.308) by adding a sentence to the end of General Instruction B.1. and adding new Item 8 as set forth below.

Note.—The text of Form 8–K does not appear in the Code of Federal Regulations.

§ 249.308 Form 8–K, for current reports.

* * * * *

United States
Securities and Exchange Commission
Washington, DC 20549
Form 8–K

* * * * *

General Instructions

* * * * *

B. Events to be Reported and Time for Filing of Reports

1. * * * A report on this form pursuant to Item 8 is required to be filed within 15 calendar days after the date on which the registrant makes the determination to use a fiscal year end different from that used in its most recent filing with the Commission.

* * * * *

Item 8. Change in Fiscal Year

If the registrant determines to change the fiscal year from that used in its most recent filing with the Commission, state the date of such determination, the date of the new fiscal year end, and the Form (*e.g.*, Form 10–K or Form 10–Q) on which the report covering the transition period will be filed.

* * * * *

4. By amending § 249.308a by revising the section heading, the second sentence, and adding two new sentences after the second sentence as set forth below.

Form 10–Q is amended by revising General Instructions A.1. and A.2. and revising the cover sheet above the line beginning with the words "Commission file number" as set forth below.

Note.—The text of Form 10–Q does not appear in the Code of Federal Regulations.

§ 249.308a Form 10–Q, for quarterly and transition reports under section 13 or 15(d) of the Securities Exchange Act of 1934.

* * * A quarterly report on this form pursuant to § 240.13a–13 or § 240.15d–13 of this chapter shall be filed within 45 days after the end of the first three fiscal quarters of each fiscal year, but no quarterly report need be filed for the fourth quarter of any fiscal year. Form 10–Q also shall be used for transition and quarterly reports filed pursuant to § 240.13a–10 or § 240.15d–10 of this chapter. Such transition or quarterly reports shall be filed in accordance with the requirements set forth in § 240.13a–10 or § 240.15d–10 applicable when the registrant changes its fiscal year end.

United States
Securities and Exchange Commission
Washington, DC 20549
Form 10–Q

General Instructions

A. Rule as to Use of Form 10–Q.

1. Form 10–Q shall be used for quarterly reports under Section 13 or 15(d) of the Securities Exchange Act of 1934, filed pursuant to Rule 13a–13 (17 CFR 240.13a–13) or Rule 15d–13 (17 CFR 240.15d–13). A quarterly report on this form pursuant to Rule 13a–13 or Rule 15d–13 shall be filed within 45 days after the end of each of the first three fiscal quarters of each fiscal year. No report need be filed for the fourth quarter of any fiscal year.

2. Form 10–Q also shall be used for transition and quarterly reports under section 13 or 15(d) of the Securities Exchange Act of 1934, filed pursuant to Rule 13a–10 (17 CFR 240.13a–10) or Rule 15d–10 (17 CFR 240.15d–10). Such transition or quarterly reports shall be filed in accordance with the requirements set forth in Rule 13a–10 or Rule 15d–10 applicable when the registrant changes its fiscal year end.

* * * * *

United States
Securities and Exchange Commission
Washington, DC 20549
Form 10–Q
(Mark One)
[ ] Quarterly report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934
For the quarterly period ended _____ or
[ ] Transition report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934
For the Transition period from _____ to _____

* * * * *

5. By amending § 249.310 by revising the section heading and the text of the section, except for the first and last sentences as set forth below.

Form 10–K is amended by revising General Instruction A, except for the first and last sentences, and the cover sheet above the line designated for the "Exact name of the registrant as specified in its charter" as set forth below.

Note.—The text of Form 10–K does not appear in the Code of Federal Regulations.

§ 249.310 Form 10–K, for annual and transition reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934.

* * * This form also shall be used for transition reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934. Annual reports on this form shall be filed within 90 days after the end of the fiscal year covered by the report. Transition reports on this form shall be filed in accordance with the requirements set forth in § 240.13a–10 or § 240.15d–10 applicable when the registrant changes its fiscal year end. However, all schedules required by Article 12 of Regulation S–X may, at the option of the registrant, be filed as an amendment to the annual report not later than 120 days after the end of the fiscal year covered by the report or, in the case of a transition report, not later than 30 days after the due date of the report. * * *

United States
Securities and Exchange Commission
Washington, DC 20549
Form 10–K

General Instructions

A. Rule as to Use of Form 10–K.

* * * This Form also shall be used for transition reports filed pursuant to section 13 or 15(d) of this Act. Annual reports on this form shall be filed within 90 days after the end of the fiscal year covered by the report. Transition reports on this form shall be filed in accordance with the requirements set forth in § 240.13a–10 and § 240.15d–10 applicable when the registrant changes its fiscal year end. However, all schedules required by Article 12 of Regulation S–X may, at the option of the registrant, be filed as an amendment to the annual report not later than 120 days after the end of the fiscal year covered by the report or, in the case of a transition report, not later than 30 days after the due date of the report. * * *

* * * * *

United States
Securities and Exchange Commission
Washington, DC 20549
Form 10–K
(Mark One)
[ ] Annual report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 [*Fee Required*]
For the fiscal year ended _____ or
[ ] Transition report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 [*No Fee Required*]
For the transition period from _____ to _____
Commission file number _____

* * * * *

6. By amending § 249.322 by revising the first sentence as set forth below.

Form 12b–25 is amended by revising the cover sheet above the line reading "Read Instructions (on back page) Before Preparing Form. Please Print or Type," paragraph (b) of Part II, and the first sentence of Part III as set forth below.

Note.—The text of Form 12b–25 does not appear in the Code of Federal Regulations.

§ 249.322 Form 12b–25, notification of late filing.

This form shall be filed pursuant to § 240.12b–25 of this chapter by issuers who are unable to file timely all or any required portion of an annual or transition report on Form 10–K, 20–F, or 11–K or a quarterly or transition report on Form 10–Q pursuant to section 13 or 15(d) of the Act or a semi-annual, annual or transition report on Form N–SAR pursuant to section 30 of the Investment Company Act of 1940. * * *

United States
Securities and Exchange Commission
Washington, DC 20549
Form 12b–25
Notification of Late Filing (Check One).
[ ] Form 10–K, —Form 20–F, —Form 11–K, —Form 10–Q, —Form N–SAR
For Period Ended:_____
[ ] Transition Report on Form 10–K
[ ] Transition Report on Form 20–F
[ ] Transition Report on Form 11–K
[ ] Transition Report on Form 10–Q
[ ] Transition Report on Form N–SAR
For the Transition Period Ended: _____

* * * * *

Part II—Rules 12b–25(b) and (c)

* * * * *

(a) * * *

(b) The subject annual report, semi-annual report, transition report on Form 10–K, Form 20–F, 11–K or Form N–SAR, or portion thereof will be filed on or before the fifteenth calendar day following the prescribed due date; or the subject quarterly report or transition report on Form 10–Q, or portion thereof will be filed on or before the fifth calendar day following the prescribed due date; and

* * * * *

Part III—Narrative

State below in reasonable detail the reasons why Forms 10–K, 20–F, 11–K, 10–Q, N–SAR, or the transition report or portion thereof could not be filed within the prescribed time period.

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. The authority citation for Part 270 continues to read, in part, as follows:

Authority: Secs. 38, 40, 54 Stat. 841, 842; 15 U.S.C. 80a–37, 80c–89; the Investment Company Act of 1940, as amended, 15 U.S.C. 80a–1, *et seq.* * * *

2. By revising § 270.8b–16 to read as follows:

§ 270.8b–16 Amendments to registration statement.

Every registered management investment company which is required to file a semi-annual report on Form N–SAR, as prescribed by rule 30b1–1 (17 CFR 270.30b1–1), shall amend the registration statement required pursuant to Section 8(b) by filing, not more than 120 days after the close of each fiscal year ending on or after the date upon which such registration statement was filed, the appropriate form prescribed for such amendments.

3. By revising § 270.30b1–2 to read as follows:

§ 270.30b1–2 Semi-annual report for totally-owned registered management investment company subsidiary of registered management investment company.

Notwithstanding the provisions of rules 30a–1 and 30b1–1, a registered investment company that is a totally-owned subsidiary of a registered management investment company need not file a semi-annual report on Form N–SAR if financial information with respect to that subsidiary is reported in the parent's semi-annual report on Form N–SAR.

4. By adding § 270.30b1–3 to read as follows:

§ 270.30b1–3 Transition reports.

Every registered management investment company filing reports on Form N–SAR that changes its fiscal year end shall file a report on Form N–SAR not more than 60 calendar days after the later of either the close of the transition period or the date of the determination to change the fiscal year end which report shall not cover a period longer than six months. No filing fee shall be required for a transition report filed pursuant to this rule.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

1. The authority citation for Part 274 continues to read, in part, as follows:

Authority: The Investment Company Act of 1940, 15 U.S.C. 80a–1 *et seq.* * * *

2. By amending § 274.101 by revising the text of the section as set forth below.

Form N–SAR is amended by revising page 1 above the line indicating whether the filing is in an amendment, and

General Instructions A, C (except the last two paragraphs which will remain the same), and F(2).

Note.—The text of Form N–SAR does not appear in the Code of Federal Regulations.

§ 271.101 Form N–SAR, semi-annual report of registered investment companies.

This form shall be used by registered investment companies for semi-annual or annual reports to be filed pursuant to rule 30a–1 (17 CFR 270.30a–1) or 30b1–1 (17 CFR 270.30b1–1) in satisfaction of the requirement of section 30(a) of the Investment Company Act of 1940 that every registered investment company must file annually with the Commission such information, documents and reports as investment companies having securities registered on a national securities exchange are required to file annually pursuant to section 13(a) of the Securities Exchange Act of 1934 and the rules and regulations thereunder (same as § 249.330 of this chapter).

Form N–SAR

Semi-Annual Report for registered investment companies

Report for six month period ending: ——— / ——— / ——— (a); or fiscal year ending: ——— / ——— / ——— (b).

Report for the transition period ending: ——— / ——— / ——— (c).

[If transition report also complete (a) or (b) above.]

* * * * *

General Instructions

A. Use of Form N–SAR

Form N–SAR is a combined reporting form that is to be used for semi-annual and annual reports by all investment companies which have filed a registration statement which has become effective pursuant to the Securities Act of 1933 ("1933 Act") with the exception of face amount certificate companies. Face amount certificate companies file periodic reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 ("1934 Act"). Form N–SAR is also used for transition reports pursuant to Rule 30b1–3 under the Investment Company Act of 1940 (the "Act"). The form is divided into four sections and only certain investment companies are to complete each section.

* * * * *

Unit Investment Trusts:

* * * * *

Under section 30(b) of the Act, sections 13 and 15(d) of the 1934 Act, and the rules and regulations thereunder, the Commission is authorized to solicit the information required by Form N–SAR from registered investment companies. Disclosure of the information specified by Form N–SAR is mandatory. Information supplied on Form N–SAR will be included routinely in the public files of the Commission and will be available for inspection by any interested persons.

* * * * *

C. Filing the Report

The report shall be filed with the Commission no later than the sixtieth day after the end of the fiscal period for which the report is being prepared. All registered management investment companies shall file the form semi-annually. All registered UITs shall file the form annually. An extension of time of up to 15 days for filing the form may be obtained by following the procedures specified in Rule 12b–25 under the 1934 Act.

All transition reports shall be filed no later than the sixtieth day after the later of either the close of the transition period or the date of the determination to change the fiscal year. However, the transition report may not cover a period longer than six months.

Rule 30b1–1 under the Act requires a $125 fee to be paid to the Commission at the time of filing each semi-annual report by open- and closed-end management investment companies and a $125 fee to be paid at the time of filing each annual report by a UIT. No fee is required for a transition report.

* * * * *

F. Preparation of the Report by Electronic users

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(2) Electronic filers may use the lockbox procedure as described in paragraph 220 of the Edgar User Manual to pay the filing fee required by Rule 30b1–1.

By the Commission.

Jonathan G. Katz,

Secretary.

March 2, 1989.

[FR Doc. 89–5576 Filed 3–10–89; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 10, 24 and 148

United States-Canada Free Trade Agreement; Extension of Time for Comments

March 6, 1989.

AGENCY: U.S. Customs Service, Treasury.

ACTION: Extension of time for comments.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the interim regulations on the United States-Canada Free Trade Agreement (CFTA). A notice inviting the public to comment on the CFTA was published in the Federal Register on December 23, 1988 (53 FR 51762), and comments were to have been received before February 21, 1989. A request has been received to extend the period of time for comments for an additional 30 days. In view of the complexity of issues and subjects involved, the request is granted.

This extension of time to file comments will not affect procedures and practices related to the implementation of duty preferences under the CFTA, since interim regulations governing these areas are currently in effect.

DATES: The time for comments is extended through March 23, 1989.

ADDRESS: Comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Joseph J. DeSanctis, Regulations and Disclosure Law Branch (202–566–8237).

Dated: March 6, 1989.

Harvey B. Fox,

Director, Office of Regulations and Rulings.

[FR Doc. 89–5679 Filed 3–10–89; 8:45 am]

BILLING CODE 4820–02–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–3513–8]

Approval and Promulgation of Implementation Plans; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving revised Missouri regulations for the control of volatile organic compound (VOC) emissions in the Kansas City area. These regulations were submitted in response to Part D of the Clean Air Act which requires state implementation plan (SIP) revisions for areas that have not attained the National Ambient Air Quality Standards. Today's action provides federal enforceability for these regulations which assures continued progress toward attainment and maintenance of the ozone air quality standard in Kansas City.

EFFECTIVE DATE: This action is effective April 12, 1989.

ADDRESSES: The state submittal and EPA's technical support document are available for inspection during normal business hours at the following locations: Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101; Missouri Department of Natural Resources, Air Pollution Control Program, Jefferson State Office Building, 205 Jefferson Street, Jefferson City,

Missouri 65101; Environmental Protection Agency, Public Information Reference Unit, Room 2922, 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Larry A. Hacker at (913) 236–2893 (FTS 757–2893).

SUPPLEMENTARY INFORMATION: On June 30, 1988, EPA proposed approval of a revised Missouri SIP for attainment of the ozone air quality standard in the Kansas City area (53 FR 24735). Essentially, the plan consists of an attainment demonstration and revised regulations for the control of VOC emissions. For a complete discussion of the state submittal, the reader is directed to the above referenced Federal Register notice.

Today's notice takes final action to approve the state's revised Kansas City VOC rules except for the rule pertaining to industrial surface coating. The state adopted further revisions to this rule subsequent to EPA's June 30 proposed rulemaking. Therefore, action on the industrial surface coating rule will be reproposed in a separate Federal Register notice.

In addition, EPA is currently reviewing its proposed action on the attainment demonstration portion of the SIP. However, EPA believes that final action on the VOC rules should not be delayed pending the outcome of its review of the attainment demonstration. Expeditious final approval of the revised VOC rules is necessary to provide federal enforceability which will assure continued progress toward attainment and maintenance of the ozone standard. No public comments were received on the June 30 proposed rulemaking insofar as the rules approved herein are concerned.

EPA Action

In today's notice, EPA takes final action to approve Missouri's revised VOC rules for the Kansas City area, which were included in state submittals of May 21, 1986, and December 18, 1987.

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

Under Section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 12, 1989. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone.

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

Date: January 27, 1989.

John A. Moore,

Acting Administrator.

40 CFR Part 52, Subpart AA, is amended as follows:

PART 52—[AMENDED]

Subpart AA—Missouri

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

Authority: 42 U.S.C. 7401–7642.

§ 52.1320 [Amended]

2. Section 52.1320 is amended by adding paragraph (c)(65) to read as follows:

* * * * *

(c) * * *

(65) Revised regulations for the control of volatile organic compound emissions in the Kansas City area were submitted by the Missouri Department of Natural Resources on May 21, 1986, and December 18, 1987. The May 21, 1986, submittal also included an ozone attainment demonstration for Kansas City, which will be addressed in a future action. Rule 10 CSR 10–2.290 provides for alternative compliance plans whereby compliance can be determined by a daily weighted average of emissions from a combination of source operations. EPA approves this rule with the understanding that any such alternative compliance plans must be submitted and approved by EPA as individual SIP revisions. In the absence of such approval, the enforceable requirements of the SIP would be the emission limits or reduction requirements stated in the rule.

(i) *Incorporation by reference.* (A) Revision to rule 10 CSR 10–2.260, Control of Emissions from Petroleum Liquid Storage, Loading, and Transfer, effective May 29, 1986, with amendments effective December 24, 1987.

(B) New rule 10 CSR 10–2.300, Control of Emissions from the Manufacturing of Paints, Varnishes, Lacquers, Enamels, and Other Allied Surface Coating Products, effective September 26, 1986, with amendments effective December 12, 1987.

(C) New rules 10 CSR 10–2.310, Control of Emissions from the Application of Automotive Underbody Deadeners, and 10 CSR 10–2.320, Control of Emissions from Production of Pesticides and Herbicides, effective November 23, 1987.

(D) Rescinded rules 10 CSR 10–2.240, Control of Emissions of Volatile Organic Compounds from Petroleum Refinery Equipment, and 10 CSR 10–2.250, Control of Volatile Leaks from Petroleum Refinery Equipment, effective November 23, 1987.

(E) Revision to rule 10 CSR 10–6.030, Sampling Methods for Air Pollution Sources, effective November 23, 1987, with amendments effective December 24, 1987.

(F) Revision to rule 10 CSR 10–2.210, Control of Emissions from Solvent Metal Cleaning, effective December 12, 1987.

(G) Revisions to rules 10 CSR 10–2.290, Control of Emissions from Rotogravure and Flexographic Printing Facilities, and 10 CSR 10–6.020, Definitions, effective December 24, 1987.

[FR Doc. 89–2420 Filed 3–10–89; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 52

[FRL–3535–1]

Approval and Promulgation of Implementation Plans; Ohio

AGENCY: Environmental Protection Agency (USEPA).

ACTION: Final rule.

SUMMARY: USEPA is approving a declaration by Ohio that recent revisions to USEPA's stack height regulations do not necessitate revisions to the State Implementation Plans (SIPs) for the Goodyear Tire and Rubber Company, Plant 2 in Akron, Ohio.

Under section 406 of the Clean Air Act, each State was required to review its SIP for consistency with the stack height regulations within 9 months of final promulgation. An intended effect of this action is to document formally that Ohio has satisfied this obligation for this source.

DATES: This action will be effective May 12, 1989 unless notice is received by April 12, 1989.

ADDRESSES: Copies of the State submittal and other materials related to this rulemaking are available for inspection during normal business hours at the following addresses: (It is recommended that you telephone Maggie Greene, at (312) 886–6088, before visiting the Region V office.)

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch

(5AR-26), 230 South Dearborn Street, Chicago, Illinois 60604.
Ohio Environmental Protection Agency, Office of Air Pollution Control, 1800 WaterMark Drive, P.O. Box 1049, Columbus, Ohio 42366-0149.

Comments on this rule should be addressed to: (Please submit an original and three copies if possible). Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Maggie Greene, (312) 886-6088.

SUPPLEMENTARY INFORMATION:

I. Background

Recent History of Stack Height Rules

On February 8, 1982 (47 FR 5864), USEPA promulgated final regulations limiting stack height credits and other dispersion techniques as required by section 123 of the Clean Air Act (the Act). These regulations were challenged in the U.S. Court of Appeals for the District of Columbia Circuit by the Sierra Club Legal Defense Fund, Inc., the Natural Resources Defense Council, Inc., and the Commonwealth of Pennsylvania in *Sierra Club v. USEPA*, 719 F.2d 436 (D.C. Cir. 1983). On October 11, 1983, the court issued its decision ordering USEPA to reconsider portions of the stack height regulations, reversing certain portions and upholding other portions.

On February 28, 1984, the electric power industry filed a petition for a *writ of certiorari* with the U.S. Supreme Court. On July 2, 1984, the Supreme Court denied the petition (104 S.Ct. 3571), and on July 18, 1984, the Court of Appeals' mandate was formally issued, implementing the court's decision and requiring USEPA to promulgate revisions to the stack height regulations within 6 months. The promulgation deadline was ultimately extended to June 27, 1985.

Revisions to the stack height regulations were proposed on November 9, 1984 (49 FR 44878), and finalized on July 8, 1985 (50 FR 27892). The revisions redefine a number of specific terms including "excessive concentrations," "dispersion techniques," "nearby," and other important concepts, and modified some of the bases for determining good engineering practice (GEP) stack height.

The regulations were challenged by environmental groups, affected industries and States (*NRDC vs. Thomas No. 85-1488*). On January 22, 1988, the D.C. Circuit issued its decision which affirmed the regulations in large part. Three provisions, however, were remanded to USEPA for reconsideration. These are:

1. Credit for sources with originally designed and constructed merged stacks (40 CFR 51.100(hh)(2)(ii)(A));
2. Grandfathering of pre-1979 formula GEP stack heights from demonstrations (40 CFR 51.100(ii)(2)); and
3. Grandfathering pre-1983 within formula stack height increases from demonstration requirements (40 CFR 51.100(kk)(2).)

Pursuant to section 406(d)(2) of the Act, all States were required to (1) review and revise, as necessary, their SIPs to include provisions that limit stack height credits and dispersion techniques in accordance with the revised regulations, and (2) review all existing emission limitations to determine whether any of these limitations have been affected by stack height credits above GEP or any other dispersion techniques. For any limitations so affected, States were to prepare revised limitations consistent with their revised SIPs. All SIP revisions and revised emission limits were to be submitted to USEPA within 9 months of promulgation, as required by section 406. Subsequently, USEPA issued detailed guidance on the performance of the required reviews.

Goodyear Tire and Rubber

This notice evaluates the review performed by Ohio for one source, the Goodyear Tire and Rubber Company, Plant 2 in Akron, Ohio. Reviews for other sources in Ohio and States in Region V will be addressed in separate **Federal Register** notices. This particular source is being singled out for expedited treatment to help settle outstanding litigation in the United States Court of Appeals for the Sixth Circuit, *Goodyear Tire and Rubber Company v. USEPA*, Case Nos. 76-231, 77-1362, 80-3077. Today's action is not affected by the January 22, 1988, court decision. Ohio's review of the Goodyear Tire and Rubber source was submitted on July 21, 1986. Additional information was submitted on September 16, 1986, and July 7, 1987.

II. Review of Emission Limitations

Prior to 1982, Boilers A and B at Goodyear Tire and Rubber's Plant 2 were vented to Stack No. 3 and Boiler C was vented to Stack No. 1. Due to structural deterioration of Stack #1, Goodyear vented the exhaust gas from Boiler C to Stack No. 3 in 1982 and eventually (in 1985) completely removed Stack No. 1. (Note, because of advanced structural decay of Stack No. 1, which was built in 1915, it was necessary to remove 15 feet off the top of this stack twice during its later years.)

The current SIP emission limit for Boilers A-C is based on the merged stack configuration. Ohio reviewed the physical stack height (76.2 meters) and stack parameters used in the dispersion modeling used to set the emission limit for Goodyear.

A. *Physical Stack Height*—(Stack No. 1), Boiler A and Boiler B (Stack No. 3) were installed in 1952, and Boiler C was installed in 1943. The Stack Height Regulations do not apply to stacks (or sources) in existence before December 31, 1970. (Note, in 1970, Stack Nos. 1 and 3 were both 77.4 meters high.) Thus, the use of the actual, grandfathered height is acceptable.

B. *Merged Stacks*—According to the Stack Height Rules, merged stacks are generally regarded as a prohibited dispersion technique. Credit may be granted for mergings implemented before July 8, 1985 (such as Goodyear), if either (a) such merging was part of a change in operation at the facility that included the installation of emissions control equipment (and there was no increase in emissions), (b) such merging was carried out for sound economic or engineering reasons (and there was no increase in emissions), or (c) the source owners or operators demonstrate that a merging was not significantly motivated by an intent to gain emissions credit for greater dispersion.

USEPA issued guidance to prepare and review justifications for merging gas streams in a memorandum entitled, "Implementation of Stack Height Regulations—Exceptions from Restrictions on Credit for Merged Stacks" (October 28, 1985). The Ohio and Goodyear justification was reviewed in accordance with this guidance.

1. *Record of Intent*—A review of USEPA's files uncovered no information showing that merging was conducted specifically to increase final exhaust gas plume rise.

2. *Reason to Replace Stacks*—As stated in Goodyear's July 18, 1986, letter and accompanying documents, Stack No. 1 (which was built in 1915) had structurally deteriorated such that it had reached the end of its useful life. This necessitated the venting of the exhaust gas from Boiler C either to a new stack or an existing stack (e.g., Stack No. 3).

3. *Increase in Emissions*—According to USEPA's October 10, 1985, guidance memorandum ("Questions and Answers on Implementing the Revised Stack Height Regulation"), in cases with no pre-merging allowable emission limitation, such as Goodyear, the post-merging allowable limit cannot exceed the pre-merging actual emission level.

The current post-merging allowable short-term SO_2 emission limitation for Goodyear is 4.64 pounds per million British thermal units (lbs/MMBTU). The maximum actual lbs/MMBTU emissions during the 2-year period prior to merging (pre-merging actual) were greater than this value (i.e., annual average on the order of 3.5–4.0 lbs/MMBTU, with maximum short-term values in the 5–6 lbs/MMBTU range). Thus, the merging has not resulted in an increase in emissions.

4. *Affirmative Demonstration* [1]—The October 28, 1985, "Merged Stack" memorandum provides an opportunity to affirmatively demonstrate that merged stacks were not significantly motivated by an intent to obtain emissions credit for increased dispersion. Evidence to support such demonstrations should include construction permits, relevant correspondence, facility records, engineering reports, and/or affidavits.

Goodyear's affirmative demonstration consists of:

(a) In-house memoranda which discuss technical and contractual issues associated with tying Boiler C into Stack No. 3, including a June 20, 1979, memorandum which indicated that Goodyear believed that the merging would not increase plume rise at the plant.

(b) Correspondence between USEPA and Goodyear, including a June 27, 1979, letter from USEPA in which USEPA stated that the merging "has been found to be based on good engineering practice" and a June 18, 1979, letter from Goodyear citing the structural deterioration of Stack No. 1 (necessitating its removal) and the improved aesthetics after Stack No. 1's removal.

(c) Affidavit from a Goodyear environmental engineer which stated the following: (1) that he believed that the effect of merging would make negligible difference in predicted impact from Stack No. 3; (2) it was not his objective or intent to provide any plume rise enhancement; and (3) plume rise enhancement was not a factor in Goodyear's decision to merge gas streams.

USEPA has reviewed and accepts the affirmative demonstration for the Goodyear Tire and Rubber Company. Thus, it is approving granting merged stack credit for Goodyear.

[1] The other two exemption criteria (sound economic or engineering reasons, and installation of pollution control equipment) do not apply to Goodyear.

III. Conclusion

The State of Ohio has reviewed the emission limitation for Goodyear's Plant 2, and has found that no revision to the SIP is necessary. As justification for its finding, Ohio (and Goodyear) provided copies of memoranda, letters, and an affidavit. USEPA has reviewed this information with respect to its implementation policy for the Stack Height Regulation. USEPA has determined that Ohio's negative declaration meets all of USEPA's requirements. Therefore, USEPA is approving the declaration by Ohio that the revisions to USEPA's stack height regulations do not necessitate revisions to the SIP for the Goodyear Tire and Rubber Company, Plant 2 in Akron, Ohio.

Because USEPA considers today's action noncontroversial and routine, we are approving it today without prior proposal. The action will become effective on May 12, 1989. However, if we receive notice by April 12, 1989 that someone wishes to submit critical comments, then USEPA will publish: (1) A notice that withdraws the action, and (2) a notice that begins a new rulemaking by proposing the action and establishing a comment period.

Under 5 U.S.C. section 605(b), the Administrator has certified that SIP approvals do not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 12, 1989. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control, Intergovernmental relations, Sulfur dioxide.

Authority: 42 U.S.C. 7401–7642.

Dated: February 28, 1989.

Valdas V. Adamkus,

Regional Administrator.

[FR Doc. 89–5694 Filed 3–10–89; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 370

[FRL–3535–5]

Emergency and Hazardous Chemical Inventory Forms and Community Right-to-Know Reporting Requirements; Clarification of Reporting Dates for Newly Covered Facilities in the Construction Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of reporting dates.

SUMMARY: On October 15, 1987, EPA published a final rule for reporting under sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA). Under sections 311 and 312, facilities required to prepare or have available a material safety data sheet (MSDS) for hazardous chemicals under the Occupational Safety and Health Act and its implementing regulations must submit the MSDS (or a list of the hazardous chemicals) and inventory forms to the State Emergency Response Commission (SERC), Local Emergency Planning Committee (LEPC) and the local fire department. On August 4, 1988, EPA published a notice which clarifies the reporting dates for facilities in the non-manufacturing sector which were covered by the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard as of June 24, 1988. This notice clarifies the reporting dates for facilities in the construction industry which were covered by the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard as of January 30, 1989.

DATES: 1. Initial submission of MSDSs or alternative list: April 30, 1989.

2. Initial submission of the inventory form containing Tier I information: March 1, 1990.

FOR FURTHER INFORMATION CONTACT: Kathleen Brody, Program Analyst, Preparedness Staff, Office of Solid Waste and Emergency Response, OS–120, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC, or the Emergency Planning and Community Right-To-Know Information Line at 1–(800) 535–0202 or in Washington, DC at (202) 479–2449.

SUPPLEMENTARY INFORMATION: On August 24, 1987 (52 FR 31852), OSHA revised its Hazard Communication Standard (HCS) to expand the scope of the industries covered by the rule from the manufacturing sector to all industries where employees are exposed to hazardous chemicals. For all

establishments except those in the construction industry, OSHA's August 1987 revised HCS rule became effective on June 24, 1988. On that same date, the United States Court of Appeals for the Third Circuit stayed the application of the revised HCS rule to the construction industry at the request of construction industry representatives. After considering the merits of the construction industry challenge to the revised HCS rule, however, the Third Circuit vacated the stay. This ruling became fully effective on January 30, 1989. In a recently published Federal Register notice (54 FR 6886, Feb. 15, 1989), OSHA announced that all provisions of the revised HCS rule were in effect in all segments of industry as of January 30, 1989.

Sections 311 and 312 of Title III of SARA apply to the owner or operator of any facility which is required to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical under the OSHA HCS. Section 311 of Title III requires that owners and operators submit an MSDS for each hazardous chemical at or above threshold amounts at the facility or a list of such chemicals to the SERC, LEPC and local fire department. Section 311(d)(1)(B) of Title III requires that the initial MSDS or list submission be made three months after the owner or operator of a facility is required to prepare or have available an MSDS for the chemical under the OSHA HCS. Therefore, EPA is today clarifying that the date established for section 311 compliance for the construction industry, newly subject to the HCS as of January 30, 1989, is April 30, 1989. Section 312 requires that the same facilities subject to section 311 submit an inventory form containing Tier I information annually on March 1 to the SERC, LEPC and local fire department. Thus, EPA is today clarifying that employers in the construction industry must submit their first Tier I inventory reports to these state and local entities by March 1, 1990.

Regulations for compliance with sections 311 and 312 of Title III were promulgated on October 15, 1987 (52 FR 38344) and codified at 40 CFR Part 370. This final regulation established the minimum threshold quantities applicable to the reporting requirements of all facilities subject to OSHA's MSDS requirements under sections 311 and 312, including facilities newly subject to the requirements at a future date.

The threshold for the first two years of reporting was set in the Agency's October 1987 regulation at 10,000 pounds, except for extremely hazardous substances (EHS). EHS must be reported if present in quantities at or above their chemical-specific threshold planning quantities or 500 pounds, whichever is less. EPA plans to propose a third-year and permanent threshold for reporting under sections 311 and 312 in the near future.

List of Subjects in 40 CFR Part 370

Community Right-to-Know, Superfund Amendments and Reauthorization Act, Hazard communication, Material safety data sheets.

Dated: March 1, 1989.

Jonathan Z. Cannon,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 89-5695 Filed 3-10-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 21, 22, 74, and 94

[General Docket 82-243; FCC 89-45]

Service and Technical Rules for Government and Non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action amends the Commission's Rules to specify service and technical rules for Government and non-Government fixed service usage of the 932-935/941-944 MHz bands. Five megahertz of the allocation is being designated for point-to-point use, with one megahertz designated for point-to-multipoint use. Licenses will be granted to qualified applicants on a first-come, first-served basis after an initial one-week filing period. In the event of mutually exclusive applications being filed during the initial filing period, or on the same day thereafter, lotteries will be used to grant licenses. The objective of this action is to satisfy Government and non-Government demand for a fixed service below one gigahertz.

EFFECTIVE DATE: April 1, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rodney Small, telephone (202) 653-8116.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Final Rule in General Docket 82-243, FCC 89-45, Adopted February 9, 1989, and Released February 28, 1989.

The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington DC 20037.

Summary of Final Rule

1. In the *First Report and Order* adopted on November 21, 1984 in this proceeding (50 FR 4650; February 1, 1985), the Commission allocated the 932-935/941-944 MHz bands for Government and non-Government fixed service usage on a co-primary basis. A *Third Notice of Proposed Rule Making* in the proceeding adopted on November 25, 1986 (52 FR 11519; April 9, 1987), proposed procedures and rules to be followed in sharing the bands.

2. Specifically, the *Third Notice of Proposed Rule Making* proposed two alternative application processing procedures to provide equitable access to the new fixed bands to both Government and non-Government entities. Under the first alternative, the essential features of the current Government and non-Government procedures would be retained. Under the second alternative, the usual 30-day non-Government filing window would be reduced to a single day, consistent with the procedure employed by the National Telecommunications and Information Administration for Government applications. This modification would allow consideration of mutually exclusive Government and non-Government applications only when filed on the same day. All other aspects of the procedure would be the same as under the first alternative.

3. No point-to-multipoint use of the new fixed bands was proposed. However, it was noted that paired private multiple address frequencies at 928-929/952-953 MHz are becoming saturated in some areas; therefore, comments were requested on whether there is a need for point-to-multipoint use which should be satisfied in this allocation.

4. We also proposed a channeling plan and technical standards in an attempt to guide efficient use of the new fixed bands. The interference protection criteria proposed for new fixed users, as well as existing grandfathered broadcast auxiliary stations that utilize the 942-944 MHz band, was that specified in § 94.63 of the Rules.

5. All commenting parties that addressed the area of permitted services supported a designation of some frequencies for point-to-multipoint use, citing the rapid growth which has occurred and the shortage of frequencies which presently exists in that service. However, since there are also substantial non-Government point-to-point needs and since the Government advocates using the entire 900 MHz fixed allocation in point-to-point applications, we believe that a designation of five megahertz of spectrum for point-to-point use and one megahertz of spectrumn for point-to-multipoint use is appropriate.

6. Our proposed channeling plan contemplated point-to-point use only. Thus, there is a need to change the proposed plan to permit point-to-multipoint use as well. We believe that a mix of 25 kHz, 50 kHz, 100 kHz, and 200 kHz channels is appropriate for point-to-point use, since there is a wide variation in information transmission requirements for this type of use. We are establishing 12.5 kHz channels for point-to-multipoint use since it appears that most requirements for this type of use can be accommodated in a 12.5 kHz channel. Applicants will be permitted to combine channels upon a showing that there is a need and sufficient frequencies are available to permit this. Applicants may split channels if they choose to do so.

7. We are adopting the proposed technical standards except for the point-to-multipoint channels. For these channels, we are adopting a 1.5 parts per million frequency tolerance and Part 90 emission roll-off standards. For the point-to-point channels, we are adopting the proposed frequency tolerance of 2.5 parts per million and the proposed emission limitations and antenna standards.

8. Disagreement was expressed concerning the proper length of the filing window. We have concluded that an initial one-week filing period, followed by a daily first-come, first-served procedure, is desirable for both point-to-point and point-to-multipoint applicants. Public notice of the initial filing period shall be given by the Commission, and notice shall also be published in the **Federal Register** at least thirty days prior to the beginning of the filing period. In the event of mutually exclusive applications being filed during the initial filing period, or on the same day thereafter, lotteries shall be used to grant licenses.

9. The rule amendments contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified information collection requirement on the public.

Ordering Clauses

10. Authority for this Rule Making is contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and section 553 of the Administrative Procedure Act, 5 U.S.C. section 553.

11. Accordingly, *it is ordered,* That Parts 1, 21, 22, 74, and 94 of the Commission's Rules and Regulations are amended as specified below, effective April 1, 1989.

12. *It is further ordered* That this proceeding is terminated.

List of Subjects

47 CFR Part 1

Practice and procedure.

47 CFR Part 21

Domestic public fixed radio services.

47 CFR Part 22

Public mobile service.

47 CFR Part 74

Aural broadcast auxiliary stations.

47 CFR Part 94

Private operational-fixed microwave service.

13. Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

15. In § 1.962, paragraph (a)(1) is revised to read as follows, and paragraph (i) is added as follows:

§ 1.962. Public notice of acceptance for filing; petitions to deny applications of specified categories.

(a) * * *

(1) Fixed point-to-point and point-to-multipoint stations using frequencies above 890 MHz (exclusive of control, relay, and repeater stations used as integral parts of mobile radio systems).

(i) Notwithstanding other provisions of this section, applications for frequencies in the 932–935/941–944 MHz bands shall be filed initially during a one-week period to be announced by public notice. After these applications have been processed, the Commission shall announce by public notice a filing date for remaining frequencies. From this filing date forward, applications shall be processed on a daily first-come, first-served basis. Applications will be considered to be mutually exclusive only if filed for the same frequency in the same geographic location during the initial filing period or, thereafter, on the same day.

16. Part 21 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 21—DOMESTIC PUBLIC FIXED RADIO SERVICES

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

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303.

18. In § 21.27, paragraph (d) is added as follows:

§ 21.27 Public notice period.

* * * * *

(d) Applications for frequencies in the 932.5–935/941.5–944 MHz bands shall be filed initially during a one-week period to be announced by public notice. After these applications have been processed, the Commission shall announce by public notice a filing date for remaining frequencies. From this filing date forward, applications shall be processed on a daily first-come, first-served basis.

19. In § 21.31, paragraph (f) is added as follows:

§ 21.31 Mutually exclusive applications.

(f) Notwithstanding other provisions of this section, applications for frequencies in the 932.5–935/941.5–944 MHz bands will be considered to be mutually exclusive only if filed for the same frequency in the same geographic location during the initial filing period or, thereafter, on the same day.

20. In § 21.101, the table in paragraph (a) is amended by adding the following frequency ranges in numeric order.

§ 21.101 Frequency tolerance.

(a) * * *

Frequency range (MHz)	Frequency tolerance (percent)		
	All fixed and base stations	Mobile stations over 3 watts	Mobile stations 3 watts or less
512 to 932 [3]	0.0005	0.0005	0.0005
932.5 to 935 [3]	0.00025	.....	.....
941.5 to 944	0.00025	.....	.....
944 to 1,000	0.0005	0.0005	0.0005

21. In § 21.107, the table in paragraph (b) is amended by adding a footnote reference to the 512 to 2,110 MHz band and revising the footnote to read as follows:

§ 21.107 Transmitter power.

(b) * * *

Frequency Band	Maximum allowable transmitter power		Maximum allowable EIRP	
	Fixed (W)	Mobile (W)	Fixed (dBW)	Mobile (dBW)
*	*	*	*	*
512 to 2,110...	20.0	20.0	(4)	.....
*	*	*	*	*

[4] The EIRP of stations in the 932.5–935 MHz, 941.5–944 MHz, and 10,600–10,680 MHz bands must not exceed +40 dBW.

22. In § 21.108, the list of frequency bands in paragraph (c) is amended by adding the following new bands in numeric order.

§ 21.108 Directional antennas.

(c) * * *

Frequency (MHz)	Category	Maximum beam-width to 3 dB points (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
932.5 to 935	A	14.0	n/a	.....	6	11	14	17	20	24
and										
941.5 to 944	B	20.0	n/a	.....	.....	6	10	13	15	20

23. In § 21.701, the list of frequency bands in paragraph (a) is amended by adding the following new bands and footnotes in numeric order; paragraphs (c) through (f) are redesignated as (d) through (g); and paragraph (c) is added as follows:

§ 21.701 Frequencies.

(a) * * *

932.5–935 MHz [17]
941.5–944 MHz [17] [18]

* * * * *

(c) *932.5–935 MHz and 941.5–944 MHz.* 200 kHz maximum authorized bandwidth, 9 MHz separation:

(1) 25 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.5125	941.5125
932.5375	941.5375
932.5625	941.5625
932.5875	941.5875
932.6125	941.6125
932.6375	941.6375
932.6625	941.6625
934.8375	941.8375
934.8625	943.8625
934.8875	943.8875
934.9125	943.9125
934.9375	943.9375
934.9625	943.9625
934.9875	943.9875

(2) 50 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.7000	941.7000
932.7500	941.7500
934.8000	943.8000

(3) 100 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.8250	941.8250
932.9250	941.9250
933.0250	942.0250
934.5250	943.5250
934.6250	943.6250
934.7250	943.7250

(4) 200 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
933.1750	942.1750
933.3750	942.3750
933.5750	942.5750
933.7750	942.7750
933.9750	942.9750
934.1750	943.1750
934.3750	943.3750

* * * * *

24. In § 21.703, the table in paragraph (a) is amended by adding the following bands in numeric order.

§ 21.703. Bandwidth and emission limitations.

(a) * * *

Frequency band (MHz)	Maximum authorized bandwidth (MHz)
932.5 to 935	0.2
941.5 to 944	0.2

* * * * *

25. Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22—PUBLIC MOBILE SERVICE

26. The authority citation for Part 22 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303), sec. 553 of the Administrative Procedure Act (5 U.S.C.), unless otherwise noted.

27. In § 22.27, paragraph (b) is redesignated as paragraph (b)(1) and paragraph (b)(2) is added as follows:

§ 22.27 Public notice period.

* * * * *

(b) * * *

(2) Applications for frequencies in the 932–932.5/941.5 MHz bands shall be filed initially during a one-week period to be announced by public notice. After these applications have been processed, the Commission shall announce by public notice a filing date for remaining frequencies. From this filing date forward, applications shall be processed on a daily first-come, first-served basis.

* * * * *

28. In § 22.31, paragraph (g) is added as follows:

§ 22.31 Mutually executive applications.

* * * * *

[17] Frequencies in these bands are shared with Government fixed stations and stations in the Private Operational-Fixed Microwave Service (Part 94).

[18] Frequencies in the 942 to 944 MHz band are also shared with broadcast auxiliary stations (Part 74).

(g) Notwithstanding other provisions of this section, applications for frequencies in the 932–932.5/941–941.5 MHz bands will be considered to be mutually exclusive only if filed for the same frequency in the same geographic location during the initial filing period or, therefore, on the same day.

29. In § 22.101, the table in paragraph (a) is amended by adding the following frequency ranges in numeric order.

§ 22.101 Frequency tolerance.

(a) * * *

Frequency range (MHz)	Frequency tolerance (percent)		
	All fixed and base stations	Mobile stations over 3 watts	Mobile stations 3 watts or less
* * * * *			
932 to 932.5	0.00015		
941 to 941.5	0.00015		

* * * * *

30. In § 22.501, paragraph (g)(1) is revised, and a new paragraph (g)(5) is added as follows:

§ 22.501 Frequencies.

* * * * *

(g)(1) The frequencies listed in this paragraph are available to one-way signaling stations utilized within a multiple address system which requires the use of at least four simultaneously operated base stations operated on the same frequency assignments. These frequencies will be assigned only when there are four or more remote sites listed on the application for license. The 928/959 MHz frequencies may be used in paired or unpaired configurations; the 932/941 MHz frequencies are for paired use only. When paired, the higher frequency will be used by the control and the lower by the base station.

890–960 MHz Band [1] [2]

928.8625	959.8625
928.8875	959.8875
928.9125	959.9125
928.9375	959.9375
928.9625	959.9625
928.9875	959.9875
932.00625	941.00625
932.01875	941.01875
932.03125	941.03125
932.04375	941.04375
932.05625	941.05625
932.06875	941.06875
932.08125	941.08125
932.09375	941.09375
932.10625	941.10625
932.11875	941.11875
932.13125	941.13125
932.14375	941.14375
932.15625	941.15625
932.16875	941.16875
932.18125	941.18125
932.19375	941.19375
932.20625	941.20625
932.21875	941.21875
932.23125	941.23125
932.24375	941.24375
932.25625	941.25625
932.26875	941.26875
932.28125	941.28125
932.29375	941.29375
932.30625	941.30625
932.31875	941.31875
932.33125	941.33125
932.34375	941.34375
932.35625	941.35625
932.36875	941.36875
932.38125	941.38125
932.39375	941.39375
932.40625	941.40625
932.41875	941.41875
932.43125	941.43125
932.44375	941.44375
932.45625	941.45625
932.46875	941.46875
932.48125	941.48125
932.49375	941.49375

[1] Except as indicated above, new control and repeater stations will not be authorized in the 890–940 MHz band. However, stations which were authorized to operate on such frequencies on April 16, 1958, may be granted renewed licenses subject to the following conditions:

Operations shall not be protected against any interference received from the emission of industrial, scientific and medical equipment operating on 915 MHz or from the emission of radiolocation stations in the 890–942 MHz band.

No harmful interference shall be caused to stations operating in the radiolocation service in the 890–942 MHz band.

[2] The paired frequencies between 932–932.5 and 941–941.5 are shared with Government fixed stations and stations in the Private Operational-Fixed Microwave Service (Part 94).

* * * * *

(5) Stations in multiple address systems on the 941–941.5 MHz channels will not be authorized to use transmitter power exceeding 100 watts nor effective isotropic radiated power exceeding +30 dBW. Stations in multiple address systems on the 932–932.5 MHz channels will not be authorized to use transmitter power exceeding 5 watts nor effective isotropic radiated power exceeding +17 dBW.

* * * * *

31. Part 74 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 74—EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

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

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082 as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083 as amended; 47 U.S.C. 301, 303, 307.

33. In § 74.502, paragraphs (a) through (d) are redesignated as paragraphs (b) through (e). In newly redesignated paragraph (e), change the internal reference to read "paragraph (b) of this section".

§ 74.502 Frequency assignment.

(a) Except as provided in W.S.C. 302, broadcast auxiliary stations licensed as of November 21, 1984, to operate in the band 942–944 MHz may continue to operate on a co-equal primary basis to other stations and services operating in the band in accordance with the Table of Frequency Allocations. These stations will be protected from possible interference caused by new users of the band by the technical standards specified in § 94.63(d)(3).

* * * * *

34. Part 94 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 94—PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

35. The authority citation for Part 94 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

36. In § 94.61, the table in paragraph (b) is amended by adding the following frequency bands and footnotes in numeric order:

§ 94.61 Applicability.

* * * * *

(b) * * *

932 to 932.5	(32)
932.5 to 935	(33)
941 to 941.5	(32)
941.5 to 944	(33)(34)

* * * * *

(32) Frequencies in the 932 to 932.5 MHz and 941 to 941.5 MHz bands are shared with Government fixed point-to-multipoint stations and point-to-multipoint stations in the Public Land Mobile Service (Part 22). Frequencies in these bands are paired with one another and are available for point-to-multipoint transmission of the licensee's products and information services, excluding video entertainment material, to the licensee's customers.

(33) Frequencies in the 932.5 to 935 MHz and 941.5 to 944 MHz bands are shared with Government fixed point-to-point stations and stations in the Point-to-Point Microwave Radio Service (Part 21). Frequencies in these bands are paired with one another.

(34) Frequencies in the 942 to 944 MHz band are also shared with broadcast auxiliary stations (Part 74).

* * * * *

37. Section 94.65 is amended by redesignating paragraph (a)(1)(iv) as paragraph (a)(1)(v); adding a new paragraph (a)(1)(iv); redesignating paragraphs (a)(2)(i) through (a)(2)(iii) as paragraph (a)(2)(ii) through (a)(2)(iv) and by adding a new paragraph (a)(2)(i) and additional frequency bands in paragraphs (a)(2)(ii), (a)(2)(iii), and (a)(2)(iv); and revising the headings of the tables in these paragraphs to read as follows:

§ 94.65 Frequencies.

* * * * *

(a) * * *

(1) * * *

(iii) * * *

(iv) Frequencies listed in this paragraph are shared with stations in the Public Land Mobile Service (Part 22).

TABLE 7—PAIRED FREQUENCIES

[12.5 kHz bandwidth]

Remote transmit	Master transmit
932.00625	941.00625
932.01875	941.01875
932.03125	941.03125
932.04375	941.04375
932.05625	941.05625
932.06875	941.06875
932.08125	941.08125
932.09375	941.09375
932.10625	941.10625
932.11875	941.11875
932.13125	941.13125
932.14375	941.14375
932.15625	941.15625
932.16875	941.16875
932.18125	941.18125
932.19375	941.19375
932.20625	941.20625
932.21875	941.21875
932.23125	941.23125
932.24375	941.24375
932.25625	941.25625
932.26875	941.26875
932.28125	941.28125
932.29375	941.29375
932.30625	941.30625
932.31875	941.31875
932.33125	941.33125
932.34375	941.34375
932.35625	941.35625
932.36875	941.36875
932.38125	941.38125
932.39375	941.39375
932.40625	941.40625
932.41875	941.41875
932.43125	941.43125
932.44375	941.44375
932.45625	941.45625
932.46875	941.46875
932.48125	941.48125
932.49375	941.49375

* * * * *

(2) * * *

(i)

TABLE 8—PAIRED FREQUENCIES

[25 kHz bandwidth]

Transmit (or receive)	Receive (or transmit)
932.5125	941.5125
932.5375	941.5375
932.5625	941.5625
932.5875	941.5875
932.6125	941.6125
932.6375	941.6375
932.6625	941.6625
934.8375	943.8375
934.8625	943.8625
934.8875	943.8875
934.9125	943.9125
934.9375	943.9375
934.9625	943.9625
934.9875	943.9875

(ii)

TABLE 9—PAIRED FREQUENCIES

[50 kHz bandwidth]

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.7000	941.7000
932.7500	941.7500
934.8000	943.8000

* * * * *

(iii)

TABLE 10—PAIRED FREQUENCIES

[100 kHz bandwidth]

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.8250	941.8250
932.9250	941.9250
933.0250	942.0250
934.5250	943.5250
934.6250	943.6250
934.7250	943.7250

* * * * *

(iv)

TABLE 11—PAIRED FREQUENCIES

[200 kHz bandwidth]

Transmit (receive) (MHz)	Receive (transmit) (MHz)
933.1750	942.1750
933.3750	942.3750
933.5750	942.5750
933.7750	942.7750
933.9750	942.9750
934.1750	943.1750
934.3750	943.3750

* * * * *

38. In § 94.67, the table is amended by revising the first two frequencies as follows:

§ 94.67 Frequency tolerance.

* * * * *

Frequency band (MHz)	Tolerance as percentage of assigned frequency
928–929, 932–932.5, 941–941.5	0.0005(9)
932.5–935, 941.5–944, 952–960	(1)(5)

* * * * *

39. In § 94.71, the table in paragraph (b) is amended by adding the following frequency ranges in numeric order:

§ 94.71 Emission and bandwidth limitations.

* * * * *

(b) * * *

Frequency band (MHz)	Maximum authorized bandwidth
* * * * *	
932–932.5, 941–941.5	12.5 kHz [1]
932.5–935, 941.5–944	25, 50, 100, 200 kHz [1]

* * * * *

40. In § 94.73, the table is amended by adding the following frequency ranges in numeric order.

§ 94.73 Power limitations.

* * * * *

(a) * * *

Frequency band (MHz)	Maximum allowable transmitter power		Maximum allowable EIRP [2]	
	Fixed (W)	Mobile (W)	Fixed (dBW)	Mobile (dBW)
* * * * *				
932–932.5	5.0	.....	+17	.....
932.5–935	20.0	.....	+40	.....
941–941.5	100.0		+30	
941.5–944	20.0	.....	+40	.....

* * * * *

41. In § 94.75, the table in paragraph (b) is amended by adding the following frequency ranges in numeric order.

§ 94.75 Antenna limitations.

* * * * *

(b) * * *

Frequency (MHz)	Category	Maximum beam-width to 3 dB points (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
932.5 to 935 and 941.5 to 944	A	14.0	n/a	.....	6	11	14	17	20	24
	B	20.0	n/a	.....	.....	6	10	13	15	20

* * * * *

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 89-5124 Filed 3-10-89; 8:45 am]

BILLING CODE 6712-01-M

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 800

Organization and Functions of the Board and Delegations of Authority

AGENCY: National Transportation Safety Board.

ACTION: Final rule.

SUMMARY: This amendment revises Part 800 to reflect the current delegations of authority to the Directors of the Bureau of Accident Investigation and the Bureau of Field Operations.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: John M. Stuhldreher, General Counsel, National Transportation Safety Board, 800 Independence Avenue SW., Washington, DC 20594; Telephone: 202-382-6540.

SUPPLEMENTARY INFORMATION: The National Transportation Safety Board is amending Part 800 to reflect the current delegations of authority to the Directors of the Bureau of Accident Investigation and the Bureau of Field Operations to determine the probable cause(s) of accidents reported in the "Brief of Accident" format. The delegations currently reserve the determination of cause in any such accident investigations to the Board when (a) requested by a single Board Member or (b) it appears to the Bureau Director that, because of significant public interest, a policy issue, or a safety issue or other matter, the determination of the probable cause(s) should be made by the Board. The Board is adding a third instance where the determination of cause is reserved by the Board: (c) when the accident investigation will be used to support findings in a safety study.

Since this regulatory amendment is not a substantive rule but a rule of agency organization and procedure, notice and public procedure are not necessary and the amendment may be made effective immediately.

Regulatory Flexibility

Under the criteria of the Regulatory Flexibility Act, these amendments to Part 800 will not impose any kind of regulatory burden on any entity. These amendments are intended to clarify the Board's procedures in respect to accident/incident investigations, hearings, and reports.

Paperwork Reduction

The amedndments that are adopted herein will not in any way impose paperwork requirements.

List of Subjects in 49 CFR Part 800

Organizations and functions, Authority delegations (government agencies).

Accordingly, Part 800 of the Board's Rules (49 CFR Part 800) is revised to read as follows:

PART 800—[AMENDED]

1. The authority citation continues to read as follows:

Authority: Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 et seq.)

2. Section 800.25 is amended by revising paragraph (c) as follows:

§ 800.25 Delegation to the Director, Bureau of Accident Investigation.

* * * * *

(c) Determine the probable cause(s) of accidents in which the determination is issued in the "Brief of Accident" format, except that the Bureau Director will submit the findings of the accident investigation to the Board for determination of the probable cause(s) when (1) any Board Member so requests, (2) it appears to the Bureau Director that, because of significant public interest, a policy issue, or a safety issue or other matter, the determination of the probable cause(s) should be made by the Board, or (3) the accident investigation will be used to support findings in a safety study. Provided, that a petition for reconsideration or modification of a determination of the probable cause(s) made under § 845.41 of the Board's regulations (49 CFR 845.41) shall be acted on by the Board.

3. Section 800.28 is amended by revising paragraph (c) as follows:

§ 800.28 Delegation to the Director, Bureau of Field Operations.

* * * * *

(c) Determine the probable cause(s) of accidents in which the determination is issued in the "Brief of Accident" format, except that the Bureau Director will submit the findings of the accident investigation to the Board for determination of the probable cause(s) when (1) any Board Member so requests, (2) it appears to the Bureau Director that, because of significant public interest, a policy issue, or a safety issue or other matter, the determination of the probable cause(s) should be made by the Board, or (3) the accident investigation will be used to support findings in a safety study. Provided, that a petition for reconsideration or modification of a determination of the probable cause(s) made under § 845.41 of the Board's regulations (49 CFR 845.41) shall be acted on by the Board.

Signed in Washington, DC on March 8, 1989.

James L. Kolstad,

Acting Chairman.

[FR Doc. 89-5701 Filed 3-10-89; 8:45 am]

BILLING CODE 7533-01-M

49 CFR Part 805

Employee Responsibilities and Conduct

AGENCY: National Transportation Safety Board.

ACTION: Final rule.

SUMMARY: This amendment revises § 805.735-2 to alphabetize all definitions.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: John M. Stuhldreher, General Counsel, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594; Telephone: 202–382–6540.

SUPPLEMENTARY INFORMATION: This amendment is to alphabetize all definitions in this section, so that in the future, if a definition needs to be added, it can be added alphabetically.

List of Subjects in 49 CFR Part 805

Administrative practice and procedure.

Accordingly, Part 805 of the Board's Rules (49 CFR Part 805) is amended to read as follows:

PART 805—[AMENDED]

1. The authority citation reads as follows:

Authority: E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR 1965 Supp.; 5 CFR 735.101 *et seq.*, and 5 CFR 735.404.

1. Section 805.735–2 is revised and reads as follows:

§ 805.735–2 Definitions.

As used in this part.

"Executive order" means Executive Order 11222 of May 8, 1965 (30 FR 6469).

"Members and employees" means the Board Members and employees of the National Transportation Safety Board (Board) and active duty officers or enlisted members of the Armed Forces detailed to the Board, but does not include special Government employees.

"Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

"Special Government employee" means an employee of the Board who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for a period not to exceed 120 days during any period of 365 consecutive days, on either a full-time or intermittent basis.

James L. Kolstad,

Acting Chairman.

Signed in Washington, DC, on March 8, 1989.

[FR Doc. 89–5702 Filed 3–10–89; 8:45 am]

BILLING CODE 7533–01–M

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49 CFR Part 826

Equal Access to Justice Act; Implementation

AGENCY: National Transportation Safety Board.

ACTION: Final rule.

SUMMARY: This amendment revises Part 826 to change the authority citation and to change one of the conditions that an applicant must meet to be eligible for an award of attorney fees and other expenses under the Equal Access to Justice Act of 1980, as restored.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: John M. Stuhldreher, General Counsel, National Transportation Safety Board, 800 Independence Avenue, SW. Washington, DC 20594; Telephone: 202–382–6540.

SUPPLEMENTARY INFORMATION: By Pub. L. 99–80, adopted August 5, 1985 (99 Stat. 186), effective October 1, 1984, Congress restored Section 504 of Title 5 and repealed Pub. L. 96–481. In doing so, Congress made certain changes to section 504. This amendment revises Part 826 to reflect the change in statutory authority and to reflect the change to section 504 in respect to one item of eligibility, i.e., individual net worth has been revised to $2 million and corporate net worth has been raised to $7 million.

Since this regulatory amendment is mandated by statute, notice and public procedure are not necessary and the amendment can be made effective immediately.

List of Subjects in 49 CFR Part 826

Administrative practice and procedure.

Accordingly, Part 826 of the Board's Rules (49 CFR Part 826) is amended as follows:

PART 826—[AMENDED]

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

Authority: Section 203(a)(1) Pub. L. 99–80, 99 Stat. 186 (5 U.S.C. 504)

2. Section 826.4 is amended by revising paragraphs (b) (1), (2), and (5) as follows:

§ 826.4 Eligibility of applicants.

* * * * *

(b) * * *

(1) An individual with a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

* * * * *

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

* * * * *

Signed in Washington, DC on March 8, 1989.

James L. Kolstad,

Acting Chairman.

[FR Doc. 89–5703 Filed 3–10–89; 8:45 am]

BILLING CODE 7533–01–M

Proposed Rules

Federal Register
Vol. 54, No. 47
Monday, March 13, 1989

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 52

[FV-88-203]

Standards for Grades of Canned Pineapple

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The purpose of this proposed rule is to revise the current voluntary U.S. Standards for Grades of Canned Pineapple. The proposed rule was developed by the U.S. Department of Agriculture (USDA) at the request of major segments of the canned pineapple industry. It is intended to improve the standards and reflect current processing techniques and marketing practices by: (1) Eliminating reference to the sub-styles "small tidbits," "large tidbits," and "symmetrical chunks"; (2) including packing media designations of "extra light sirup" and "artificially sweetened"; (3) changing drained weight values to accommodate the extra densities of the new packing media; (4) modifying the procedure for determining the drained weight and acceptance criteria to reflect other U.S. grade standards and with the Food and Drug Administration (FDA) drained weight procedure and acceptance criteria; (5) eliminating the recommended count and size designations for slices and half slices styles; (6) replacing dual grade nomenclature with single letter designations; (7) adding the new style "whole"; and (8) providing a uniform format consistent with recent revisions of other U.S. grade standards. This proposed rule also includes conforming and miscellaneous nonsubstantive changes for clarity.

DATE: Comments must be received on or before May 12, 1989.

ADDRESS: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in duplicate to the Office of the Docket Clerk, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, P.O. Box 96456, Room 2085, South Building, Washington, DC 20090-6456. Comments should reference the date and page number of this issue of the Federal Register and will be made available for public inspection in the office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: D. Todd Dulaney, Processed Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, P.O. Box 96456, Room 0713, South Building, Washington, DC 20090-6456, Telephone (202) 447-6247.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been designated as a "nonmajor" rule. It will not result in an annual effect on the economy of $100 million or more. There will be no major increase in cost or prices to consumers; individual industries; Federal, State, or local government agencies; or geographic regions. It will not result in significant effects on competition, employment, investments, productivity, innovations, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Agencies are required to periodically review existing regulations. An objective of the regulatory review is to ensure that the grade standards are serving their intended purpose, the language is clear, and the standards are consistent with AMS policy and authority.

The Administrator, Agricultural Marketing Service, has certified that this action will not have a significant economic impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act, Pub. L. 96-354 (5 U.S.C. 601). The proposed changes reflect current marketing practices.

In addition, these standards are voluntary. A small entity may avoid incurring any additional economic impact by not employing them.

Modern pineapple processing techniques have brought about changes in the procedures used to determine quality grades of canned pineapple since the current grade standards became effective in March 1957.

The Pineapple Growers Association of Hawaii (PGAH), an association representing the majority of the canned pineapple industry in the United States, has requested the U.S. Department of Agriculture to revise the U.S. Standards for Grades of Canned Pineapple and align the grading procedures with current processing techniques and marketing practices. The current U.S. grade standards for canned pineapple provide for the sub-styles, "small tidbits" and "large tidbits" under the style of "tidbits." Also, under the style of "chunks," reference is made to the sub-style "symmetrical chunks." The Food and Drug Administration (FDA) does not include these sub-styles as part of the Canned Pineapple Standard of Identity (21 CFR 145.180(a)(2d)).

In order to simplify the standards and maintain consistency between the definitions of the USDA grade standards and the FDA pineapple standard, this proposal would eliminate all reference to the terms "large tidbits," "small tidbits," and "symmetrical chunks" under the respective styles in the U.S. grade standards. In addition, the definitions for all styles of canned pineapple in the U.S. grade standards would be changed to reflect the style definitions in the current FDA standard of identity.

The canned pineapple industry has begun using packing media with sirup designations in addition to those described in the current U.S. grade standards. The current FDA canned pineapple standard provides for and defines these additional packing media designations (21 CFR 145.180(a)(3) and 145.181). This proposal would align the U.S. grade standards with the FDA standard by providing for two additional sirup designations.

They are described as "extra light sirup," with sirup densities of ten degrees Brix or more but less than 14 degrees Brix, and "artificially sweetened" not defined with sirup density since the packing media contains no additional sucrose. To further clarify usage of the U.S. grade standards, terminology describing existing packing media designations would also be changed to reflect corresponding definitions in the FDA

canned pineapple standard (21 CFR 145(a)(3).

To accommodate the new values for the proposed additional sirup densities, drained weight values for common container sizes for sirup densities less than 14 degrees Brix are provided in the proposed new U.S. grade standard. The new drained weight values and present values would be adjusted to the nearest tenth of an ounce to reflect current manufacturing practices and the accuracy of modern weighing equipment used for drained weight determination. The current U.S. grade standards provide a method for determining drained weights of crushed style canned pineapple by transferring adequately drained pineapple material from the drain screen to a clean dry pan that has previously been weighed. After determining the combined weight of the pineapple material and pan, the weight of the pan is then subtracted from the total weight to reveal the weight of the crushed pineapple material.

This method is cumbersome since the dry pan "tare weight," along with the drain screen "tare weight," can be automatically subtracted from the total weight, without transferring the pineapple material, using scales designed for this purpose. This proposal provides a procedure that streamlines drained weight determinations for crushed style canned pineapple by eliminating the extra steps involved in physically removing the pineapple material from the drain screen and subtracting the predetermined "tare weight" of the pan. The proposed method reflects FDA procedures and acceptance criteria for determining drained weights (21 CFR 145.3) and reflects procedures described in other styles of canned pineapple and other U.S. grade standards.

The coring, cutting, and slicing procedures in modern pineapple processing plants enable processors to uniformly size units for the two styles, "slices" and "half slices" with a controlled degree of accuracy. Uniform counts of units for these two styles are placed in containers as a result. According to the PGAH, the majority of the pineapple processors believe that the section for recommended unit size and count designations for filled containers, as described in the current U.S. grade standards, is redundant and should be removed. This proposal would delete the section, "Recommended Counts and Sizes of Slices and Half Slices," from the U.S. grade standards, as unnecessary.

Consistent with recent or proposed changes to other U.S. grade standards, this proposal also would replace dual grade nomenclature with single letter grade designations. Under the proposal, "U.S. Grade A" or ("U.S. Fancy"), "U.S. Grade B" or ("U.S. Choice") and "U.S. Grade C" or ("U.S. Standard") would simply become "U.S. Grade A," "U.S. Grade B," and "U. S. Grade C."

The proposal would also include the new style "whole", a solid cored and peeled whole fruit, cut into a symmetrical cylinder.

The proposed changes would also provide a uniform format consistent with recent revisions of other U.S. grade standards. The proposed format is designed to provide industry personnel and Agricultural Commodity Graders with simpler and more comprehensive standards. Definitions of terms and easy-to-read tables would replace the textual descriptions in existing grade standards. The changes would be expected to promote better understanding of the grade standards. Other sections would be modified to conform with these changes.

List of Subjects in 7 CFR Part 52

Fruits, Vegetables, Food grades and standards.

For the reasons set forth in the preamble, it is proposed that 7 CFR Part 52 is amended as follows:

PART 52—PROCESSED FRUITS AND VEGETABLES, PROCESSED PRODUCTS THEREOF, AND CERTAIN OTHER PROCESSED FOOD PRODUCTS

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

Authority: Agricultural Marketing Act of 1946, Secs. 203, 205, 60 stat. 1087, as amended, 1090, as amended; (7 U.S.C. 1622, 1624).

2. The Subpart—United States Standards for Grades of Canned Pineapple, is revised to read as follows:

Subpart—United States Standards for Grades of Canned Pineapple

Sec.

Subpart—United States Standards for Grades of Canned Pineapple

§ 52.1711 Product description.

Canned pineapple is the product represented as defined in the Standards of Identity, Quality, and Fill of Container for Canned Pineapple (21 CFR 145.180 and 145.181) issued under the Federal Food, Drug, and Cosmetic Act.

§ 52.1712 Styles.

(a) *Whole* consists of whole fruit peeled and cored into reasonably symmetrical pineapple cylinders with both ends cut perpendicular to the cylinder axis.

(b) *Slices* consist of uniformly cut circular slices or rings cut across the axis of the peeled, cored pineapple cylinders.

(c) *Half slices* consist of uniformly cut, approximately semi-circular halves of slices.

(d) *Broken slices* consist of arc-shaped portions which are not required to be uniform in size and/or shape.

(e) *Spears* consist of predominantly 65 mm (2.5 in), or longer, slender sectors cut radially and lengthwise from peeled cored pineapple cylinders.

(f) *Tidbits* consist of predominantly 8 mm (0.31 in) to 13 mm (0.51 in), reasonably uniform wedge-shaped sectors cut from slices or portions thereof.

(g) *Chunks* consist of short, thick units cut from slices and/or from peeled, cored pineapple, are predominantly more than 13 mm (0.51 in) in both thickness and width, and less than 38 mm (1.5 in) in length.

(h) *Cubes* consist of reasonably uniform, cube-shaped units, predominantly 14 mm (0.55 in) or less in the longest edge dimension.

(i) *Crushed* consists of finely cut, finely shredded or grated, or small diced pieces of canned pineapple.

§ 52.1713 Definition of terms.

In these U.S. standards, unless otherwise required by the context, the following terms shall be construed, respectively, to mean:

(a) *Acid* means the grams of anhydrous citric acid in 100 mL of the liquid drained from the product 15 days or more after the pineapple is canned, or the blended homogenized slurry of the comminuted entire contents of the container when measured less than 15 days after canning.

(b) *Blemish* means surface areas and spots which contrast strongly in color or texture with the normal pineapple tissue, and are in excess of 2 mm (0.08 in) in the longest dimension of the

exposed surface of the unit. Blemishes include deep fruit eyes, fragments of shell, brown spots, bruised portions and other abnormalities that are possible to detect in good commercial practice before sealing in the containers. In crushed pineapple the term applies to each fragment of crushed pineapple that bears a blemish. *Serious blemish* means that the blemish seriously affects the appearance or edibility of the unit.

(c) *Brix measurement* means the total soluble solids content of the product corresponding to a pure sucrose solution of the same specific gravity. It is measured 15 days or more after canning (natural equalization) or less than 15 days after canning on the blended homogenized slurry of the comminuted entire contents of the container (simulated equalization).

(d) *Broken unit* means that the whole slice is definitely severed from the core hole to the outer circumference.

(e) *Character* refers to the degree of ripeness and maturity, the texture of the fruit, and the degree of freedom from core material.

(1) *Good character* (applies to all styles) means the units are of practically uniform ripeness, are reasonably firm with fruitlets appearing as a compact structure, are reasonably free from porosity and there is not more than 11 g (0.4 oz) of core material contained in one pound of drained fruit. Half slices or broken slices that fall within this classification shall not be graded above U.S. Grade C, regardless of the total score for the product.

(2) *Reasonably good character* (applies to all styles) means the units are of reasonably uniform ripeness, the fruitlets are reasonably compact in structure, are fairly free from porosity, and there is not more than 31 g (1.1 oz) of core material contained in one pound of drained fruit. Except for half slices or broken slices styles, canned pineapple that falls within the classification defined as "reasonably good character" shall not be graded above U.S. Grade B, regardless of the total score for the product. Half slices or broken slices styles that fall within this classification shall not be graded above U.S. Grade C, regardless of the total score for the product.

(3) *Fairly good character* (applies only to half slices or broken slices styles) means the units are of fairly uniform ripeness, the fruitlets are fairly compact in structure, the units are fairly free from porosity, and there is not more than 31 g (1.1 oz) of core material contained in one pound of drained fruit. Half slices or broken slices that fall within this classification shall not be graded above U.S. Grade C, regardless of the total score for the product.

(4) *Poor character* means product that fails to meet the requirements of "reasonably good" or "fairly good character" as applicable for the style. Canned pineapple that falls within this classification shall not be graded above Substandard, regardless of the total score for the product.

(f) *Chip* means any unit in cubes style that is less than 8 mm (0.31 in) in the greatest dimension.

(g) *Color* refers to the predominant varietal characteristic color of properly ripened and properly processed pineapple.

(1) *Good color* (applies to all styles) means that the color of the canned pineapple units or mass is bright and is characteristic of properly ripened and properly processed pineapple of similar varieties; and that there may be slight variations in shades of such characteristic color in the units, within each unit or within the mass, and that white radiating streaks may be present: *Provided,* that such variations do not materially affect the appearance or edibility of the product. Half slices or broken slices styles that fall within this classification shall not be graded above U.S. Grade C, regardless of the total score for the product.

(2) *Reasonably good color* (applies to all styles) means that the color of the canned pineapple units or mass may be no more than slightly dull but is characteristic of properly ripened and properly processed pineapple of similar varieties; and that there may be marked variations in shades of such characteristic color in the units, within each unit, or within the mass, and that white radiating streaks may be present: *Provided* that such variations do not seriously affect the appearance or edibility of the product. Canned pineapple that falls within this classification shall not be graded above U.S. Grade B, regardless of the total score for the product, except half slices or broken slices styles which shall not be graded above U.S. Grade C, regardless of the total score for the product.

(3) *Fairly good color* (applies only to half slices or broken slices styles) means that the color of the canned pineapple units or mass may be dull, but is characteristic of properly ripened and properly processed pineapple of similar varieties; and, that there may be marked variations in shades of such characteristic color in the units, within each unit, or within the mass, and that white radiating streaks may be present which may seriously affect the appearance or edibility of the product. Half slices or broken slices styles of canned pineapple that fall within this classification shall not be graded above U.S. Grade C, regardless of the total score for the product.

(4) *Poor color* (applies to all styles) means product that fails to meet the requirements of "reasonably good color" or "fairly good color," as applicable for the style. Product that falls within this classification shall not be graded above Substandard, regardless of the total score for the product.

(h) *Core material* means the pineapple portion which is identified as definitely hard and characteristic of the center structure of pineapple, normally removed during processing.

(i) *Defect* refers to the degree of freedom, for the applicable style, from trimmed units, blemished units, mashed units and from any other defects, including specks in crushed style, that cannot be weighed which detract from the appearance or edibility of the product.

(1) *Practically free from defects* (applies to all styles) means that the canned pineapple is practically free from any defects including defects not specifically mentioned. Practically free from defects means, for the respective styles:

(i) *Whole.* Not more than 10 percent, by count, of the fruit units (cylinders) may be slightly trimmed, based on the average of all containers in the sample; not more than 10 percent by count of the fruit units (cylinders) may have an area greater than 7 percent of the total surface area which is mashed; however, a sample having less than 10 containers in permitted to have one slightly trimmed unit and one unit with more than 7 percent of the suface area mashed. Not more than 2 blemishes and serious blemishes per fruit unit (cylinder) is permitted.

(ii) *Slices.* Not more than a reasonable amount of units may be insignificantly or slightly trimmed, and no slices may be excessively trimmed. Not more than a total of 5 percent, by count, of the units may be blemished and seriously blemished; or one unit in a container is permitted to be blemished and seriously blemished if such unit exceeds the allowance of 5 percent, by count: *Provided* that in all containers comprising the sample, such blemished units and seriously blemished units do not exceed an average of 5 percent of the total number of units. Not more than one unit in containers of more than 25 units, may be mashed.

(iii) *Tidbits.* Not more than 5 percent of the drained weight may consist of units that are excessively trimmed. Not

more than a total of 5 percent, by count, of the units may be blemished and seriously blemished: *Provided* that not more than 2½ percent, by count, may be seriously blemished. Not more than 3 of the units in containers of less than 150 units, or not more than 2 percent of the units in containers of 150 or more, may be mashed.

(iv) *Chunks.* Not more than a total of 5 percent, by count, of the units may be blemished and seriously blemished: *Provided,* that not more than 2½ percent, by count, may be seriously blemished. Not more than 3 of the units in containers of less than 70 units, or not more than 5 percent of the units in containers of 70 units or more, may be mashed.

(v) *Cubes.* Not more than a total of 2 percent of the drained weight may be blemished and seriously blemished: *Provided,* that not more than 1 percent of the drained weight may be seriously blemished.

(vi) *Spears.* Not more than a reasonable amount of units may be insignificantly or slightly trimmed, but none may be excessively trimmed. Not more than a total of 5 percent, by count, of the units may be blemished and seriously blemished, or one unit in a container is permitted to be blemished or seriously blemished if such unit exceeds the allowance of 5 percent, by count: *Provided,* that in all containers comprising the sample, such blemished units and seriously blemished units do not exceed an average of 5 percent of the total number of units. Not more than one unit per container may be mashed.

(vii) *Crushed.* Not more that ½ percent of the drained weight may consist of fragments bearing blemishes, including blemished and seriously blemished fragments. Defects also include dark specks that cannot be weighed, yet affect the appearance or edibility of the product.

(viii) *Half slices.* Not more than a reasonable amount of units may be insignificantly or slightly trimmed, but none may be excessively trimmed. Not more than a total of 5 percent, by count, of the units may be blemished and seriously blemished, or one unit in a container is permitted to be blemished or seriously blemished if such unit exceeds the allowance of 5 percent, by count: *Provided,* that in all containers comprising the sample, such blemished and seriously blemished units do not exceed an average of 5 percent of the total number of units. Not more than one unit in containers of 25 units or less, and not more than 3 units in containers of more than 25 units, may be mashed. Product that falls into this classification, shall not be graded above U.S. Grade C, regardless of the total score for the product.

(ix) *Broken slices.* Not more than 5 percent, by count, of the units may be excessively trimmed. Not more than a total of 5 percent, by count, of the units may be blemished and seriously blemished. Not more than 5 percent of the units, by count, may be mashed. Product that falls into this classification, shall not be graded above U.S. Grade C, regardless of the total score for the product.

(2) *Reasonably free from defects* (applies to all styles) means that the canned pineapple is reasonably free from any defects, including defects not specifically mentioned. Except for half slices and broken slices styles, product that falls into this classification, shall not be graded above U.S. Grade B, regardless of the total score for the product. Reasonably free from defects means, for the respective styles:

(i) *Whole.* Not more than 10 percent, by count, of the fruit units (cylinders) may be excessively trimmed, based on the average of all containers in the sample; not more than 10 percent, by count, of the fruit units (cylinders) may have an area greater than 10 percent of the total surface area which is mashed; however, a sample having less than 10 containers is permitted to have one excessively trimmed unit and one unit with more than 10 percent of the surface area mashed. Not more than 3 blemishes and serious blemishes per fruit unit (cylinder) is permitted.

(ii) *Slices.* Not more than a total of 20 percent, by count, of the units may be slightly and excessively trimmed: *Provided,* that not more than 7½ percent, by count, of the units may be excessively trimmed; but in any container having not more than 10 units, one unit may be excessively trimmed; and in any container having more that 10 units, but not more than 27 units, two units may be excessively trimmed. Not more than a total of 12½ percent, by count, of the units may be blemished and seriously blemished; but in any container having not more than 5 units, one unit may be blemished or seriously blemished; in containers having more that 5 units, but not more than 10 units, two units may be blemished or seriously blemished; and in containers having more than 10 units, but not more than 32 units, four units may be blemished and seriously blemished. Not more than one unit in containers of 25 units or less, and not more than 3 units in containers of more than 25 units, may be mashed.

(iii) *Tidbits.* Not more than 15 percent of the drained weight may consist of units that are excessively trimmed. Not more than a total of 12½ percent, by count, of the units may be blemished and seriously blemished: *Provided,* that not more than 6¼ percent, by count, may be seriously blemished. Not more than 3 of the units in containers of less than 150 units, or not more than 2 percent of the units in containers of 150 units or more, may be mashed.

(iv) *Chunks.* Not more than a total of 12½ percent, by count, may be blemished and seriously blemished: *Provided,* that not more than 6¼ percent, by count, may be seriously blemished. Not more than 3 of the units in containers of less than 70 units, or not more than 5 percent of the units in containers of 70 units or more, may be mashed.

(v) *Cubes.* Not more than a total of 12½ percent, by count, of the units may be blemished and seriously blemished; *Provided,* that not more than 6¼ percent, by count, may be seriously blemished.

(vi) *Spears.* Not more than a total of 20 percent, by count, of the units may be insignificantly, slightly, and excessively trimmed: *Provided,* that not more than 15 percent, by count, of the units may be excessively trimmed. Not more than 12½ percent, by count, of the units may be blemished and seriously blemished; in containers having more than 5 units, but not more than 10 units, two units may be blemished and seriously blemished; and in containers having more than 10 units, but not more than 32 units, four units may be blemished and seriously blemished. Not more than one unit per container may be mashed.

(vii) *Crushed.* Not more than 1¼ percent of the drained weight may consist of blemished and seriously blemished fragments.

(viii) *Half slices.* Not more than a total of 20 percent, by count, of the units may be slightly and excessively trimmed: *Provided,* that not more than 7½ percent, by count, of the units may be excessively trimmed; but in any container having not more than 10 units, one unit may be excessively trimmed; and in any container having more than 10 units but not more than 27 units, two units may be excessively trimmed. Not more than a total of 8 percent, by count, of the units may be blemished and seriously blemished; or one unit in a container is permitted to be blemished or seriously blemished if such unit exceeds the allowance of 8 percent, by count: *Provided,* that in all containers comprising the sample such blemished and seriously blemished units do not exceed an average of 8 percent of the total number of units. Not more than one unit in containers of 25 units or less, and not more than 3 units in containers or

more than 25 units, may be mashed. Product that falls within this classification, shall not be graded above U.S. Grade C, regardless of the total score for the product.

(ix) *Broken slices.* Not more than 10 percent, by count, of the units may be excessively trimmed. Not more than 8 percent, by count, of the units may be blemished or seriously blemished. Not more than 5 percent, by count, of the units may be mashed. Product that falls into this classification, shall not be graded above U.S. Grade C, regardless of the total score for the product.

(3) *Fairly free from defect* (applies only to half slices or broken slices styles) means that the canned pineapple is "fairly free from defects," including defects not specifically mentioned. Half slices or broken slices styles that fall into this classification, shall not be graded above U.S. Grade C, regardless of the total score for the product, and, in addition, has the following meanings with respect to the following styles of canned pineapple:

(i) *Half slices.* Not more than 7½ percent, by count, of the units may be excessively trimmed; but in any container having not more than 10 units, one unit may be excessively trimmed; and in any container having more than 10 units, but not more than 27 units, two units may be excessively trimmed. Not more than 12½ percent, by count, of the units may be blemished and seriously blemished, but in any container having not more than 5 units, one unit may be blemished or seriously blemished; in containers having more than 5 units, but not more than 10 units, two units may be blemished and seriously blemished; and in containers having more than 10 units, but not more than 32 units, four units may be blemished and seriously blemished. Not more than one unit in containers of 25 units or less, and not more than 3 units in containers of more than 25 units, may be mashed.

(ii) *Broken slices.* Not more than 15 percent, by count, of the units may be excessively trimmed. Not more than 12½ percent, by count, of the units may be blemished and seriously blemished; but in any container having more than 10 units, but not more than 32 units, four units may be blemished and seriously blemished. Not more than 5 percent, by count, of the units may be mashed.

(4) *Excessive defects* means canned pineapple which fails to meet either "reasonably free from defects" or "fairly free from defects," as applicable for the style. Product that falls into this classification shall not be graded above Substandard, regardless of the total score for the product.

(j) *Eye* means the blossom cup of the pineapple that is normally removed during processing (see blemish).

(k) *Extraneous vegetable material* (EVM) means any objectionable vegetable material regardless of size, from other than the pineapple fruit, which is harmless.

(l) *Flavor and odor*—(1) *Good flavor and odor* means that the flavor and odor is normal for canned pineapple and is free from objectionable flavors and odors of any kind.

(2) *Fairly good flavor and odor* means that the flavor and odor may be lacking in good flavor and odor, but is free from objectionable flavors and odors of any kind.

(m) *Mashed* (in styles other than cube or crushed) means a unit that has lost its normal shape as evidenced by marks of mechanical injury. A unit that has lost its normal shape because of ripeness and which bears no mark of mechanical injury shall not be considered as "mashed."

(n) *Porosity* means the degree of freedom from air spaces in the pineapple unit that gives a spongy texture.

(o) *Sample unit size* means the amount of product specified to be used for grading.

(p) *Shell* means all the outer layer of the fruit that is normally removed during processing (see blemish).

(q) *Tartness* means the taste sensation that is biting, sharp, and sour which is characteristic of the pineapple fruit.

(1) *Excessively tart* means that more than 1.35 g of acid is present in 100 mL of the drained liquid.

(2) *Not excessively tart* means that not more than 1.35 g of acid is present in 100 mL of the drained liquid.

(r) *Trim* means the degree of impairment of the pineapple units from the paring, coring, cutting, or trimming process.

(1) *Insignificantly trimmed* means any trimming that is noticeable but of lesser degree than slightly trimmed.

(2) *Slightly trimmed* (applies only to whole, slices, or half slices styles) means that the portion trimmed away approximates 3 percent to not more than 5 percent of the apparent physical bulk of the perfectly formed unit and if such trimming materially affects the normal circular shape of the outer or inner edge of the unit.

(3) *Excessively trimmed* in whole, slices, or half slices styles means that the portion trimmed away exceeds 5 percent of the apparent physical bulk of the perfectly formed unit and if such trimming destroys the normal circular shape of the outer or inner edge of the unit. In broken slices, spears, or tidbits styles means that the normal shape of the unit is destroyed by trimming.

(s) *Uniformity of size and shape* is not scored for crushed style. The other three factors (color, defects, and character) are scored and the total is multiplied by 100 and divided by 80, dropping any fractions to determine the total score for crushed style canned pineapple. For broken slices style, this quality factor may be scored no higher than 15 points. The four factors (color, uniformity of size and shape, defects, and character) are scored and the total is multiplied by 100 and divided by 95, dropping any fractions to determine the score.

(1) *Radial axis* in whole, slices, and half slices styles, means the measurement along the radius from the inside arc to the outside arc.

(2) *Length.* (i) In tidbits and chunks styles, means the measurement along the radius from the inside arc to the outside arc.

(ii) In spears style, means the longitudinal measurement of the spear.

(3) *No. 8 Sieve* means the meshes of a sieve designated in the American Society for Testing and Materials (ASTM) Standard E–11, Standards for Specifications for Wire Cloth Sieves for Testing Purposes.

(4) *Practically uniform in size and shape* means for the following styles:

(i) *Whole.* The maximum radial axis of the cylinder does not exceed the minimum radial axis of the cylinder by more than 6 mm (0.25 in). The cylinder may be cracked but not broken into separate pieces.

(ii) *Slices.* The diameter of the largest slice does not exceed the diameter of the smallest slice by more than 2 mm (0.08 in). The thickest slice does not exceed the thinnest slice by more than 2 mm (0.08 in) in thickness. The maximum radial axis of any slice does not exceed the minimum radial axis of the same slice by more than 3 mm (0.12 in). The drained weight of the largest slice is not more than 1.4 times the drained weight of the smallest slice.

(iii) *Tidbits.* Not more than 7½ percent of the drained weight may consist of units each of which weighs less than three-fourths as much as the average weight of all the untrimmed tidbits.

(iv) *Chunks.* None of the units may have a longest dimension (along any edge) greater than 38 mm (1.5 in). Not more than 10 percent of the drained weight consists of pieces weighing less than 5 g (0.18 oz) each.

(v) *Cubes.* Not more than a aggregate of 10 percent of the drained weight may consist of units of such size that they pass through the meshes of a sieve with

(5/16 in) square openings, and pieces weighing more than 3 g (0.11 oz) each.

(vi) *Spears.* The units are of substantially equal length. Not more than 10 percent, by count, of the units or not more than one unit in a container of less than 10 units, may be less than 19 mm (0.75 in) or more than 45 mm (1.75 in) in the longest edge dimension other than the longitudinal measurement of the spear. The drained weight of the largest spear is not more than 1.4 times the weight of the smallest spear.

(vii) *Half slices.* The diameter of the largest half slice does not exceed the diameter of the smallest half slice by more than 2 mm (0.08 in). The drained weight of the largest half slice is not more than 1.75 times the drained weight of the smallest half slice (except for an occasional broken piece due to splitting or an occasional whole slice not quite completely cut through).

(5) *Reasonably uniform in size and shape* (applies to all styles except broken and crushed styles). Except for half slices style, the applicable styles of canned pineapple that fall into this classification, shall not be graded above U.S. Grade B, regardless of the total score for the product. Reasonably uniform in size and shape has the following meanings with respect to style:

(i) *Whole.* The maximum radial axis of the cylinder does not exceed the minimum radial axis of the cylinder by more than 10 mm (0.31 in). The cylinder may be cracked but not broken into separate pieces.

(ii) *Slices.* The diameter of the largest slice does not exceed the diameter of the smallest slice by more than 3 mm (0.12 in). The thickest slice does not exceed the thinnest slice by more than 3 mm (0.12 in) in thickness. The maximum radial axis of any slice does not exceed the minimum radial axis of the same slice by more than 6 mm (0.25 in). The drained weight of the largest slice is not more than 1.4 times the drained weight of the smallest slice.

(iii) *Tidbits.* Not more than 15 percent of the drained weight may consist of units each of which weighs less than three-fourths as much as the average weight of all the untrimmed tidbits.

(iv) *Chunks.* None of the units may have a longest dimension (along any edge) greater than 38 mm (1.5 in). Not more than 15 percent of the drained weight consists of pieces weighing less than 5 g (0.18 oz) each.

(v) *Cubes.* Not more than 10 percent of the drained weight may consist of units of such size that they pass through the meshes of a sieve with 8 mm (0.31 in) square openings. Not more than 15 percent of the drained weight may consist of pieces weighing more than 3 g (0.11 oz) each.

(vi) *Spears.* The units are of reasonably uniform length. Not more than 20 percent, by count, of the units or not more than one unit in a container of less than 5 units, may be less than 19 mm (0.75 in) or more than 45 mm (1.75 in) in the longest edge dimension other than the longitudinal measurement of the spear. The drained weight of the largest spear is not more than 1.4 times the weight of the smallest spear.

(vii) *Half slices.* The diameter of the largest half slice does not exceed the diameter of the smallest half slice by more than 3 mm (0.12 in). The thickest half slice does not exceed the thinnest half slice by more than 3 mm (0.12 in) in thickness. The drained weight of the largest half slice is not more than 1.75 times the drained weight of the smallest half slice (except for an occasional broken piece due to splitting or occasional whole slice not quite completely cut through). Product that falls within this classification shall not be graded above U.S. Grade C, regardless of the total score for the product.

(6) *Fairly uniform in size and shape* (applies only to the style of half slices) means that the units fail to meet the requirements of "reasonably uniform in size and shape" and shall not be graded above U.S. Grade C, regardless of the total score for the product. The drained weight of the largest half slice is not more than 1.75 times the weight of the smallest half slice (except for an occasional broken piece due to splitting or an occasional whole slice not quite completely cut through).

(7) *Not uniform in size and shape* (applies only to broken slices style) means:

(i) Not more than 10 percent of the drained weight may consist of pieces having an arc of less than 90 degrees.

(ii) Not more than 5 percent of the drained weight may consist of pieces that measure in thickness less than 8 mm (0.31 in) or more than 25 mm (1 in); or pieces that measure less than 19 mm (0.75 in) in width as measured from the outer edge to the inner edge; and

(iii) Not more than 5 percent of the drained weight may consist of broken slices having an outside diameter differing by as much as 10 mm (0.39 in) from those present in the greatest proportion by weight.

(8) *Poor uniformity of size and shape* (applies to all styles except crushed style) means canned pineapple which fails to meet in some respect; "reasonably uniform in size and shape," "fairly uniform in size and shape, or "not uniform in size and shape," as applicable for the style. Products that fall into this classification, shall not be graded above Substandard, regardless of the total score for the product.

(t) *Unit* means one whole cylinder, slice, half slice, broken slice, spear tidbit, chunk, cube or a specified weight of crushed pineapple.

§ 52.1714 Recommended sample unit sizes.

The requirements for all factors of quality and analysis are based on the following:

(a) The entire contents of a container;

(b) A representative portion of the contents of a container;

(c) A combination of the contents of two or more containers of the same item; or

(d) A representative portion of processed product stored or held in bulk containers.

§ 52.1715 Brix measurements.

Cut-out requirements for liquid packing media in canned pineapple are not incorporated in the grades of the finished product since sirup or any other liquid medium, as such, is not a factor of quality for the purposes of these grades. The "cut-out" Brix measurements, as applicable to the respective designations, are as follows:

TABLE I—PACKING MEDIA DESIGNATIONS

Designations	Brix measurement
"Extra heavy sirup"; "extra heavily sweetened pineapple juice and water"; or "extra heavily sweetened pineapple juice."	22° or more, but not more than 35°
"Heavy sirup"; "heavily sweetened pineapple juice and water"; or "heavily sweetened pineapple juice."	18° or more, but less than 22°
"Light sirup"; "lightly sweetened pineapple juice and water"; or "lightly sweetened pineapple juice."	14° or more, but less than 18°
"Slightly sweetened water"; "extra light sirup"; "slightly sweetened pineapple juice and water"; or "slightly sweetened pineapple juice."	10° or more, but less than 14°
"In water" (except crushed style)	Not applicable
"In pineapple juice."	Not applicable
"In pineapple juice and water."	Not applicable
"In clarified pineapple juice."	Not applicable
"Artificially sweetened."	Not applicable

§ 52.1716 Fill of container for crushed style canned pineapple.

(a) The standard of fill of container for canned crushed pineapple is a fill of not less than 90 percent of the total water capacity of the container. Crushed style canned pineapple that does not meet

this requirement is "Below Standard in Fill."

(b) The recommended fill of container for canned pineapple, other than crushed style canned pineapple, is not incorporated in the grades of the finished product since fill of container, as such, is not a factor of quality for the purposes of these grades. It is recommended that each container of canned pineapple of all styles except crushed style canned pineapple be as full as practicable without impairment of quality and that the product and packing medium occupy not less than 90 percent of the volume of the container.

§ 52.1717 Minimum drained weights for canned crushed pineapple.

(a) *General.* The minimum drained weights for crushed style canned pineapple are not incorporated in the grades of the finished product since drained weight is not a factor of quality for the purpose of these grades; however, minimum drained weights for crushed style canned pineapple other than "heavy pack" or "solid pack" are standards of quality, and minimum drained weights for crushed style "heavy pack" and "solid pack" canned pineapple are standards of identity under the Federal Food, Drug, and Cosmetic Act. Crushed style canned pineapple, other than "heavy pack" or "solid pack", which is less than 63 percent of the net weight of the contents of the container is:

(1) Below standard in quality, good food—not high grade; or

(2) Below standard in quality, contains excess liquid.

(b) The minimum drained weights for crushed canned pineapple are shown in Table II of this section.

TABLE II—MINIMUM DRAINED WEIGHTS FOR CRUSHED STYLE CANNED PINEAPPLE

Container	Other than "heavy pack" or "solid pack" crushed.	"Heavy pack" crushed.	"Solid pack" crushed.
Any Container Size	Drained fruit: not less than 63 percent, by weight, of net contents.	Drained fruit: not less than 73 percent but less than 78 percent, by weight, of net contents.	Drained fruit: not less than 78 percent of net contents.

§ 52.1718 Recommended minimum drained weights for canned pineapple other than crushed style pineapple.

(a) There are no recommended drained weight minimums for whole style canned pineapple since fill for this style is based on volume.

(b) *General.* The recommended minimum drained weights for canned pineapple in styles other than crushed and whole are based on equalization of the product 15 days or more after the product has been canned. The recommended minimum drained weights for canned pineapple in styles other than crushed and whole are not incorporated in the grades of the finished product, since drained weight is not a factor of quality for the purposes of these grades.

(c) *Method for ascertaining drained weight in canned pineapple (including canned crushed pineapple).* The drained weight is determined by emptying the contents of a container upon a United States Standard No. 8 circular sieve of proper diameter so as to distribute the product evenly, inclining the sieve slightly to facilitate drainage, and allowing to drain for two minutes. The drained weight is the weight of the sieve and pineapple less the weight of the dry sieve. A sieve 8 inches in diameter is used for the equivalence of No. 3 size cans (404 X 414) and smaller, and a sieve 12 inches in diameter is used for containers larger than the equivalent of the No. 3 size can.

(d) Recommended minimum drained weights of canned pineapple in styles other than crushed style are shown in Table III of this section.

TABLE III—RECOMMENDED MINIMUM DRAINED WEIGHTS FOR STYLES OF CANNED PINEAPPLE OTHER THAN CRUSHED OR WHOLE STYLE

Container Designation	Container Dimension	Style	With sirup density 14° Brix or more	With sirup density less than 14° Brix
	(inches)		(ounces)	(ounces)
No. 1 Flat	307 x 203	All styles	4.9	4.7
8 oz Tall	211 x 304	All styles	5.0	4.8
211 Cyl	211 x 414	All styles	7.7	7.4
No. 1¼	401 x 207.5	All styles	8.7	8.2
No. 1½	307 x 309	All styles	9.4	8.9
No. 2	307 x 409	All styles	12.3	11.7
No. 2½	401 x 411	All styles	17.8	17.0
No. 10	603 x 700	Chunks, Tidbits	65.7	63.6
No. 10	603 x 700	Slices	61.5	59.5
No. 10	603 x 700	Half slices and Broken slices	62.5	60.5
No. 10	603 x 700	Cubes	67.4	64.1

(e) Conformance with the recommended minimum drained weights for canned pineapple other than crushed style is determined by averaging the drained weights from all the containers which are representative of a specific lot and such lot is considered as meeting the minimum drain weight recommendations if the following criteria are met:

(1) The average of the drained weights from all of the containers in the sample meets the recommended drained weight;

(2) One-half or more of the containers meet the recommended drained weight;

(3) The drained weights from the containers which do not meet the recommended minimum drained weights are within the range of variability for good commerical practice.

§ 52.1719 Grades.

(a) U.S Grade A is the quality of canned pineapple that meets the applicable requirements of Tables IV and VII.

(b) U.S. Grade B is the quality of canned pineapple that meets the applicable requirements of Tables IV and VII.

(c) U.S. Grade C is the quality of canned pineapple that meets the applicable requirements of Tables V and VI.

(d) Substandard is the quality of canned pineapple that fails to meet the requirements for "U.S. Grade B" or "U.S. C," as applicable for the style.

§ 52.1720 Factors of quality and analysis.

(a) The grade of a lot of canned pineapple is based on evaluation and analysis of the product for the following scoreable quality, and non-scoreable quality and analytical factors:

(1) Color;

(2) Uniformity of size and shape (except crushed style);

(3) Defects;

(4) Character;

(5) Flavor and odor; and

(6) Tartness.

(b) The relative importance of each scoreable quality factor is expressed numerically on the scale of 0 to 100. The maximum number of points that may be given each factor is:

Quality Factors	Points
Color	30
Uniformity of size and shape	20
Defects	20
Character	30
Total Score	100

(c) The essential variations within each scoreable quality factor are so described that the value may be determined for each factor and expressed numerically. The numerical range for the rating of each factor is inclusive (for example, 24 to 26 points means 24, 25, or 26 points) and the score points shall be prorated relative to the degree of excellence for each scoreable quality factor.

§ 52.1721 Requirements for Grades

TABLE IV—CANNED PINEAPPLE—WHOLE, SLICES, SPEARS, TIDBITS, CHUNKS, CUBES

Quality Factors	Factor Description	Grade	Score Point Range
Color	Good	(A)	27–30
	Reasonably Good	(B)	24–26 [1]
	Poor	(SSTD)	0–23 [2]
Uniformity of Size and Shape	Practically Uniform	(A)	18–20
	Reasonably Uniform	(B)	16–17 [1]
	Poor Uniformity	(SSTD)	0–15 [2]
Defects	Practically Free	(A)	18–20
	Reasonably Free	(B)	16–17 [1]
	Excessive	(SSTD)	0–15 [2]
Character	Good	(A)	27–30
	Reasonably Good	(B)	24–26
	Poor	(SSTD)	0–23 [2]
Total Score (Range)		(A)	90–100 points
		(B)	80–89 points
		(SSTD)	0–79 points
Flavor and Odor		(A)	Good
		(B)	Fairly Good
		(SSTD)	Off Flavor
Tartness		(A)	Not Excessively Tart
		(B)	Not ExcessivelyTart
		(SSTD)	Excessively Tart

[1] Cannot be graded above U.S. Grade B, regardless of the total score for the product
[2] Cannot be graded above Substandard, regardless of the total score for the product.

TABLE V—CANNED PINEAPPLE—BROKEN SLICES

Quality Factors	Factor Description	Grade	Score Point Range
Color	Good		27–30 [1]
	Reasonably Good	(C)	24–26 [1]
	Fairly Good		21–23 [1]
	Poor	(SSTD)	0–20 [2]
Uniformity Of Size and Shape	Not Uniform	(C)	14–15 [1]
	Poor Uniformity	(SSTD)	0–13 [2]
Defects	Practically Free		18–20 [1]
	Reasonably Free	(C)	16–17 [1]
	Fairly Free		14–15 [1]
	Excessive	(SSTD)	0–13 [2]
Character	Good		27–30 [1]
	Reasonably Good	(C)	24–26 [1]
	Fairly Good		21–23 [1]
	Poor	(SSTD)	0–20 [2]
Total Score (Range) [3]		(A)	90–100 points
		(B)	80–89 points
		(SSTD)	0–79 points
Flavor and Odor		(A)	Good
		(B)	Fairly Good
		(SSTD)	Off Flavor
Tartness		(A)	Not Excessively Tart
		(B)	
		(SSTD)	Excessively Tart

[1] Cannot be graded above U.S. Grade C, regardless of the total score for the product.
[2] Cannot be graded above Substandard, regardless of the total score for the product.
[3] To determine the total score, the four factors (Color, Uniformity, Defects, and Character) are scored and the total is multipled by 100 and divided by 95, dropping any fractions.

TABLE VI—CANNED PINEAPPLE—HALF SLICES

Quality factors	Factor description	Grade	Score point range
Color	Good		27–30 [1]
	Reasonably Good	(C)	24–26 [1]
	Fairly Good		21–23 [1]
	Poor	(SSTD)	0–20 [2]
Uniformity Of Size and Shape	Practically Uniform		18–20 [1]
	Reasonably Uniform	(C)	16–17 [1]
	Fairly Uniform		14–15 [1]
	Poor Uniformity	(SSTD)	0–20 [2]
Defects	Practically Free		18–20 [1]
	Reasonably Free	(C)	16–17 [1]
	Fairly Free		14–15 [1]
	Excessive	(SSTD)	0–13 [2]
Character	Good		27–30 [1]
	Reasonably Good	(C)	24–26 [1]
	Fairly Good		21–23 [1]
	Poor	(SSTD)	0–20 [2]
Total Score (Range)		(C)	70–100 points
		(SSTD)	0–69 points
Flavor and Odor		(C)	Good or Fairly Good
		(SSTD)	Off Flavor
Tartness		(C)	Not Excessively Tart
		(SSTD	Excessively Tart

[1] Cannot be graded above U.S. Grade C, regardless of the total score for the product.
[2] Cannot be graded above Substandard, regardless of the total score for the product.

TABLE VII.—CANNED PINEAPPLE—CRUSHED

Quality factors	Factor description	Grade	Score point range
Color	Good	(A)	27–30
	Reasonably good	(B)	24–26 [1]
	Poor	(SSTD)	0–23 [2]
Defects	Practically free	(A)	18–20
	Reasonably free	(B)	16–17 [1]
	Excessive	(SSTD)	0–15 [2]
Character	Good	(A)	27–30
	Reasonably good	(B)	24–26 [1]
	Poor	(SSTD)	0–23 [2]
Total Score (Range) [3]		(A)	90–100 points
		(B)	80–89 points
		(SSTD)	0–79 points
Flavor and Odor		(A)	Good
		(B)	Fairly Good
		(SSTD)	Off Flavor
Tartness		(A)	Not Excessively Tart
		(B)	Not Excessively Tart
		(SSTD)	Excessively Tart

[1] Cannot be graded above U.S. Grade B, regardless of the total score for the product.
[2] Cannot be graded above Substandard, regardless of the total score for the product.
[3] To determine the total score, the other three factors (Color, Defects, and Character) are scored and the total is multiplied by 100 and divided by 80, dropping any fractions.

§ 52.1722 Sample size.

The sample size used to determine whether canned pineapple meets the requirements of these standards shall be as specified in the sampling plans and procedures in the "Regulations Governing Inspection and Certification of Processed Fruits and Vegetables, Processed Products Thereof, and Certain Other Processed Food Products" (7 CFR 52.1 through 52.83).

§ 52.1723 Lot quality and analytical requirements.

A lot of canned pineapple is considered as meeting the quality and analytical requirements if:

(a) The requirements specified in Tables IV through VII, as applicable, are met; and

(b) The sampling plans and procedures in 7 CFR 52.1 through 52.83 are met.

Dated: March 7, 1989.

J. Patrick Boyle,

Administrator.

[FR Doc. 89–5606 Filed 3–10–89; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 933

[Docket No. AO F&V 87–1; AMS–FV–88–104]

Strawberries Grown in Florida; Termination of Proceedings to Formulate a Marketing Agreement and Order

AGENCY: Agricultural Marketing Service USDA.

ACTION: Termination of proceedings and withdrawal of proposed rule.

SUMMARY: This notice announces termination of proceedings to promulgate a proposed marketing agreement and order program for strawberries grown in Florida. Termination is based on results of a referendum of strawberry producers conducted by USDA from August 17–31, 1988.

DATE: Termination of proceedings to promulgate the proposed marketing agreement and order is effective March 13, 1989.

FOR FURTHER INFORMATION CONTACT: John Toth or William Pimental, Fruit and Vegetable Division, USDA/AMS, P.O. Box 2276, Winter Haven, Florida 33883, telephone (813) 299–4770; or Tom Tichenor, Marketing Order Administration Branch, Room 2531–S, P.O. Box 96456, Washington, DC 20090–6456, telephone (202) 475–3930.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding include the following: The Notice of Hearing was issued May 6, 1987, and published in the **Federal Register** (52 FR 17581) on May 11, 1987. An Extension of Time for Filing Briefs was issued July 13, 1987, and published in the **Federal Register** (52 FR 28369) on July 21, 1987. A Recommended Decision and Opportunity to File Written Exceptions to the Proposed Marketing Agreement and Order was issued March 1, 1988 and published in the **Federal Register** (53 FR 7194) on March 7, 1988. A Decision and

Referendum Order on Proposed Marketing Agreement and Order was issued July 25, 1988, and published in the **Federal Register** (53 FR 28642) on July 29, 1988.

This administrative action is governed by the provisions of Section 556 and 557 of Title 5 of the United States Code and therefore is not subject to the requirements of Executive Order 12291 and Departmental Regulation 1512–1.

Preliminary Statement

This action is issued under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674 *et seq.*], hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing formulation of marketing agreements and orders [7 CFR Part 900]. The proposed marketing agreement and order, hereinafter referred to collectively as the "Order," were formulated on the record of a public hearing held May 27–28, 1987, in Valrico, Florida to consider the proposed Marketing Order No. 933 [proposed 7 CFR Part 933] regulating the handling of strawberries grown in Florida. The Notice of Hearing contained the proposed order submitted by the Florida Strawberry Growers Association.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of the Agricultural Marketing Service (AMS), on March 1, 1988, filed with the Hearing Clerk, U.S. Department of Agriculture, and Recommended Decision containing a notice of opportunity to file written exceptions thereto by April 6, 1988. Three exceptions were filed.

The Decision and Referendum Order was issued July 25, 1988, directing that a referendum among Florida strawberry producers be conducted during the period August 17–31, 1988. The referendum was conducted by the Fruit and Vegetable Division's Southeast Regional Marketing Field Office in Winter Haven, Florida, in accordance with 7 CFR Part 900.401–.407 governing procedures for conducting referenda concerning marketing orders. The Act requires that a proposed marketing order must be approved by either at least two-thirds of the producers voting in a referendum, or, by producers of at least two-thirds of the volume of the commodity represented in the referendum.

Findings and Conclusions

The proposed order did not receive a two-thirds favorable vote of all those voting. A total of 142 valid ballots were cast in the referendum. Of these, 75 ballots, or 54 percent, favored the proposed order while 66 ballots, or 46 percent, opposed the order.

The proposed order also did not receive the required two-thirds favorable vote of the volume of strawberries produced by those voting. A total production volume of strawberries produced by those voting. At total production volume of 6,511,202 flats was represented by those voting. Of this volume, 3,701,846 flats, or 57 percent of the total volume, was produced by those favoring the order and 2,809,355 flats or 43 percent of the total volume, was produced by those opposed to the order.

Testimony presented at the hearing indicated that there are estimated to be between 130 and 160 Florida strawberry producers. A total of 142 completed ballots indicates a large percentage of producers took part in the referendum.

Therefore, based on the results of the referendum, the proceedings to promulgate the proposed Marketing Order No. 933 regulating the handling of strawberries grown in Florida and hereby terminated, and the proposed rule is withdrawn.

List of Subjects in 7 CFR Part 933

Marketing agreement and order, Strawberries, Florida.

Dated: March 6, 1989.

Robert Melland,

Deputy Assistant Secretary Marketing and Inspection Services.

[FR Doc. 89–5684 Filed 3–10–89; 8:45 am]

BILLING CODE 3410–02–M

Farmers Home Administration

7 CFR Parts 1901, 1955, and 1980

Nonprofit National Corporations Loan and Grant Program

AGENCY: Farmers Home Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Farmers Home Administration (FmHA) is proposing to amend the Agency's policies and procedures governing the Nonprofit National Corporations Loan and Grant Program. The intended effect of this action is to reorganize and supplement the existing interim regulation for better understanding by both FmHA and the public and then to publish the rule as a final rule, also to clarify wording, correct inconsistencies, and where applicable, to delete obsolete material and update references in other program regulations.

DATE: Comments must be received on or before April 12, 1989.

ADDRESSES: Submit written comments, in duplicate, to the Office of the Chief, Directives and Forms Management Branch, Farmers Home Administration, U.S. Department of Agriculture, Room 6348, South Agriculture Building, 14th and Independence Avenue SW., Washington, DC 20250. All written comments made pursuant to this notice will be available for public inspection during regular work hours at the above address. 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. Submit any comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Farmers Home Administration, Washington, DC 22053.

FOR FURTHER INFORMATION CONTACT: Susan G. Wieferich, Senior Loan Officer, Program Management Branch, Community Facilities Division, Farmers Home Administration, U.S. Department of Agriculture, Room 6320, South Agriculture Building, 14th and Independence Avenue SW., Washington, DC 20250; telephone (202) 382–1490.

SUPPLEMENTARY INFORMATION:

Classification

This proposed action has been reviewed under USDA procedures established in Department Regulation 1512–1, which implements Executive Order 12291, and has been determined to be nonmajor. The proposed action is not likely to result in any of the following: (a) An annual effect on the economy of $100 million or more, (b) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions, or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Environmental Impact

This document has been reviewed in accordance with 7 CFR Part 1940, Subpart G, "Environmental Program." FmHA has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969, Pub. L. 91–190, an Environmental Impact Statement is not required.

Intergovernmental Review

This program is listed in the catalog of Federal Domestic Assistance under No. 10.434 and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials (7 CFR 3015, Subpart V, 48 FR 29112, June 24, 1983).

Regulatory Flexibility Act

FmHA has determined that this action will not have a significant economic impact on a substantial number of small entities, because the action will not affect a significant number of small entities as defined by the Regulatory Flexibility Act (5 U.S.C. 601).

Background

Section 1323 of the Food Security Act of 1985 (Pub. L. 99–198) established a program whereby guaranteed loans and grants are made available to nonprofit national corporations (NNC's) which in turn provide financial and technical assistance to rural businesses for the improvement of business, industry and employment in rural areas.

A first interim rule was published in the **Federal Register** (51 FR 34926) on September 30, 1986, and invited comments for 30 days ending October 30, 1986. Nine comments were received. As a result of these comments and of a statute (H.J. 738—Continuing Resolution), which amended the enabling legislation, a second interim rule was published in the **Federal Register** (52 FR 25586) on July 8, 1987, and invited comments for 30 days ending August 7, 1987. No comments were received and the program was subsequently implemented, although a final rule was never published.

The second interim rule could be published as a final rule with minor modifications. However, the majority of the changes which are necessary if the program is to function effectively and efficiently can only be included in the instruction by means of a proposed rule. With the advice of the Office of General Counsel (OGC), FmHA has decided to proceed with a proposed rule.

This proposed rule will reorganize and supplement the instruction for better understanding by both FmHA and the public, clarify wording, correct inconsistencies and, where applicable, delete obsolete material and update references in other program regulations. The changes will result in more efficient service to the public, while continuing to protect the Government's interest.

A summary of the proposed major changes are as follows:

(1) Subpart E of Part 1901 will be amended to reference Subpart G of Part 1980 of this chapter.

(2) Subpart A of Part 1955 will be amended to reference Subpart G of Part 1980 of this chapter.

(3) Subpart G of Part 1980 includes the following proposed revisions:

(a) Section 1980.605 includes definitions for affiliate, recipient, project, loan agreement, operating agreement, technical and financial assistance.

(b) Section 1980.606 redefines eligibility requirements for an NNC.

(c) Section 1980.612 clarifies equal opportunity and nondiscrimination requirements.

(d) Section 1980.614 clarifies the eligible purposes for which financial assistance can be used.

(e) Section 1980.615 expands and clarifies the ineligible purposes for which financial assistance cannot be used including a new restriction on refinancing of recipient creditors.

(f) Section 1980.628 includes the grant agreement requirement that if a guaranteed loan is not closed within 180 days of receipt of a grant, then FmHA may, at its option, demand repayment of the original principal amount of the grant with interest.

(g) Section 1980.641 includes a filing deadline for loan guarantee and grant applications.

(h) Section 1980.642 redefines the priorities that will be used in selecting the applicants who will receive guaranteed loans and grants.

(i) Section 1980.643 redefines the items which constitute a complete application package.

(j) Section 1980.645 clarifies FmHA actions in reviewing the application package.

(k) Section 1980.646 clarifies the loan guarantee and grant approval/fund obligation process.

(l) Section 1980.647 redefines the items which are necessary for the preguarantee review, including specific items which must be covered by the loan agreement.

(m) Section 1980.648 redefines the items which are necessary to close a loan guarantee and grant.

(n) Section 1980.654 clarifies the process for disbursement of loan guarantee/grant funds.

(o) Section 1980.656 consolidates reporting requirements for the loan guarantee.

(p) Section 1980.658 clarifies field visit requirements for the loan guarantee.

(q) Section 1980.670 clarifies servicing requirements for defaults.

(r) Section 1980.671 clarifies servicing requirements for liquidations.

(s) Section 1980.672 clarifies servicing requirements for protective advances.

(t) Section 1980.697 clarifies servicing requirements for bankruptcies.

(u) Section 1980.698 includes the loan guarantee/grant program under the appeals process contained in Subpart B of Part 1900.

List of Subjects

7 CFR Part 1901

Civil rights, Compliance reviews, Fair housing, Minority groups.

7 CFR Part 1955

Liquidation of loans, Acquisition, Foreclosure, Government acquired property.

7 CFR Part 1980

Loan programs—Nonprofit corporations, Grant programs—Nonprofit corporations.

Accordingly, FmHA proposes to amend Chapter XVIII, Title 7, Code of Federal Regulations, as follows:

PART 1901—PROGRAM-RELATED INSTRUCTIONS

1. The authority citation for Part 1901 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 40 U.S.C. 442; 5 U.S.C. 301; 42 U.S.C. 2942; 7 CFR 2.23; 7 CFR 2.70.

Subpart E—Civil Rights Compliance Requirements *C*

2. In § 1901.204, paragraph (a)(22) is added and paragraphs (d)(1), (d)(3)(iv), (d)(5), (e)(2)(ii), and (f) are revised to read as follows:

§ 1901.204 Compliance reviews.

(a) * * *

(22) Nonprofit National Corporations grants.

* * * * *

(d) * * *

(1) *Designation of Compliance Review Officer.* The State Director, except for Technical Assistance and Training grants (Pub. L. 99–198) and Nonprofit National Corporations grants, will designate the Compliance Review Officer for recipient organization. County Supervisors may be designated only if they have received approved compliance review training. Otherwise, the Compliance Review Officer must be a member of the State staff. For Technical Assistance and Training grants and Nonprofit National Corporations grants, the Assistant Administrator for Community and Business Programs will designate the

Compliance Review Officer for recipient organizations.

* * * * *

(3) * * *

(iv) Technical Assistance and Training grants (Pub. L. 99–198) and Nonprofit National Corporations grants. The Compliance Review Officer will record in the running record information obtained during the compliance review and the determination of recipient's compliance or noncompliance. A report will be prepared and sent to the Assistant Administrator, Community and Business Programs, for each recipient.

* * * * *

(5) *Forwarding noncompliance report.* The State Director will see that the reports are complete. If the recipient was found in noncompliance, the State Director will immediately send a copy of the report to the Administrator, Attention: Equal Opportunity Officer, with action proposed to bring the recipient into compliance. For Technical Assistance and Training grants and Nonprofit National Corporations grants, the Assistant Administrator, Community and Business Programs, will send a copy of the report to the Equal Opportunity Officer.

* * * * *

(e) * * *

(2) * * *

(ii) Technical Assistance grants, Technical Assistance and Training grants (Pub. L. 99–198) and Nonprofit National Corporations grants. The initial compliance review will be conducted before the grant is closed.

* * * * *

(f) State Office summary reports. The State Director will keep a list of all compliance reviews conducted during the reporting year so as to schedule each year's reviews. The State Director will submit a copy of this list to the Administrator, Attention: Equal Opportunity Office, no later than July 31 of each year. Recipients found in noncompliance will also be listed on the summary report. Exhibit B is a sample report. For Technical Assistance and Training grants and Nonprofit National Corporations grants, the Assistant Administrator, Community and Business Programs, will submit a summary report, using Exhibit B of this subpart as a guide, to the Equal Opportunity Officer by July 31 of each year.

PART 1955—PROPERTY MANAGEMENT

3. The authority citation for Part 1955 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.2223; 7 CFR 2.70.

Subpart A—Liquidation of Loans Secured by Real Estate and Acquisition of Real and Chattel Property.

4. Section 1955.1 is revised to read as follows:

§ 1955.1 Purpose.

This subpart delegates authority and prescribes procedures for the liquidation of Farmers Home Administration (FmHA) loans identified in § 1955.3 of this subpart and acquisition of property by voluntary conveyance to the Government, by foreclosure of security instruments, by exercise of the Government's redemption rights, and certain other actions which result in acquisition of property by the Government. When FmHA elects to liquidate a guaranteed loan other than Business and Industrial (B&I) and Nonprofit National Corporations (NNC) under the contract of guarantee, the liquidation will be completed according to this subpart. Liquidations of guaranteed B&I and NNC loans will be effected upon direction from the Assistant Administrator, Community and Business Programs. For Community Programs and insured B&I and NNC actions involving loans secured by other than real or chattel property, such loans will be handled in accordance with the provisions of this subpart which do not deal specifically with real or chattel property. Prior to liquidation these cases will be submitted to the National Office for prior review and guidance. Community Program loans sold without insurance by the FmHA to the private sector will be serviced in the private sector and will not be serviced under this subpart. The provisions of this subpart are not applicable to such loans. Future changes to this subpart will not be made applicable to such loans.

PART 1980—GENERAL

5. The authority citation for Part 1980 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23; 7 CFR 2.70.

6. Subpart G is amended by revising §§ 1980.601 through 1980.7800, removing and reserving Appendix B, and adding Appendix D to read as follows:

Subpart G—Nonprofit National Corporations Loan and Grant Program

§ 1980.601 Purpose.

This subpart prescribes the policies and procedures for processing and servicing guaranteed loans and grants made by the Farmers Home Administration (FmHA) to nonprofit national corporations (NNC).

§ 1980.602 Objective.

The objective of this program is to improve business, industry and employment, specifically the direct retention and/or creation of jobs in rural areas. This program is expected to stimulate and encourage loan guarantees and/or grants made by public or private organizations to NNCs, which will affiliate with State rural development and finance organizations to deliver a program of financial and/or technical assistance to local businesses (recipients). The funds generated by this program are intended to stimulate innovative business and entrepreneurial practices and to assist in the diversification of the economy in rural areas. It is anticipated that businesses assisted through this program will, to the maximum extent practicable, provide services to the farm community, provide opportunities for employment for displaced farm families, and supplement farm family income through the use of farm labor and products.

§ 1980.603 Program administration.

The Administrator for FmHA is responsible for the administration of the program and may redelegate duties and responsibilies as authorized in this subpart to appropriate FmHA employees. The Assistant Administrator, Community and Business Programs, is the contact person for processing and servicing activities.

§ 1980.604 Administrative provisions.

Certain sections of this subpart contain a reference to Appendix A—Administration Provisions. Appendix A of this subpart provides FmHA personnel with directions on how to process and administer loan guarantee and grant program. This information is not considered as material the public needs to know in order to obtain the benefit of program assistance. Appendix A is not published in the Federal Register nor is it contained in the Code of Federal Regulations (CFR).

(Refer to Appendix A to Subpart G—Administrative Provisions.)

§ 1980.605 Definitions

(a) *Affiliate.* A state rural development and finance organization, profit or nonprofit, which has the authority to do business in part of all of one or more states. Although the affiliate is a separate and distinct legal entity from the NNC, the affiliate is not precluded from being a legally organized subsidiary to the NNC. An affiliate may

also be a lender as defined in paragraph (c) of this section.

(b) *Application.* A reference to Form FmHA 1980–60, "Application for Loan Guarantee" and supporting documentation. The NNC applicant uses this form to apply for both the loan guarantee and the grant. Part A is completed by the NNC applicant. Part B is completed by the proposed lender.

(c) *Financial assistance.* A loan to a recipient. The recipient loan funds are derived in part from the loan guarantee and/or grant funds made available by FmHA to the NNC.

(d) *Lender.* The lender is the public agency or private organization (including financial institutions such as insurance companies) which is to process and service the loan to the NNC, guaranteed by FmHA under the provisions of this subpart. The lender is the legal entity which along with the NNC applicant requests the loan guarantee from FmHA.

(e) *Loan agreement.* An agreement which defines the working relationship between the NNC and an FmHA approved lender, including the conditions under which the lender will make and service the FmHA guaranteed loan to the NNC. The loan agreement is subject to FmHA review and concurrence.

(f) *Nonprofit National Corporation* (NNC). The legal entity which receives FmHA guaranteed loan and grant funds for the purpose of improving business, industry, and employment opportunities in rural areas.

(g) *Operating agreement.* An agreement which defines the working relationship between the NNC and its affiliates. The agreement is subject to FmHA review and concurrence. An affiliate may execute an operating agreement with more than one NNC. Likewise, an NNC may execute an agreement with more than one affiliate per State. As a result, part or all of a particular State may be served by one or more affiliates and/or NNCs.

(h) *Principals.* An officer, director, stockholder, other owner or individual (including immediate family members) and/or any parent, subsidiary or affiliate which is directly involved in the operation and management of that legal entity.

(i) *Project.* The specific proposal for which the recipient (local business) seeks financial and/or technical assistance from the NNC.

(j) *Recipient.* The legal entity (local business), profit or nonprofit, receiving financial and/or technical assistance through the efforts of the NNC, under the provisions of this subpart.

(k) *Rural area.* All areas of a State that are not included within any city having a population of twenty thousand or more as determined by the Secretary of Agriculture according to the latest decennial census of the United States.

(l) *State.* Any of the fifty States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Somoa, and the Commonwealth of the Northern Mariana Islands.

(m) *Technical assistance.* A problem solving *activity* performed for the benefit of the recipient by the NNC and/or others (including the affiliate). Technical assistance is paid for with grant funds, made available by FmHA to the NNC . FmHA will determine whether a specific activity qualifies as technical assistance.

§ 1980.606 NNC eligibility.

To be eligible for this program, an applicant must fulfill the following criteria:

(a) Be a nonprofit corporation in good standing and legally authorized to conduct business in at least three States.

(b) The general purpose of the corporation, as stated in its organizational documents (e.g., articles of incorporation), must include the stimulation of business, industry, and employment opportunties in rural areas.

(c) Be legally authorized to borrow and to lend money in at least three States, as well as to give and to accept security for said monies.

(d) Have written approval by the governors of at least three States in which the NNC intends to administer a loan program.

(e) Possess a recent audit, conducted by an independent public accountant, which demonstrates that the NNC has the financial solvency and resources necessary to carry out the intent of this program.

§ 1980.607 Citizenship requirements.

(a) *NNC.* At least 51 percent of the membership of any NNC or 51 percent of the outstanding interest in any NNC must be owned by those who are either citizens of the United States or reside in the United States after being legally admitted for permanent residence.

(b) *Recipient.* At least 51 percent of the membership of any recipient or 51 percent of the outstanding interest in any recipient must be owned by those who are either citizens of the United States or reside in the United States after being legally admitted for permanent residence.

§ 1980.608 Case and Identification (ID) numbers.

(a) *FmHA case number.* The case number will be the NNC's Internal Revenue Service (IRS) tax number preceded by the FmHA State and County Code Numbers. The case number will be used on all FmHA forms.

(b) *ID number of lender.* The lender's IRS tax number will be used as its ID number in correspondence and on FmHA forms relating to the loan guarantee.

§ 1980.609 Use of forms.

FmHA forms will be used as indicated by this subpart. Otherwise, lenders and NNC's should use their own forms, mortgages, security instruments and other agreements, provided such documents do not contain any provisions that are in conflict or are inconsistent with the provisions of this subpart. All forms and legal documents executed by the NNC should carry the NNC's corporate seal.

§ 1980.610 Intergovernmental review.

The NNC's recipients are subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. The intergovernmental review process is further described in Subpart J of Part 1940 of this chapter, available in any FmHA office.

(a) *NNC applicant.* The approval of Form FmHA 1980–60 is not subject to intergovernmental consultation.

(b) *Recipient.* Unless the State point of contact for intergovernmental consultation elects to limit or to eliminate the intergovernmental review in writing, the point of contact must be notified of each technical assistance activity and each loan to be received by each recipient under this subpart within that State. Notification can be initiated by the NNC, by the affiliate or by the recipient. The NNC will submit to the FmHA State Office copies of the notification to, and the comments from, the State point of contact. The FmHA State Office will determine if compliance with Executive Order 12372 has been demonstrated and, if so, will then forward an appropriate notification to the FmHA National Office. The National Office must receive State Office clearance on the intergovernmental review process before it authorizes the NNC and/or the lender to advance funds to that recipient. In those instances where FmHA determines that comments from the point of contact cannot be accommodated, the FmHA State Office will provide the point of contact with a

timely explanation of the basis for its decision. FmHA will not implement its decision for 15 days after the point of contact receives the explanation, unless unusual circumstances make the 15-day waiting period unreasonable. The explanation will be in writing and may be supplemented by telephone, meeting or other telecommunication.

§ 1980.611 Environmental requirements.

(a) *General.* Unless specifically modified by this section, the requirements of Subpart G of Part 1940 of this chapter apply to this subpart. Although the purpose of the program established by this subpart is to improve business, industry and employment in rural areas, this purpose is to be achieved, to the extent practicable, without adversely affecting important farmlands and forest lands, prime rangelands, wetlands and floodplains. Therefore, prospective lenders, NNCs and recipients 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 impact the environment.

(b) *NNC applicant.* As part of Form FmHA 1980–60 and when required by Subpart G of Part 1940 of this chapter, the NNC applicant must provide a completed Form FmHA 1940–20, "Request for Environmental Information, for each recipient for which the applicant's plan proposes financial assistance, as defined in § 1980.605(c) of this subpart. FmHA will review the complete application and initiate a Class II environmental assessment. This assessment will focus on the potential cumulative impacts of the projects as well as any environmental concerns or problems that are associated with individual projects that can be identified at this time from the information submitted. Because neither the completion of the Class II environmental assessment nor the approval of the application is an FmHA commitment to the use of funds for a specific project and because such funds can eventually be used in several States, no public notification requirements for a Class II assessment will apply to the application. The affected public has not been sufficiently identified at this stage of the FmHA review. Should an application be approved, each recipient to be assisted would undergo the applicable environmental review and public notification requirements in Subpart G of Part 1940 of this chapter prior to FmHA's consent to financial assistance for that recipient. FmHA will prepare an Environmental Impact Statement for any application where financial assistance is a major Federal action determined to have a significant effect on the quality of the human environment. Technical assistance is considered a categorical exclusion under FmHA's environmental review process. However, as further specified in Subpart G of Part 1940 of this chapter, the NNC, in the process of providing technical assistance, must consider the potential environmental impacts of the recommendations provided to the recipient.

(c) *Recipient.* Once the loan guarantee has been closed and/or the grant agreement executed, the NNC will submit to the FmHA State Office, when required by Subpart G of Part 1940 of this chapter, a properly completed Form FmHA 1940–20, executed by each recipient for which the NNC intends to provide financial assistance as defined by § 1980.605(c) of this subpart. The FmHA State Office will complete, for each recipient, the environmental review required by Subpart G of Part 1940 of this chapter. Appropriate notification will then be transmitted to the FmHA National Office. The National Office must receive State Office clearance on the environmental review process before it can authorize a commitment of financial assistance to the recipient by the NNC and/or the lender.

§ 1980.612 Equal opportunity and nondiscrimination requirements.

(a) The Federal Equal Credit Opportunity Act, prohibits creditors (e.g., the lender, the NNC, and the FmHA) from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age and physical or mental handicap (provided that the credit applicant has the capacity to enter into a binding contract).

(b) Executive Order 11246 provides for equal employment opporunity without regard to race, color, religion, sex, or national origin and the elimination of all facilities segregated on the basis of race, color, religion, or national origin on construction work financed by FmHA involving a construction contract of more than $10,000. To comply with Executive Order 11246, the NNC applicant will be required to execute Form FmHA 400–1, "Equal Opportunity Agreement," prior to receipt of a loan guarantee and/or grant. The recipient, as defined by § 1980.605(j) of this subpart, will be required to execute Form FmHA 400–1 prior to receipt of financial assistance, as defined by § 1980.605(c) of this subpart.

(c) Title VI of the Civil Rights Act of 1964 states that no person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. In compliance with this Act, the NNC applicant will be required to execute Form FmHA 400–4, "Assurance Agreement," prior to receipt of a loan guarantee and/or grant. The recipient, as defined by § 1980.605(j) of this subpart will be required to execute Form FmHA 400–4 prior to receipt of financial assistance, as defined by § 1980.605(c) of this subpart.

(d) For complete details on equal opportunity and discrimination requirements, including the conduct of compliance reviews (grant only), refer to Subpart E of Part 1901 of this chapter.

(Refer to Appendix A to Subpart G—Administrative Provisions)

§ 1980.613 Technical assistance.

Technical assistance, as defined by § 1980.605(m) of this subpart, is a problem solving activity performed for the benefit of the recipient by the NNC and/or others (e.g. the affiliate). Grant funds may be used to pay for the actual cost of providing a specific technical service to a recipient. Market research, product testing, financial feasibility, and management development are considered examples of problem solving activities, as opposed to such activities as the acquisition of physical assets, debt repayment, the provision of working capital, and loan closing expenses. FmHA will determine whether a specific activitiy qualifies as technical assistance. It is expected that technical assistance will be provided only when necessary to ensure project success. However, the actual provision of technical assistance does not necessarily mean that a loan to the recipient will follow.

§ 1980.614 Financial assistance—eligible purposes.

Financial assistance, as defined by § 1980.605(c) of this subpart, must be used by the NNC to assist recipients in projects which will improve business, industry and employment in rural areas, and meet the objectives of this program as stated in § 1980.602 of this subpart. Financial assistance to the recipients may be used for, but is not limited to:

(a) Business and industrial acquisitions, construction, conversion, enlargement, repair, modernization, or development cost.

(b) Purchasing and development of land, easements, rights-of-way, building, facilities, leases, or materials.

(c) Purchasing of equipment, leasehold improvements, machinery or supplies.

(d) Pollution control and abatement.

(e) Transportation services incidental to industrial development.

(f) Startup operating costs and working capital.

(g) Sites for housing development provided the community demonstrates a need for additional housing to prevent a loss of jobs in the area, or to house families moving to the area as a result of new employment opportunities.

(h) Assistance, other than for working capital or debt refinancing, for meat processing facilities and integrated meat and poultry operations. Assistance may not be for agricultural production as defined in § 1980.615(g) of this subpart. However, recipients which are in the business of processing, marketing, or packaging of agricultural products, as well as agricultural production, may be eligible for assistance for that portion of the business other than agricultural production, provided the agricultural production aspect is separate from the rest of the business; e.g., the production aspects are handled through separate legal business entities or through maintenance of the accounting system in such manner as to clearly identify the use of and future accounting of the assistance proceeds and operation of the business.

(i) Aquaculture including conservation, development, and utilization of water for aquaculture. Aquaculture means the culture or husbandry of aquatic animals or plants by private industry for commercial purposes including the culture and growing of fish by private industry for the purpose of granting or augmenting publicly-owned or regulated stock of fish.

(j) The growing of mushrooms or hydroponics.

(k) Commercial nurseries primarily engaged in the production of ornamental plants and trees and other nursery products such as bulbs, florists' greens, flowers, shrubbery, flower and vegetable seeds, sod, the growing of vegetables from seed to the transplant stage.

(l) Project forestry which includes establishments primarily engaged in the operation of timber tracts, tree farms, forest nurseries, and related activities such as reforestation.

(m) For the recipient only, interest (including interest on interim financing) during the period before the first principal payment becomes due or the facility becomes income producing, whichever occurs first.

(n) Industrial sites or parks, provided there exists current and firm written commitments from businesses to locate in the park, which will adequately and directly retain and/or create jobs.

(o) Feasibility studies.

(p) Reasonable fees and charges to the recipient *only* as specifically listed in this paragraph. Authorized fees include loan packaging fees and loan closing costs, environmental data collection fees, and other professional fees rendered by professionals generally licensed by individual State or accreditation associations, such as Engineers, Architects, Lawyers, Accountants, and Appraisers. The amount of fee will be what is reasonable and customary in the community or region where the recipient is located. For example, Architects and Engineers customarily charge fees based on a percentage of estimated project costs. Lawyers, Accountants, and Appraisers customarily charge for services on an hourly basis. Any fees for professional or expert services are to be fully documented and justified on Form FmHA 1980–60. The fees and charges referred to in this paragraph may be funded only from loan proceeds and are subject to review and concurrence by FmHA.

(q) Subject to the limitations defined in § 1980.615 (e) and (f), of this subpart refinancing recipient creditors may be allowed in connection with viable projects, when it is determined that refinancing is necessary to create and/or retain jobs or when it is necessary to convert short-term debt into longer term debt to allow the recipient to improve its cash flow position in such a manner that the recipient can expand to provide additional employment opportunities.

§ 1980.615 Financial assistance—Ineligible purposes.

Financial assistance, as defined by § 1980.605(c) of this subpart, may not be used by the NNC for the following:

(a) To pay the NNC's own salaries for office or clerical assistance, NNC administrative, transportation, or publication costs and expenses.

(b) For distribution or payment to the owners, partners, shareholders, or beneficiaries of the recipient or members of their families when such persons will retain any portion of their equity in the project.

(c) For assistance to government employees, military personnel, or principals or employees of the NNC who are directors, officers or have ownership or hold stock in the business.

(d) For the transfer of ownership of the recipient unless the loan will keep the business from closing, or prevent the loss of employment opportunities in the area, or provide expanded job opportunities.

(e) To refinance creditors in excess of the market value of the collateral.

(f) To refinance a recipient creditor if the recipient creditor is the affiliate, a lender, or the NNC as defined in § 1980.605 (a), (d), and (f) of this subpart, or if the recipient creditor is an agency of the Federal Government.

(g) For agricultural production, which means the cultivation, production (growing), and harvesting, either directly or through integrated operations of agricultural products (crops, animals, birds and marine life either for fiber or food for consumption), and the disposal or marketing thereof; and the raising, housing, feeding (including commercial, custom feedlots), breeding, hatching, control and/or management of farm and domestic animals.

(h) For any legitimate business activity when more than 10 percent of the annual gross revenue is derived from legalized gambling activity.

(i) For any illegal project activity.

(j) For hotels, motels, tourist homes or convention centers.

(k) For any tourist, recreation or amusement facility, including ski areas and scenic gondolas.

(l) For financing community antenna television services or related facilities.

(m) Charitable and educational institutions, churches, organizations affiliated with or sponsored by churches, and fraternal organizations.

(n) For any project in a city or town with a population in excess of twenty thousand as determined by the latest decennial census.

(o) For any otherwise eligible project that is in violation of either a Federal, State or local environmental protection law or regulation or an enforceable land use restriction unless the financial assistance required will result in curing or removing the violation.

§§ 1980.616 through 1980.620 [Reserved]

§ 1980.621 Availability of other credit.

The inability to obtain credit from other sources is not a requirement for assistance under this subpart.

§ 1980.622 Limitations on FmHA assistance.

(a) FmHA guaranteed loan and/or grant funds will not be used to finance more than 75 percent of the total cost of a recipient's project. The total combined outstanding FmHA assistance from all programs may not exceed $500,000 to any one recipient. The difference between the total project cost and the funds provided by FmHA must come from other sources of financing and/or

NNC or recipient contributions. In no event, will grant and/or guaranteed loan funds from the NNC program exceed $500,000 to any one recipient during that recipient's lifetime.

(b) Normally, the percentage of guarantee will be 80 percent or less, but never more than 90 percent.

(c) Once FmHA has released grant funds or has authorized the release of guaranteed loan funds, in amounts equal to the grant or loan(s) guaranteed by FmHA, as applicable, the requirements imposed on the NNC under this subpart shall not be applicable to any new projects thereafter financed by the NNC. Such new projects shall not be considered as being derived from Federal funds.

§ 1980.623 The guaranteed loan.

(a) *Documentation.* The interest rate and term of the guaranteed loan must be specifically documented and justified on Form FmHA 1980–60 or on an addendum to the form at the time the application is submitted to FmHA. Interest rate and term will be subject to FmHA approval.

(b) *Interest rate.* Interest rates, fixed, variable or a combination of the two, will be negotiated between the lender and the NNC applicant. Interest rates will be those rates reasonably and customarily charged loan recipients in similar circumstances in the ordinary course of business.

(c) *Interest rate changes.*

(1) Any change in the interest rate between the date of issuance of the commitment for guarantee and the date of issuance of the loan guarantee must be fully justified in writing and is subject to FmHA review and approval.

(2) A variable interest rate must be a rate that is tied to a base rate published periodicially in a recognized national or regional financial publication specifically agreed to by the lender and the NNC applicant on Form FmHA 1980–60. The interest rate must rise and fall with the selected base rate. Changes in the rate cannot be retroactive and can be made no more often than quarterly. Floors and ceilings on variable interest rates will be allowed at the option of the NNC.

(3) The NNC and the lender may effect a permanent reduction in the interest rate of the FmHA guaranteed loan at any time during the life of the loan upon written agreement between the two parties. FmHA must be notified by the lender, in writing, within ten calendar days of the change.

(i) A fixed rate cannot be changed to a variable rate unless the variable rate has a ceiling which is less than the original fixed rate.

(ii) A variable rate can be changed to a reduced fixed rate.

(4) No increases in interest rates will be permitted under the FmHA loan guarantee except the normal fluctuations in FmHA approved variable interest rate loans.

(d) *Term.* The maximum time allowable for final maturity for an FmHA guaranteed loan is ten years.

(e) *Promissory note.* (1) The lender must incorporate within the variable rate promissory note, a provision for adjustment of payment installments coincident with an interest rate adjustment. This will assure that the outstanding principal balance is properly amortized within the prescribed loan maturity to eliminate the possibility of a balloon payment at the end of the loan. Balloon payments are not permissible for any financial assistance provided to either an NNC or a recipient under this program.

(2) The lender is responsible for the legal documentation of interest changes by an allonge attached to the promissory note(s) or any other legally effective amendment of the rate(s); however, no new note may be issued.

(3) In a final loss settlement, when qualifying rate changes were made in accordance with paragraph (c)(3) of this section, the interest will be calculated for the periods the given rates were in effect, except that interest claimed on a loan which originated at a variable rate can never exceed the amount which would have been eligible for claim had the variable interest remained in force. The lesser cost to the Government will always prevail. The lender must maintain records which adequately document the accrued interest claimed.

(4) FmHA will not guarantee any loan in which the promissory note or any other document provides for the payment of interest upon interest.

(5) Ordinarily, monthly payments of principal and interest are expected. However, the first repayment of principal may be scheduled for payment after the NNC has begun to generate income from projects financed with FmHA funds, but no later than three years from the date of the promissory note and at least annually thereafter. Payments on interest will not be deferred and will be due at least annually from the date of the note.

(Refer to Appendix A to Subpart G—Administrative Provisions)

§ 1980.624 Full faith and credit.

The loan guarantee constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which the lender has actual knowledge at the time it becomes such lender or which lender participates in or condones. A note which provides for payment of interest on interest is void. The loan guarantee will be unenforceable by the lender to the extent any loss is occasioned by violation of usury laws, negligent servicing or failure to obtain the required security regardless of the time at which FmHA acquires knowledge of the foregoing. Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by FmHA in its Form FmHA 1980–61, "Commitment for Guarantee." Negligent servicing is defined as the failure to perform those services which a reasonable, prudent lender would perform in servicing its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also not acting in a timely manner or acting in a manner contrary to the manner in which a reasonable, prudent lender would act up to the time of loan maturity or until a final loss is paid.

§§ 1980.625 through 1980.627 [Reserved]

§ 1980.628 The grant—general.

(a) A grant may be made to complement a loan guarantee to an NNC, subject to the terms and conditions of this subpart.

(b) A grant may be used for technical assistance purposes as defined by § 1980.613 of this subpart and/or for financial assistance purposes as defined by § 1980.614 of this subpart.

(c) Grants will be awarded only from appropriated funds specifically allocated for this program.

(d) Before assistance in the form of an FmHA grant will be considered, one or more of the following criteria must be present and evidence thereof included as supporting documentation for Form FmHA 1980–60:

(1) A critical employment situation exists as measured by unemployment, underemployment, and low family income levels.

(2) Significant financial support from public agencies and/or private organizations exists as evidenced by the applicant's plan.

(3) Use of loan funds and funds from other sources alone will not make the applicant's plan economically feasible.

(e) Once Form FmHA 1940–1, "Request for Obligation of Funds," has been executed by FmHA and the NNC, the NNC has 180 calendar days to close the guaranteed loan. If the loan is not closed within this time period, FmHA

may, at its option, demand repayment of the original principal amount of the grant with interest.

§ 1980.629 Lenders—general.

(a) As supporting documentation for Part B of FmHA Form 1980–60, each proposed lender must provide FmHA with:

(1) Evidence of lender's organizational structure, including evidence of which agency or authority, if any, supervises the lender, and

(2) A copy of the lender's most recent annual report or audit, conducted by an independent public accountant, which demonstrates that the lender has the necessary financial solvency and resources to carry out its responsibilities under this program.

(b) A lender may use agents, correspondents, branches, financial experts or other institutions or persons to provide expertise and assistance in performing its responsibilities under this program.

(c) If there is more than one lender, the lenders in conjunction with the NNC, may select one to be the lead lender, whose responsibility it will be to coordinate part or all of the loan processing and servicing functions between the NNC, FmHA and the other lenders.

§ 1980.630 Security.

(a) It is the responsibility of the lender to obtain and to maintain in existence and of record, adequate security to protect the interests of the lender and FmHA.

(b) Security must be of a nature that repayment of the loan is reasonably assured when considered in conjunction with the integrity and ability of NNC management, the fiscal solvency of the NNC and the NNC's prospective earnings.

(c) Security may include, but is not limited to: land, buildings, machinery, equipment, furniture, fixtures, inventory, accounts receivable, cash or special cash security accounts, marketable securities, and cash surrender value of life insurance. Security may also include assignments of leases or leasehold interest, revenues, patents, and copyrights. However, lease assignments taken as security will not be guaranteed by FmHA under this program.

(d) All security must secure the entire loan. The lender will not take separate security to secure only that portion of the loan or loss not covered by the guarantee. The lender will not require compensating balances or certificates of deposit as a means of eliminating the lenders exposure on the guaranteed portion of the loan. However, compensating balances as used in the ordinary course of business may be used.

(e) Normally acceptable security for FmHA guaranteed loans would consist of an assignment of notes and related security instruments securing the financial assistance from the NNC to the recipients, as well as a security interest in cash held by the NNC and its affiliates stemming from FmHA-related funds, cash from the repayments of recipient loans, and any other security as required by the lender.

§ 1980.631 Conflict of interest.

When Form FmHA 1980–60 is submitted to FmHA, FmHA requires written disclosure of any legal ownership or financial interest, and any existing financial transactions between the NNC applicant and the proposed lender or between principals of these two legal entities. FmHA shall determine whether such ownership or financial transcation is sufficient to create a potential conflict of interest. In the event FmHA determines there is a conflict of interest, the FmHA assistance to the NNC applicant will not be approved until such conflict is eliminated. If a conflict of interest is discovered after a commitment for guarantee has been issued but before the loan guarantee has been issued, the conflict of interest must be eliminated or the loan will not be guaranteed.

§ 1980.632 Fees and charges.

All fees and charges between the lender, the NNC, the affiliate, and the recipient, must be specifically documented and justified on Form FmHA 1980–60, or on an addendum to the application at the time the application is submitted to FmHA for processing. All fees and charges are subject to FmHA review and concurrence.

(a) *Recipient.* Fees and charges to the recipient may be made only as specifically listed in § 1980.614(p) of this subpart.

(b) *NNC.* Fees and charges to the NNC will be those reasonably and customarily charged loan recipients in similar circumstances in the ordinary course of business and may be paid with loan funds at the time the FmHA guaranteed loan is closed.

(c) *Late payment charges.* Under no circumstances will late payment charges and any interest accruing to such charges be covered by the FmHA loan guarantee or be added to the principal and interest due under any guaranteed note. However, these conditions do not preclude there being a charge for late payment provided:

(1) Late payment charges are routinely made by the lender/NNC in all types of loan transactions.

(2) Payment has not been received within the customary timeframe allowed by the lender/NNC. The term "payment received" means that the payment in cash or by check money order, or similar medium has been received by the lender/NNC at its main Office, branch Office, or other designated place of payment.

(3) The parties involved agree in writing that the rate or method of calculating the late payment charges will not be changed to increase charges while the loan guarantee is in effect.

(d) *Packaging fee.* The NNC may contract with the lender or another party, including the affiliate, to assist in the preparation and submission of the NNC's application to FmHA, Form FmHA 1980–60. A fee for this packaging service may be charged to the NNC and paid with loan funds at the time the FmHA guaranteed loan is closed. The maximum allowable packaging fee is 2 percent of the total principal amount of the loan as reflected by the commitment(s) for guarantee issued by FmHA.

§ 1980.633 The NNC plan and scope of work.

FmHA requires that technical and financial assistance to recipients be administered in accordance with a plan, developed by the NNC applicant and approved by FmHA. The NNC plan must define specific objectives (refer to § 1980.602 of this subpart) and operating procedures, including standards and selection criteria for technical and/or financial assistance. The plan will be submitted to FmHA as part of Form FmHA 1980–60. The proposed lender will be provided with a copy of the plan and will attach its written evaluation of the plan to Part B of Form FmHA 1980–60. At a minimum, the plan must cover the following items:

(a) Demonstrate a need for guaranteed loan and grant funds. At a minimum, the applicant must identify a sufficient number of recipients requiring assistance equal to the amount of assistance requested from FmHA.

(b) Demonstrate the applicant's ability to administer a national rural development loan program in accordance with the provisions of this subpart. The applicant must provide a complete listing of all personnel responsible for administering this program along with a statement of their qualifications and experience. The personnel may be either members or

employees of the applicant's organization or contract personnel hired for this purpose. If the personnel are contracted for, the contract between the applicant and the entity providing such service will be submitted for FmHA's review.

(c) Demonstrate to FmHA's satisfaction that the applicant is affiliated with or has a working relationship with State rural development and finance organizations (affiliates) in three or more States.

(d) Provide evidence to FmHA's satisfaction that the applicant has a successful record of obtaining and managing private and/or philanthropic funds.

(e) Demonstrate the applicant's ability to commit financial resources under the control or the applicant to assist in the establishment of a rural development and finance program. This should include a statement of the source(s) of funding for the guaranteed loan(s) and source(s) of non-FmHA funds for administration of the applicant's operations, as well as financial and technical assistance for projects.

(f) Demonstrate to FmHA's satisfaction that the applicant has secured commitments of significant financial support from public agencies and/or private organizations for the establishment of a rural development and finance program.

(g) Include a proposal for providing adequate security for the FmHA guaranteed loan. The proposal should specifically address those items of security outlined in § 1980.630 of this subpart.

(h) Include a detailed statement of the proposed use of FmHA grant funds. Grant funds will be advanced in reasonable proportion to the use of loan guarantee funds. Therefore, an outline is required describing what will constitute project eligibility for grant related financial and technical assistance as a complement to the FmHA guaranteed loan funds the applicant will make available to recipients (refer to § 1980.628(d) of this subpart for other criteria which must be addressed).

(i) Identify what activities will constitute technical assistance to projects it assists (refer to § 1980.613 of this subpart for further details).

(j) Include a list of proposed fees and other charges it will assess the recipients it funds (refer to §§ 1980.614(p) and 1980.632 of this subpart for further details).

(k) The applicant's plan for relending the grant and/or guaranteed loan funds must be of sufficient detail to provide FmHA with a complete understanding of what the applicant will accomplish by lending the funds to the recipient. A scope of work, prepared by the applicant, will provide the complete mechanics of how the funds will get from the applicant to the recipient. The eligibility criteria, the application process, method of disposition of the funds to the recipient, monitoring of the recipient's accomplishments and reporting requirements by the recipient's management are examples of the items that must be addressed. The scope of work must require all recipients to provide a certification similar to that provided in §1980.643(p).

§§ 1980.634 through 1980.640 [Reserved]

§ 1980.641 Filing application deadline.

Subject to the availability of funds, applicants and lenders desiring FmHA assistance as provided in this subpart should file applications with the FmHA National Office, Assistant Administrator, Community and Business Programs, Washington, DC 20250 between January 1 and March 31 each fiscal year.

§ 1980.642 Priority.

The application and supporting documentation will be used to determine the applicant's priority for available funds. The following specific criteria will be considered in the competitive selection of loan guarantee and/or grant recipients:

(a) The proposal will improve business, industry and employment, specifically the direct retention and/or creation of jobs in rural areas.

(b) The proposal will provide financial and technical assistance to projects that wil provide services to the farm community, provide opportunities for employment for displaced farm families, and supplement farm family income through the use of farm labor and products.

(c) The proposal will stimulate and involve financial and technical assistance from public or private organizations in the development of projects under this program.

(d) The applicant has a proven record of successfully assisting rural business and industry. Such proof will normally consist of:

(1) The number of past and present loans the applicant has made and serviced that are similar in nature to the purpose of this program.

(2) The delinquency rate on the loans in the applicant's portfolio.

(3) The background and expertise of the applicant's staff that will be making and servicing the portfolio.

(4) The capitalization of the NNC applicant for making such loans.

(e) The proposal will be cost effective, including but not limited to: the ratio of projects to total cost of the proposal and the ratio of total jobs directly retained and/or created to the total cost of the proposal.

§ 1980.643 Developing the application.

A complete application will consist of the following:

(a) Form FmHA 1980–60, Part A completed by the NNC applicant and Part B completed by the lender with lender's evaluation and recommendations.

(b) Form FmHA 1940–20, as defined by § 1980.611 of this subpart and by Subpart G of Part 1940 of this chapter.

(c) Projected balance sheets, cash flow and earnings statements for at least 3 years supported by a list of assumptions showing the basis for the projections.

(d) Financial statements for the past 3 years or since the inception of the organization, and a recent audit prepared by an independent public accountant which demonstrates the applicant has financial solvency and resources necessary to carry out the intent of this program.

(e) A certificate of indebtedness detailing outstanding debt by name and address of creditor, account number, original principal amount, rate, term, installment amount and frequency, outstanding principal and interest, security, and current status.

(f) NNC applicant's plan and scope of work as defined by § 1980.633 of this subpart.

(g) Certified copies of the applicant's organizational documents (i.e., articles of incorporation and bylaws) and a certificate of good standing from the State in which the applicant is incorporated. The organizational documents must reflect that the applicant is authorized to carry out the provisions of the NNC program; which includes the authorization to borrow and to lend money, as well as to give and accept security for said monies.

(h) List of all members of the governing body including officers and term of office.

(i) Resolution of members authorizing appropriate officials to apply for FmHA assistance and to execute the necessary documents to obtain such assistance.

(j) Certificates of authority to do business in three or more States.

(k) Written approval to administer a loan program, as provided for in this subpart, by the Governor of each State in which the applicant intends to operate.

(l) A list of recent creditors (by name, address and account number) with whom FmHA may check to verify credit history.

(m) Preliminary opinion of lender's legal counsel relative to applicant's organizational structure and legal authority necessary to become involved with a loan guarantee.

(n) Preliminary opinion of applicant's legal counsel relative to applicant's organizational structure and legal authority necessary to become involved with a loan guarantee and/or grant.

(o) For the proposed affiliate(s), evidence of organizational structure (e.g. articles of incorporation) and documentation relative to that organization's goals and accomplishments.

(p) Applicant will certify that it is not presently suspended, debarred, proposed for debarment, declared ineligible or voluntarily excluded from any Federal program, has not had a Federal program terminated for cause or does not presently have an officer, major shareholder, partner or owner under indictment or conviction for fraud or criminal offense in connection with any Federal program in accordance with Executive Order 12549 and USDA Uniform Assistance Regulation Part 3017. Federal program includes activities involving Federal financial and nonfinancial assistance and benefits. If such a certification cannot be provided, the applicant will submit a written explanation.

(q) Any additional information requested by FmHA.

§ 1980.644 [Reserved]

§ 1980.645 FmHA review of application.

The "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs" will be reviewed in connection with all NNC applications.

(a) All loan guarantee and/or grant applications will be approved or rejected, and both the NNC applicant and the proposed lender (when appropriate) will be notified in writing by FmHA, normally within 45 calendar days after March 31 of each year.

(b) If an application is not complete, the NNC applicant and the proposed lender (when appropriate) will be notified in writing of the specific items missing from the application, not later than 20 calendar days after the receipt of the application by FmHA.

(c) NNC applicants who are eligible, but do not have the priority necessary for further consideration will be notified with a letter which includes the following statements:

(1) "Your proposal cannot be funded within the available funds."

(2) "You are advised against incurring obligations which cannot be fulfilled without FmHA funds."

(d) NNC applicants that are eligible for funding within the available funds will be provided with further processing instructions.

(e) If an application is rejected, the NNC applicant and the proposed lender (when appropriate) will be notified in writing of the specific reasons for the rejection. The notification will state that a review of this decision by FmHA may be requested in accordance with § 1980.698 of this subpart and Subpart B of Part 1900 of this chapter.

(Refer to Appendix A to Subpart G—Administrative Provisions)

§ 1980.646 Loan guarantee and/or grant approval and fund obligation.

(a) *Commitment for guarantee.* (1) If an application for a loan guarantee is approved, FmHA will issue Form FmHA 1980–61 along with an attachment containing any additional requirements of the commitment, including, but not limited to: percent guarantee, repayment terms, security, guarantee fee, loan agreement, use of loan proceeds, loan servicing, inspections, lender's certification, limitations on sale of guarantee, intergovernmental reviews, environmental reviews, and conditions for issuance of Forms FmHA 1980–62 "Loan Guarantee," and FmHA 1980–63 "Nonprofit Lender's Agreement." The attachment to Form FmHA 1980–61 will include a requirement that the NNC obtain the lender's and FmHA's concurrence in the proposed use of loan funds, *prior* to making a commitment to a specific recipient (refer to § 1980.654 of this subpart for further details).

(2) The applicant and the lender must review Form FmHA 1980–61 along with any additional requirements issued by FmHA. To accept the commitment and its requirements, the lender completes that portion of Form FmHA 1980–61 entitled "Acceptance of Conditions," and returns a dated and signed copy to FmHA. If certain conditions cannot be met, the applicant and the lender may propose alternative conditions to FmHA.

(3) It is the intent of FmHA that once Form FmHA 1980–61 is issued and accepted by the lender, the application may not be modified as to the scope of the project, overall work plan concept, project purpose, use of proceeds or terms and conditions. All changes require the prior concurrence of FmHA. Only minor changes will be considered, unless otherwise provided for in this subpart. Changes in the organizational structure and/or membership of the NNC applicant (legal entity) will not be approved. If such changes within the NNC applicant do take place, FmHA will not issue a loan guarantee to the lender who holds Form FmHA 1980–61 for that applicant.

(4) If the lender accepts Form 1980–61 and subsequently decides that it no longer wants a loan guarantee, the lender will immediately advise both the NNC applicant and FmHA in writing.

(b) *Grant.* (1) If an application for a grant is approved, the revised scope of work, and Forms FmHA 400–1, FmHA 400–4, and FmHA 1940–1 will be forwarded to the applicant for execution and return to FmHA.

(2) As with the loan guarantee, FmHA will require that the NNC obtain FmHA's concurrence in the proposed use of grant funds, prior to making a commitment to a specific recipient (refer to § 1980.654 of this subpart for further details).

(c) *Fund obligation.* Once the conditions set forth in paragraphs (a) or (a) and (b) of this section have been complied with, notice of approval of a loan guarantee and/or grant will be accomplished by sending the NNC applicant and the lender (if a guarantee is involved) copies of Form FmHA 1940–1, executed by FmHA on the obligation date.

(Refer to Appendix A to Subpart G—Administrative Provisions)

§ 1980.647 Preguarantee review.

Prior to loan closing and to issuance of the loan guarantee, the applicant and/or the lender will provide information for a preguarantee review by FmHA. Upon receipt of the documents listed below, FmHA will forward appropriate copies to the Office of the General Counsel (OGC) with a request for closing instructions. If the OGC requires additional information or revisions to proposed documents before issuing closing instructions, FmHA will notify the applicant and the lender (when appropriate). The advice and counsel of OGC is for the benefit of FmHA only and does not relieve the lender, NNC, or recipient from their respective responsibilities under FmHA regulations or agreements. The information for the preguarantee review will include, but is not limited to:

(a) Final draft of the loan agreement, which must include, but is not limited to:

(1) A description of loan amortization, including as an exhibit the proposed form of the promissory note (or other evidence of debt) and the structure of repayments, the interest rate, term, and conditions of the loan.

(2) A detailed description of all fees and charges to the NNC applicant.

(3) The lender's plan for servicing the loan and providing management assistance to the NNC applicant (including on-site visits to the NNC applicant as defined in § 1980.658 of this subpart).

(4) All requirements set forth by FmHA in Form FmHA 1980–61.

(5) The requirement for quarterly financial statements prepared by management and an annual audit in accordance with § 1980.656 of this subpart.

(6) General record and book-keeping requirements, including a requirement that the records be made available to the lender and/or FmHA upon request.

(7) Limitations on purchase or sale of equipment and fixed assets.

(8) Limitations on compensation of officers and members.

(9) Prohibition against the NNC applicant assuming the liabilities of any other person or entity.

(b) Final draft of operating agreements with affiliates.

(c) Proposed copy of note, mortgage, financing statement, security agreement, assignment, resolution, and any other documents which the lender expects the applicant to sign on the day of loan closing.

(d) Evidence that the lender has met or will meet all requirements attached to the Form FmHA 1980–61.

(e) Draft copy of Form FmHA 1980–63.

(f) Proposed final opinion of lender's legal counsel to include counsel's review of security instruments and closing documents.

(g) Proposed final opinion of applicant's legal counsel to include counsel's review of security instruments and closing documents.

(h) Draft copy of Form FmHA 1980–19, "Guaranteed Loan Closing Report."

(i) A proposed timetable for visits to the NNC by the lender as defined in § 1980.658 of this subpart.

(j) Evidence of fidelity bond coverage for the positions of person entrusted with the receipt and disbursement of its funds and the custody of valuable property. The amount of the bond will be at least equal to the maximum amount of money that the applicant will have on hand at any one time, exclusive of funds deposited in a bank account where the withdrawal of funds is contingent upon the countersignature of a person outside the applicant organization. A certified power of attorney, with effective date, will be attached to each bond.

(Refer to Appendix A to Subpart G—Administrative Provisions)

§ 1980.648 Loan guarantee and/or grant closing.

(a) *Loan guarantee.* Once loan closing instructions have been received from OCG, FmHA will work with the applicant and the lender to complete loan closing plans and to establish a mutually acceptable closing date.

(1) At loan closing, the following items will be executed and appropriate copies provided to FmHA.

(i) Forms FmHA 400–1 and FmHA 400–4 unless previously executed by the applicant.

(ii) Lender's certification to the following:

(A) No major changes have been made in the lender's loan conditions and requirements since the issuance of the commitment for guarantee except those approved in the interim by FmHA in writing.

(B) Truth in lending requirements have been met.

(C) All equal employment opportunity and nondiscrimination requirements have been or will be met at the appropriate time.

(D) The loan has been properly closed, and the required security instruments have been obtained, or will be obtained on any after acquired property that cannot be covered initially under State law.

(E) All other requirements of the commitment for guarantee have been met.

(F) Lien priorities are consistent with requirements of the commitment for guarantee.

(G) The loan proceeds have been, or will be, disbursed for purposes and in amounts consistent with this subpart, the commitment for guarantee, and Form FmHA 1980–60. A copy of a detailed loan settlement statement of the lender will be attached to support this certification.

(H) There has been no material adverse change(s) in the NNC's financial condition nor any other adverse change in the NNC during the period of time from FmHA's issuance of the commitment for guarantee to issuance of the loan guarantee. The lender's certification must address all adverse changes of the NNC and be supported by financial statements of the NNC not more than 60 days old at the time of certification. For purposes of this paragraph, the term "NNC" includes additionally any parent, affiliate, or subsidiary of the NNC. A copy of the financial statements must be submitted to FmHA.

(iii) Final loan agreement.

(iv) Note, mortgage, financing statement, security agreement, assignment, resolution, and all other documents required by the lender.

(v) Final opinion of lender's legal counsel.

(vi) Final opinion of applicant's legal counsel.

(vii) Any additional items required by FmHA.

(2) If FmHA determines that all closing requirements have been met, FmHA will:

(i) Execute Form FmHA 1980–63. FmHA will retain the original and a signed duplicate original will be retained by the lender. A Form FmHA 1980–63 must be executed for all loans guaranteed by FmHA.

(ii) Execute Form FmHA 1980–62. The original of Form FmHA 1980–62 will be attached to the original note and delivered to the lender, who will concurrently deliver the guarantee fee. A conformed copy of the form with a copy of the note attached will be retained by FmHA.

(iii) Execute Form FmHA 1980–19 which will be sent to the FmHA Finance Office with the guarantee fee. The fee will be one percent (1%) of the principal loan amount multiplied by the percent of guarantee, paid one time only at the time the loan guarantee is issued. The fee will be paid to FmHA by the lender and is nonrefundable. The fee may be passed on to the NNC.

(b) *Grant.* (1) Grants will be closed in accordance with this subpart, applicable parts of Subpart G of Part 1942 of this chapter, and any closing instructions from the Regional Attorney, OGC.

(2) Grants will be considered closed when Form FmHA 1940–1 is executed by the NNC and by FMHA.

(Refer to Appendix A to Subpart G—Administrative Provisions)

§ 1980.649 FmHA refusal to execute loan guarantee or grant.

If FmHA determines that it cannot execute the loan guarantee or grant because all requirements have not been met, it will promptly inform the lender or NNC applicant, as appropriate, of the reason(s) for the refusal in writing. FmHA will give the lender or NNC applicant a reasonable period within which to satisfy FmHA objections. If the lender or NNC applicant writes FmHA within the period allowed requesting additional time to satisfy the objections, FmHA may, in writing, allow such additional time as it considers necessary and reasonable under the circumstances. If the objections are satisfied within the time allowed, the guarantee or grant, as appropriate, may be executed.

§§ 1980.650 through 1980.653 [Reserved]

§ 1980.654 Disbursement of FmHA loan guarantee and/or grant funds.

(a) *General.* FmHA grant funds will be disbursed by FmHA in accordance with the provisions of USDA Uniform Federal Assistance Regulation Part 3015. FmHA guaranteed loan funds will be disbursed by the lender to the NNC upon completion of all or part of the project(s). Funds will be disbursed to the NNC in amounts corresponding to the proportionate quantity of work completed and in accordance with the loan agreement. For each project, a final written certification from the NNC to the lender is required, stating that the acquisition of property, plant, and equipment in an amount equal to the guaranteed loan funds disbursed to the NNC by the lender has been completed.

(b) *Release of technical assistance funds.* (1) The NNC is responsible for providing the FmHA State Office with a project description (refer to Appendix D of this subpart) and intergovernmental review data as defined in § 1980.610 of this subpart.

(2) Once the National Office has received intergovernmental review clearance from the State Office, the NNC may request grant funds from the National Office by submission of Standard Form (SF) 270 "Request for Advance or Reimbursement." An SF–270 should be submitted not more than once a month. Ordinarily, payment will be made within 30 days after receipt of proper request for reimbursement. When the NNC submits an SF–270, it will also submit, simultaneously, a statement identifying the recipients to be assisted and the type of assistance they are to receive.

(c) *Release of financial assistance funds.* (1) The NNC is responsible for providing the FmHA State Office with a project description (Appendix D of this subpart), intergovernmental review data (as defined by § 1980.610 of this subpart), environmental data (as defined by § 1980.611 of this subpart) and the following:

(i) A lender certification (only if guaranteed loan funds are involved). For each recipient, the lender must require and certify to each of the following:

(A) Security will be adequate in accordance with § 1980.630 of this subpart.

(B) No claim or liens of laborers, materialmen, contractors, subcontractors, suppliers of machinery and equipments or other parties are against the collateral of the NNC, and that no suits are pending or threatened that would adversely affect the collateral of the NNC when the security instruments are filed.

(C) Hazard insurance with a standard mortgage clause naming the NNC as beneficiary will be required on every recipient in an amount that is at least the lesser of the depreciated replacement value of the property being insured or the amount of the loan. Hazard insurance includes fire, windstorm, lightning, hail, business interruption, explosion, riot, civil commotion, aircraft, vehicle, maring, smoke, builder's risk, public liability, property damage, flood or mudslide, or any other hazard insurance that may be required to protect the collateral. The NNC's interest in the insurance will be assigned to the lender.

(D) Ordinarily, life insurance, which may be decreasing term insurance, is required for the principals and key employees of the recipient and will be assigned or pledged to the NNC and subsequently to the lender. A schedule of life insurance available for the benefit of the loan will be included as part of the recipient's application.

(E) Workmen's compensation insurance on projects is required in accordance with State law.

(F) If other financing is involved with the FmHA-related assistance to the NNC or the recipient, then the FmHA assistance will be secured with a lien position superior to or on a parity basis with that of the other source of financing.

(G) Provide concurrence in the project to be funded.

(ii) An NNC certification (if guaranteed loan and/or grant funds are involved). For each recipient, the NNC will be required to certify to the following, plus the requirements in paragraphs (c)(1)(i) (A) through (G) of this section.

(A) Recipient's project is located in an eligible area.

(B) At least 51 percent of the outstanding interest in the recipient has membership or is owned by those who are either citizens of the United States or reside in the United States after being legally admitted for permanent residence.

(C) FmHA grant/guaranteed loan funds will not exceed 75 percent of total project cost.

(D) Recipient does not have a total combined outstanding amount of FmHA assistance (grant and/or guaranteed loan) in excess of $500,000.

(E) Funds will be used for eligible purposes as defined by § 1980.614 of this subpart.

(F) Recipient meets objective and purpose of program.

(G) Recipient has other public and/or private investment funds.

(H) Recipient will, to the maximum extent possible, use local labor and resources (agricultural, if possible).

(I) Recipient will, to the maximum extent possible, be innovative in providing services and/or products to the public.

(J) Recipient will, whenever possible, involve the maximum use of agricultural or agricultural-related producs and services.

(K) Forms FmHA 400–1 and FmHA 400–4 will be executed by the recipient organization at project loan closing.

(2) Once the National Office has received clearance from the State Office regarding intergovernmental review, environmental assessment, NNC and, when applicable, lender certifications, the NNC may request authorization from the National Office to close the recipient loan and, if applicable, may request grant funds for that purpose by use of SF–270.

§ 1980.655 FmHA's access to records.

(1) *Lender records.* Upon request by FmHA, the lender will permit authorized representatives of FmHA to inspect and make copies of any of the records of the lender pertaining to FmHA guaranteed loans. Such inspection and copying may be made during regular office hours of the lender, or any other time the lender and FmHA find convenient.

(b) *NNC records.* The FmHA and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the NNC which are pertinent to the loan guarantee and/or grant program for the purpose of making an audit, examination, excerpts and transcripts.

§ 1980.656 Loan guarantee reporting requirements.

(a) The NNC is required to furnish quarterly financial statements during the first year after loan closing and organization-wide audited financial statements each year. Submission dates to FmHA and the lender are twenty (20) days after the end of each of the first three quarters and 90 days following the year-end.

(b) The lender will furnish FmHA with its analysis of the NNC's operations and financial statement within 30 days of receipt of such statement. FmHA in turn will evaluate the lender's analysis and follows up with the lender on servicing action(s) required or negative observations not detected through the lender's analysis.

(c) All audits are to be performed in accordance with USDA Uniform Assistance Regulation Part 3015 and with generally accepted government auditing standards (GAGAS), using the publication, "Standards for Audit of Governmental Organizations, Programs, Activities and Functions," developed by the Comptroller General of the United States in 1981, and any subsequent revisions.

§ 1980.657 Grant reporting requirements.

(a) A grantee (the NNC) must maintain financial management systems and retain financial records in accordance with the USDA Uniform Assistance Regulation Part 3015.

(b) Grantee records must include an accurate accounting and documentation of how these funds are used.

(c) SF–269, "Financial Status Report " and a project performance activity report will be required of all grantees on a quarterly basis. A final project performance report will be required with the last SF–269. Grantees shall constantly monitor performance to ensure that time schedules are being met, projected work by time periods is being accomplished, and other performance objectives are being achieved. Grantees should submit an original and one copy of each report to the FmHA National Office, Assistant Administrator, Community and Business Programs, Washington, DC 20250. The project performance reports shall include but need not be limited to the following:

(1) A comparison of actual accomplishments to the objectives established for that period. This should be based on The FmHA approved plan and scope-of-work;

(2) Reasons why established objectives were not met;

(3) Problems, delays, or adverse conditions which will materially affect attainment of planned project objectives, prevent the meeting of time schedules or objectives, or preclude the attainment of project work elements during established time periods. This disclosure shall be accompanied by a statement of the action taken or contemplated to resolve the situation;

(4) Objectives established for the next reporting period; and

(5) Status of compliance with any special conditions on the use of grant funds.

(d) Grantee must report and remit interest earned on advances of grant funds deposited in interest accounts to FmHA on a quarterly basis in accordance with the USDA Uniform Assistance Regulation Part 3015.

(e) The grantee will be required to submit an audit report prepared in accordance with the USDA Uniform Assistance Regulation Part 3015.

§ 1980.658 Loan guarantee servicing.

The lender is responsible for servicing the guaranteed loan in accordance with the terms of Forms FmHA 1980–62 and FmHA 1980–63.

(a) *Field visits.* (1) The lender will visit the NNC quarterly during the first year after loan closing and annually each year thereafter unless problems develop. Problem and/or delinquent NNCs will be visited as frequently as need demands. The lender will also make visits upon special written request of FmHA.

(2) The lender will notify FmHA of any scheduled visits or field inspections of the NNC's operations, which may include projects after issuance of the loan guarantee. To the extent possible, FmHA will attend such inspections.

(3) Any inspections or reviews conducted by FmHA, including those with the lender, are for the benefit of FmHA only and not for other parties of interest. FmHA inspections do not relieve any parties of interest of their responsibilities to conduct necessary inspections, nor can these parties rely on FmHA's inspections in any manner whatsoever.

(b) *Annual lender/FmHA meeting.* FmHA may conduct an annual meeting with each lender or its agent with whom a loan guarantee is outstanding. The meeting may be scheduled at the time FmHA makes a periodic field inspection to the NNC's place of business. At the meeting, a review will be made of the lender's performance in loan servicing, including enforcement of conditions and covenants in the loan agreement. The observations and results of the meeting will be documented on Form FmHA 449–39, "Field Visit Review (Business and Industrial Loans)," or in similar format. Servicing exceptions on the part of the lender which are noted by FmHA will be confirmed by letter to the lender.

(Refer to Appendix A to Subpart G—Administrative Provisions and to Appendix C to Subpart G—Form FmHA 1980–63.)

§ 1980.659 Grant servicing.

Grants will be serviced in accordance with Subpart E of Part 1951 of this chapter.

§ 1980.660 Transfer between lenders.

(a) *Prior to issuance of the loan guarantee.* FmHA may approve the transfer of an outstanding commitment for guarantee from the present lender to a new eligible lender, provided there are:

(1) No changes in ownership or control of the NNC applicant,

(2) No changes in the NNC applicant's written plan or scope of work, and

(3) The new lender agrees in writing to accept all original loan conditions and agreements.

(i) To effect such a transfer, the present lender will provide FmHA with a letter stating the reasons for withdrawal from the program. The new proposed lender will execute and submit a new Part B of Form FmHA 1980–60.

(ii) If the transfer is approved, FmHA will issue a letter amending the original Form FmHA 1980–61. The new lender will acknowledge acceptance of the amendment in writing.

(b) *Subsequent to issuance of the loan guarantee.* FmHA may approve the transfer of an outstanding loan guarantee from the present lender to a new eligible lender, provided the new lender agrees to assume all original loan requirements including liabilities, servicing responsibilities, and acquiring legal title to the unguaranteed portion of the loan. Such approval will be granted only in extreme circumstances (e.g., when a lender discontinues lending operations).

(Refer to Appendix A to Subpart G—Administrative Provisions)

§ 1980.661 Transfer between NNC's.

The guaranteed loan and/or grant to the NNC cannot be transferred to or assumed by another NNC.

§1980.662 Sale of loan guarantee.

(a) The loan guarantee with the full faith and credit of the United States cannot be sold by the lender into the secondary market.

(b) Sale of participation interests in the guaranteed loan are acceptable, subject to the following:

(1) The lender retains the note and legal title thereto, all security for the note, and all responsibility for servicing and liquidation, and

(2) The FmHA guarantee extends only to the lender and not to participants, and

(3) Participation cannot be sold to an NNC or to a principal of an NNC, and

(4) The lender must retain in its own portfolio a minimum of five percent of the total guaranteed loan and this amount must be from the unguaranteed portion of the loan.

§§ 1980.663 through 1980.669 [Reserved]

§ 1980.670 Defaults by NNC.

(a) The lender will notify FmHA when an NNC is thirty (30) days past due on a payment or if the NNC has not met its responsibilities of providing the required financial statements to the lender or is otherwise in default. The lender will

notify FmHA of the status of an NNC's default on Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status."

(b) In case of any monetary or material non-monetary default under the loan agreement, the lender is responsible for arranging a meeting with FmHA and the NNC to resolve the problem. A memorandum of the meeting, individuals who attend, and a summary of the problem and proposed solutions will be prepared by the FmHA representative and retained in the loan file. The lender and the NNC will be notified in writing of any decision reached by FmHA.

(c) In considering servicing options, the prospects for providing a permanent cure without adversely affecting the risks of FmHA and the lender must become the paramount objective. Temporary curative actions such as payment deferments, moratoriums on payments or collateral subordination, if approved, must strengthen the loan and be in the best interests of the lender and FmHA.

(d) Consultant services may be used to assist FmHA and the lender in determining which servicing action is appropriate. Any servicing actions taken by the lender must have the prior written concurrence of FmHA and will be paid for by the lender.

(e) The National Office may, at its option, assume the servicing responsibility on individual cases.

(Refer to Appendix A to Subpart G—Administrative provisions and to Appendix C to Subpart G—Form FmHA 1980–63.)

§ 1980.671 Liquidation.

(a) If the lender concludes that liquidation of a guaranteed loan account is necessary because of one or more defaults or third party actions that the NNC cannot or will not cure or eliminate within a reasonable period of time, a meeting will be arranged by the lender with FmHA. When FmHA concurs with the lender's conclusion or at any time concludes independently that liquidation is necessary, it will notify the lender and the matter will be handled in accordance with Form FmHA 1980–63.

(b) If a lender acquires title to property either through voluntary conveyance or foreclosure proceeding, FmHA may elect to permit the lender the option to calculate the final loss settlement using the net proceeds received at the time of ultimate disposition of such property. The lender must submit its written request for this option to FmHA, and FmHA must agree, prior to the lender submitting any request for estimated loss payment.

(Refer to Appendix A to Subpart G—Administrative Provisions and Appendix C to Subpart G—Form FmHA 1980–63.)

§ 1980.672 Protective advances.

Protective advances are advances made by the lender for the purpose of preserving and protecting the collateral where the NNC has failed to and will not or cannot meet its obligations. Generally, protective advances are made only when liquidation is under consideration or in process. Protective advances must constitute an indebtedness of the NNC to the lender and be secured by the security instrument(s). Written authorization by FmHA is required on all protective advances which exceed a total cumulative advance of $500 to the same NNC. Protective advances include, but are not limited to, advances made for taxes, annual assessments, ground rent, hazard or flood insurance premiums affecting the collateral, and other expenses necessary to preserve or protect the security. Attorney fees are not a protective advance. Protective advances will not be made in lieu of additional loans, in particular, working capital loans.

(Refer to Appendix C—Form FmHA 1980–63.)

§§ 1980.673 through 1980.696 [Reserved]

§ 1980.697 Bankruptcy.

(a) It is the lender's responsibility to protect the guaranteed loan debt and all the collateral securing it in bankruptcy proceedings. These responsibilities include but are not limited to the following:

(1) When the potential for bankruptcy becomes apparent, the lender will promptly inform FmHA and will keep FmHA adequately and regularly informed in writing of all aspects of any backruptcy proceedings.

(2) The lender will file a proof of claim where necessary and all the necessary papers and pleadings concerning the case.

(3) The lender will attend and where necessary participate in meetings of the creditors and all court proceedings.

(4) The lender, whose collateral is subject to being used by the trustee in bankruptcy, will immediately seek adequate protection of the collateral.

(5) Where appropriate, the lender should seek involuntary conversion to a liquidating proceeding or seek dismissal of the proceedings.

(b) In a Chapter 11 reorganization, if an independent appraisal is necessary in FmHA opinion, FmHA and the lender will share such appraisal fee equally.

(c) Expenses on Chapter 11 reorganization cases are not to be deducted from the collateral proceeds. Reasonable and customary liquidation expenses may be deducted from the collateral proceeds in liquidation cases under Chapter 7 or section 1123(b)(4) *liquidations* provided the lender presents a written justification for each expense, secures FmHA's written concurrence prior to incurring the expense, and the lender conducts the liquidation.

(d) An estimated loss payment may be filed by the lender at the initiation of a Chapter 7 proceeding or after a Chapter 11 proceeding becomes a liquidation proceeding. On loans in bankruptcy, any loss payment must be handled in accordance with the Form FmHA 1980–63 and be approved by the Administrator.

(e) The Administrator or designee, with the assistance of the Regional Attorney for the area in which the NNC is located, will perform the required functions necessary to protect the interest of the Government for the grant only.

(Refer to Appendix A to Subpart G—Administrative Provisions.)

§ 1980.698 Appeals.

Any adverse decision made by FmHA relative to the loan guarantee and/or grant may be appealed by the NNC or lender under Subpart B of Part 1900 of this chapter.

(Refer to Appendix A to Subpart G—Administrative Provisions.)

§ 1980.699 Exception authority.

The Administrator may, in individual cases, make an exception to any requirement or provision of this subpart which is not inconsistent with the authorizing statute, an applicable law or decision of the Comptroller General, if the Administrator determines that application of the requirement or provision would adversely affect the Government's interest. The basis for this exception will be fully documented. The documentation will identify the particular requirement involved, explain the adverse effect on the Government's interest and show how the adverse impact will be eliminated or minimized if the exception is made.

§ 1980.700 OMB Control Number.

The collection of information requirements in this regulation have been approved by the Office of Management and Budget and assigned OMB Control Number 0575–0121.

Appendix D to Subpart G—Project Description

1. Name of recipient.
2. Address (provide address for both recipient and project if they differ).
3. Contact person and telephone number for recipient.
4. Funding source/amount.

(a) FmHA:
Technical assistance grant .....$_____
Loan (from grant funds).....$_____
Loan guarantee.....$_____
(b) _____: Non-NNC loan.....$_____
(Name)
(c) _____: Other source .....$_____
(Name)
(d) Total: .....$_____

5. Purpose of Loan (detailed description of proposal).
6. Business—new or existing and for how long.
7. Number of jobs created, saved or benefited by assistance.

Dated: February 14, 1989.

Neal Sox Johnson,

Acting Administrator.

[FR Doc. 89-5304 Filed 3-10-89; 8:45 am]

BILLING CODE 3410-07-M

Animal and Plant Health Inspection Service

9 CFR Part 92

[Docket No. 88-162]

Importation of Horses From Argentina

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations by removing the requirment that horses imported into the United States from Argentina be quarantined for not less than seven days. This quarantine period is needed to determine if the horses are infected with Venezuelan equine encephalomyelitis (VEE). We are proposing to remove this particular quarantine requirement because we have determined that VEE does not exist in Argentina. The adoption of this proposal would allow horses imported into the United States from Argentina that meet all the requirements for importation, in most cases, to qualify for a shortened quarantine period (usually three days) upon importation into the United States.

DATE: Consideration will be given only to comments postmarked or received on or before April 12, 1989.

ADDRESSES: Send an original and two copies of written comments to Helen R. Wright, Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 88-162. Comments received may be inspected at USDA, Room 1141, South Building, 14th and Independence Ave. SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Harvey A. Kryder, Senior Staff Veterinarian, Import-Export Products Staff, VS, APHIS, USDA, Room 753, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-7885.

SUPPLEMENTARY INFORMATION:

Background

Regulations of the Animal and Plant Health Inspection Service (APHIS) on animal importations in 9 CFR Part 92 (referred to below as the regulations) prohibit or restrict the importation of horses that could introduce various diseases, including Venezuelan equine encephalomyelitis (VEE), into the United States. VEE, a viral disease of the central nervous system, progresses rapidly in horses and is frequently fatal. The last outbreak of VEE in the United States was eradicated in 1972.

Section 92.11(d)(1)(i) of the regulations requires that horses imported into the United States from the Western Hemisphere, except those from Canada and Mexico, be quarantined at designated ports of entry for not less than seven days. The purpose of this requirement is to prevent the introduction into the United States of horses infected with VEE; the quarantine period of not less than seven days was instituted because symptoms of VEE in infected horses become apparent within seven days of infection.

Horses from Canada and Mexico are not subject to this quarantine period because VEE does not exist in these countries. Recently, veterinary officials of the Argentine government have provided APHIS with survey results and animal testing data [1] demonstrating that VEE does not exist in Argentina. Therefore, we are proposing to remove the requirement that horses imported into the United States from Argentina undergo a quarantine of not less than seven days to prevent the introduction of VEE into the United States. Horses from Argentina would continue, however, to be subject to the other applicable import requirements of 9 CFR Part 92, including the requirement in (92.8 concerning inspection of horses at the port of entry and the requirements in (92.11(d) concerning the testing of imported horses, the quarantine of horses until test results are obtained, and the certification by a port veterinarian that horses are free from clinical evidence of disease.

[1] Copies of this material may be obtained by writing to the Administrator, c/o Import-Export Products Staff, VS, APHIS, Room 753, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this proposed rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule would have an effect on the economy of less than $100 million; would not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and would not cause 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.

Our proposal would generally reduce the time that horses imported from Argentina must spend in quarantine at the port of arrival, and would, therefore, reduce the cost to importers of expenses related to this quarantine. The number of horses imported from Argentina annually is small compared with the total number of horses imported annually. In 1987, of 21,500 imported horses, approximately 600 were imported from Argentina. These importations involved several hundred individuals importing one or a few horses, with no importations of large groups of horses. Because horses imported from Argentina under this proposed rule would usually be quarantined for no more than three days while test results are obtained, the main economic effect of this rule would be to save importers the costs of quarantining their horses for four days, a savings of approximately $237 per horse.

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

Paperwork Reduction Act

The regulations in this proposal contain no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

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

List of Subjects in 9 CFR Part 92

Animal diseases, Canada, Imports, Livestock and livestock products, Mexico, Poultry and poultry products, Quarantine, Transportation, Wildlife.

Accordingly, we are proposing to amend 9 CFR Part 92 as follows:

PART 92—IMPORTATION OF CERTAIN ANIMALS AND POULTRY AND CERTAIN ANIMAL AND POULTRY PRODUCTS; INSPECTION AND OTHER REQUIREMENTS FOR CERTAIN MEANS OF CONVEYANCE AND SHIPPING CONTAINERS THEREON

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

Authority: 7 U.S.C. 1622; 19 U.S.C. 1306; 21 U.S.C. 102–105, 111, 134a, 134b, 134c, 134d, 134f, and 135; 31 U.S.C. 9701; 7 CFR 2.17, 2.51, and 371.2(d).

§ 92.11 [Amended]

2. In § 92.11(d)(1)(i) the words "and except with respect to horses from Argentina," would be added immediately following the word "Mexico,".

Done in Washington, DC, this 8th day of March 1989.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 89–5736 Filed 3–10–89; 8:45 am]

BILLING CODE 3410–34–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1259

National Space Grant College and Fellowship Program

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This proposed rule establishes NASA policies, responsibilities, and procedures relative to the National Space Grant College and Fellowship Program established by Title II of the National Aeronautics and Space Administration Authorization Act of 1988. This program, through the designation of Space Grant colleges/consortia and the establishment of Space Grant programs and fellowships, is designed to broaden the base of universities and individuals contributing to and benefiting from aerospace science and technology and ultimately contribute to the development and utilization of space resources.

DATE: Comments must be submitted on or before April 12, 1989.

ADDRESS: Educational Affairs Division, Code XE, NASA Headquarters, Washington, DC 20546. Comments may be inspected in FB6, Room 6127, between 8:00 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Elaine T. Schwartz, 202/453–8344.

SUPPLEMENTARY INFORMATION: The National Aeronautics and Space Administration has determined that this proposed rule does not constitute a major rule for the purposes of Executive Order 12291 and it will not have a significant economic impact on a substantial number of small business entities under the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 1259

Aerospace, Consortium, Fellowship Program, Higher Education, Space, Grant College.

Part 1259 is added to Title 14, Chapter V, to read as follows:

PART 1259—NATIONAL SPACE GRANT COLLEGE AND FELLOWSHIP PROGRAM

Subpart 1—Basic Policy

Sec.

Subpart 2—Space Grant Program and Project Awards

Subpart 3—National Needs Grants

Subpart 4—Space Grant College and Consortium Designation

Subpart 5—Space Grant Fellowships

Subpart 6—Space Grant Review Panel

Authority: Pub. L. 100–147, 101 Stat. 869–875, 42 U.S.C. 2486; 42 U.S.C. 2452.

Subpart 1—Basic Policy

§ 1259.100 Scope of part.

(a) This Part 1259 establishes the policies, responsibilities, and procedures relative to the National Space Grant College and Fellowship Program established by Title II of the National Aeronautics and Space Administration Authorization Act of 1988. (Pub. L. 100–147, Oct. 30, 1987, 101 Stat. 869–875, 42 U.S.C. 2486). This statute authorizes the Administrator of the National Aeronautics and Space Administration (NASA), in order to carry out the purposes of the National Space Grant College and Fellowship Act (the Act), to accept conditional or unconditional gifts and donations, to accept and use funds from other Federal departments, agencies and instrumentalities, to make awards with respect to such needs or problems and to designate Space Grant colleges. It further directs the Administrator to establish a graduate fellowship program to provide educational assistance to qualified individuals in fields related to space, and to establish an independent committee known as the Space Grant Review Panel to review and advise the Administrator with respect to Space Grant programs.

(b) The regulations of this part do not apply to awards made by NASA under any other authority.

§ 1259.101 Definitions.

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

(a) "Field related to space" means any academic discipline or field of study (including the physical, natural and biological sciences, and engineering, space technology, education, economics, sociology, communications, planning, law, international affairs and public administration) which is concerned with or likely to improve the understanding, assessment, development, and utilization of space.

(b) "Institution of higher education" means any college or university in any State which:

(1) Admits as regular students only individuals who have a certificate of

graduation or equivalent from a secondary school;

(2) Is legally authorized within such State to provide a program of education beyond secondary education;

(3) Provides an educational program for which a bachelor's degree or other higher degree is awarded;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association.

(c) "National of the United States" means a citizen of the United States or a native resident of a possession of the United States. It does not refer to or include a citizen of another country who has applied for United States citizenship.

(d) "Panel" means the Space Grant Review Panel established pursuant to section 210 of the Act.

(e) "Person" means any individual, public or private corporation, partnership or other association or entity (including any Space Grant college, Space Grant consortium, institution of higher education, institute, or laboratory), or any State, political subdivision thereof, or agency or officer of a State or political subdivision thereof.

(f) "Space" means "aeronautical and space activities" which has the meaning given to such term in section 103(1) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2452).

(g) "Space Grant college" means any public or private institution of higher education which is designated as such by the Administrator or designee pursuant to section 208 of the Act.

(h) "Space Grant regional consortium" means any association or other alliance which is designated as such by the Administrator or designee pursuant to section 208 of the Act.

(i) "Space Grant program" means any program which:

(1) Is administered by any Space Grant college, Space Grant regional consortium, institution of higher education, institute, laboratory or State or local agency; and

(2) Includes two or more projects involving education and one or more of the following activities in the fields related to space:

(i) Research;

(ii) Training; or

(iii) Advisory services.

(j) "Space Grant program award" means any award contemplated under section 206(a) of the Act.

(k) "Special Space Grant program award" means any award extended under section 206(b) of the Act.

(l) "Specific national need grant" means any award extended under section 207 of the Act.

(m) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States.

(n) "State Space Grant cooperating institution" means any institution of higher education in a State which does not have a designated Space Grant college that is named by the Administrator or designee to provide selected Space Grant program functions within that State.

§ 1259.102 General policy.

(a) In accordance with subsections 103(a)(2) and (3) of the National Aeronautics and Space Act of 1958, as amended, (42 U.S.C. 2457(a)(3)), it is NASA's policy, through various educational programs, to provide direct support for and encouragement to teachers, students, and prospective students in fields related to space.

(b) In compliance with the National Space Grant College and Fellowship Act (42 U.S.C. 2486), it shall be NASA's purpose to:

(1) Increase the understanding, assessment, development, and utilization of space resources by promoting a strong educational base, responsive research and training activities, and broad and prompt dissemination of knowledge and techniques;

(2) Utilize the abilities and talents of the universities of the Nation to support and contribute to the exploration and development of the resources and opportunities afforded by the space environment;

(3) Encourage and support the existence of interdisciplinary and multidisciplinary programs of space research, to engage in activities of training (including teacher education), research and public service and to have cooperative programs with industry;

(4) Encourage and support the existence of consortia, composed of university and industry members, to advance the exploration and development of space resources in cases in which national objectives can be better fulfilled than through the programs of single universities;

(5) Encourage and support Federal funding for graduate fellowships in fields related to space;

(6) Support activities in colleges and universities generally for the purpose of creating and operating a network of institutional programs that will enhance achievements resulting from efforts under this Act; and

(7) Encourage cooperation and coordination among Federal agencies and Federal programs concerned with space issues.

(c) It shall be NASA's policy to designate Space Grant colleges, State Space Grant cooperating institutions and Space Grant regional consortia and award fellowships, grants, contracts, and other transactions competitively in a merit-based review process.

(d) It shall be NASA's policy to designate and make awards without discriminating on the basis of sex, race, color, religion, national origin, or handicap.

§ 1259.103 Special authorities—gift acceptance and other Federal funding.

(a) *Acceptance of gifts.* (1) In order to carry out the provisions of the Act, the Administrator is authorized to accept conditional or unconditional gifts or donations of services, money or property, real, personal or mixed, tangible or intangible. This authority is delegated to the Director, Educational Affairs Division.

(2) The Administrator or designee may decline any gift or donation that the Administrator determines is not in accord with the purposes of the program. Also, conditional gifts or donations that are not in compliance with the Act or the implementing regulations shall be declined. NASA may use a reasonable amount from a gift or donation to cover any administrative costs associated with such gift or donation.

(b) *Acceptance and use of funds from other Federal agencies.* (1) To carry out the provisions of the Act, the Administrator is authorized to accept and use funds from other Federal departments, agencies, and instrumentalities to pay for awards under this program. This authority is delegated to the Director, Educational Affairs Division.

(2) The Administrator or designee may decline any such funds when the Administrator determines acceptance would not be in accord with the purposes of the program. NASA may use a reasonable amount from transferred Federal funds to cover any administrative costs associated with such transfers.

Subpart 2—Space Grant Program and Project Awards

§ 1259.200 Description.

Awards are authorized to establish any Space Grant and/or fellowship

program or project if such program or project will further the purposes of the Act.

§ 1259.201 Types of Space Grant program and project awards—regular and special.

(a) A regular Space Grant program or project award shall:

(1) Be funded by NASA up to 66 percent of the total cost of the Space Grant award and/or fellowship program involved; or

(2) Be funded up to 100 percent of its cost if funded by another Federal entity.

(b) A special Space Grant program or project award may be funded up to 100 percent of the total cost of the special project if the Administrator or designee, the Director, Educational Affairs Division, finds that:

(1) No reasonable means is available through which the applicant can meet the matching requirements for a regular Space Grant award under paragraph (a) of this section;

(2) The probable benefit of such project outweighs the public interest in such matching requirement; and

(3) The same or equivalent benefit cannot be obtained through the award of a regular Space Grant program or project award under paragraph (a) of this section or the award of a specific national need grant under section 207 of the Act.

§ 1259.202 Application procedures.

(a) The opportunity to apply shall be announced by the Director, Educational Affairs Division.

(b) The application procedures and evaluation guidelines for awards under this section will be included in the announcements of such programs.

(c) The applications will be reviewed by a peer review merit selection panel appointed by the Director, Educational Affairs Division.

§ 1259.203 Limitations.

Public Law 100–147, section 206(d) (2) and (3), states that:

(a) Funds for awards made under this section may not be used to:

(1) Purchase land;

(2) Purchase, construct, preserve, or repair any building; or

(3) Purchase or construct any launch facility or launch vehicle.

(b) Funds may be used to lease any of the items listed in paragraph (a) of this section as long as prior written approval is obtained from the Administrator or designee.

Subpart 3—National Needs Grants

§ 1259.300 Description.

National needs awards may be awarded by the Administrator or designee to meet such needs or problems relating to aerospace identified by the Space Grant Review Panel, by NASA officials or by any person. Such awards may be up to 100 percent of the total cost of the program or project.

§ 1259.301 Identification of national needs.

National needs shall be identified by the Administrator who shall consider specific national needs and problems relating to space proposed by the space Grant Review Panel, any NASA official or any person.

§ 1259.302 Application procedures.

(a) The Administrator or designee has the authority to make awards to meet identified national needs.

(b) The Director, Educational Affairs Division, shall establish a competitive, merit-based review process to examine unsolicited national needs proposals.

§ 1259.303 Limitations.

The same limitations shall apply as are stated in § 1259.203.

Subpart 4—Space Grant College and Consortium Designation

§ 1259.400 Description.

(a) The Administrator may designate Space Grant colleges, Space Grant college consortia, and Space Grant regional consortia in order to establish Federal/university partnerships to promote a strong educational base in the space and aeronautical sciences. These designated colleges and consortia will provide leadership for a network of American colleges and universities, industry, and State and local governments in space-related fields. The Administrator hereby delegates this authority to the Director, Educational Affairs Division.

(b) Designation of Space Grant colleges, Space Grant college consortia, and Space Grant regional consortia shall be for 5 years. Designation of Space Grant colleges and consortia may be continued based on a merit review at the beginning of the fifth year.

(c) Each designated Space Grant college or consortium will receive:

(1) A Space Grant award that requires a 100 percent match; and

(2) Funds for fellowships.

(d) Each Space Grant college or consortium will be funded annually.

§ 1259.401 Responsibilities.

Each designated Space Grant college or consortium shall:

(a) Designate a Space Grant Program Director;

(b) Establish a Space Grant Office;

(c) Administer a fellowship program;

(d) Develop and implement programs of public service, interdisciplinary space-related programs, advisory activities, and cooperation with industry, research laboratories, State and local governments, and other colleges and universities, particularly institutions in their State and/or region with significantly large enrollments of racial minorities who are under-represented in science and technology; and

(e) Provide nonfederal matching funds (exclusive of in-kind contributions) for the Space Grant program equal to that provided by NASA.

§ 1259.402 Basic criteria and application procedures.

(a) Any institution of higher education may be designated a Space Grant college if the Administrator or designee finds that it has a balanced program of research, education, training and advisory services in fields related to space, as further defined in the program announcement.

(b) Any association or other alliance of two or more persons may be designated a Space Grant regional consortium, if the Administrator or designee finds that such association or alliance:

(1) Is established for the purpose of sharing expertise, research, educational or training facilities, and other capabilities in order to facilitate research, education, training, and advisory services, in any field related to space; and

(2) Will encourage and follow a regional approach to solving problems or meeting needs relating to space, in cooperation with other institutions of higher education, Space Grant program grantees, and other persons in the region.

(c) The opportunity to apply for designation shall be announced by the Director, Educational Affairs Division. The application procedures and evaluation guidelines for designation shall be included in the designation announcement.

(d) Designation will be decided by a competitive merit review of the program proposal measured against the purposes of the Act and including, but not limited to, proposed linkages with other colleges and universities (particularly institutions with significant enrollments of under-represented minority groups), public service, and collaboration with space-related industry.

§ 1259.403 Limitations.

The same limitations shall apply as are stated in § 1259.203.

§ 1259.404 Suspension or termination of designation.

The Administrator or designee, the Director, Educational Affairs Division, may, for cause, and after an opportunity for a hearing before an Administrative Judge appointed by the Deputy Administrator, suspend or terminate the Space Grant designation of any institution or consortium.

Subpart 5—Space Grant Fellowships

§ 1259.500 Description.

The Space Grant fellowship program will provide educational and training assistance to qualified individuals at the graduate level in fields related to space. Awards will be made to institutions of higher education for fellowships. The student recipients shall be known as NASA Space Grant Fellows.

§ 1259.501 Responsibilities.

(a) All institutions which receive Space Grant fellowships will be expected to use the awards to increase the pool of graduate students in fields related to space.

(b) The overall fellowship program shall be cognizant of institutional diversity and geographical distribution.

§ 1259.502 Application procedures.

(a) All applicants for designation as Space Grant colleges and consortia must apply for Space Grant fellowships.

(b) Applicants for Space Grant program or project grants (under 1259.200) and for national needs grants (under 1259.300) may also apply for Space Grant fellowships.

(c) There will be a merit review selection of Space Grant fellowship awards.

§ 1259.503 Limitations.

(a) Fellowships shall be awarded only to Nationals of the United States.

(b) Any students supported under this fellowship program shall not be funded for more than 4 years unless the Director, Educational Affairs Division, makes an exception.

Subpart 6—Space Grant Review Panel

§ 1259.600 Panel description.

An independent committee, the Space Grant Review Panel, which is not subject to the Federal Advisory Committee Act, shall be established to advise the Administrator with respect to Space Grant program and project awards, the Space Grant fellowship program, and the designation and operation Space Grant colleges and consortia. A majority of the voting members shall be individuals who, by reason of knowledge, experience, or training are especially qualified in one or more of the fields related to space. The other voting members shall be individuals who, by reason of knowledge, experience or training, are especially qualified in, or representative of, education, extension services, State government, industry, economics, planning, or any other activity related to the purposes of the Space Grant program.

§ 1259.601 Establishment and composition.

(a) The Panel, to be located at NASA Headquarters in Washington, DC, will be composed of ten voting members who are not current NASA employees.

(b) It shall include four from Federal departments, agencies or entities that have an interest in space programs or science and education, and six nonfederal representatives.

(c) The nonfederal representatives shall include two persons who are directly involved with the Space Grant program at a Space Grant college or consortium, one person involved with the Space Grant program at a university that is not a designated Space Grant college, a university president or chancellor, one representative of a space-related industry, and the last person to be from whatever field the Administrator determines to be of greatest concern.

(d) The Panel members shall be appointed by the Administrator or designee.

(e) The relevant organizations and associations in aerospace and science education fields will be asked to provide three names for each position on the panel. The Administrator shall consider them, but not be limited to them, in the selection process.

(f) The Administrator or designee shall select a Chair and a Vice Chair. The Vice Chair shall act as Chair in the absence or incapacity of the Chair.

(g) The Administrator or designee may select NASA officials to serve as ex officio, nonvoting members of the panel.

§ 1259.602 Conflict of interest.

Any member of the Panel who has a personal or financial interest in an issue before the Panel shall abstain from voting on such issue.

§ 1259.603 Responsibilities.

(a) The Panel shall advise the Administrator and the Director, Educational Affairs Division, with respect to:

(1) Applications or proposals for, and performance under, awards made pursuant to sections 206 and 207 of Title II of the Act;

(2) The Space Grant fellowship program;

(3) The designation and operation of Space Grant colleges and Space Grant regional consortia, and the operation of Space Grant and fellowship programs;

(4) The formulation and application of the planning guidelines and priorities pursuant to section 205(a) and (b)(1) of Title II of the Act; and

(5) Such other matters as the Administrator refers to the Panel for review and advice.

(b) The Panel shall meet biannually and at any other time at the call of the Chair or upon a request from a majority of the voting members or at the call of the Administrator.

(c) The Panel may exercise such powers as are reasonably necessary in order to carry out the duties enumerated in paragraph (a) of this section.

(d) The Director, Educational Affairs Division, shall appoint an Executive Secretary who shall perform administrative duties for the Panel.

(e) Federal members of the Panel will have their agencies reimbursed by NASA for any travel costs and per diem expenses required to attend Panel meetings.

(f) Nonfederal members of the Panel will be reimbursed by NASA for travel costs and per diem expenses required to attend Panel meetings.

March 1, 1989.

Dale D. Myers,

Deputy Administrator.

[FR Doc. 89-5487 Filed 3-10-89; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Rel. No. 34-26599; File No. S7-9-89]

Disclosure of Equity Participants in Control Transactions

AGENCY: Securities and Exchange Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Securities and Exchange Commission ("Commission") today is publishing for comment proposals to revise the instructions to certain schedules filed in connection with control transactions. The proposals are intended to provide shareholders with material information concerning significant equity participants in limited

partnerships, closely-held corporations, and similar entities engaged in control transactions.

DATE: Comments should be received on or before May 12, 1989.

ADDRESS: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Comment letters should refer to File No. S7–9–89. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: David A. Sirignano or Richard E. Baltz at (202) 272–3097, Office of Tender Offers, Division of Corporation Finance.

SUPPLEMENTARY INFORMATION: The Commission is proposing for comments amendments to Schedule 13D,[1] 14D–1,[2] 14B [3] and 13E–3.[4]

I. Executive Summary

The Commission is proposing to amend the instructions to certain schedules required to be filed in connection with major acquisitions of securities, tender offers, proxy contests, and going private transactions to require disclosure of information concerning the identity and background of limited partners and other participants holding significant investments in limited partnerships or other closely-held entities or groups of such entities engaged in these transactions. The Commission is concerned that the current instructions, which require a demonstration of control before disclosure concerning an equity participant is mandated, do not adequately provide shareholders and the marketplace with material information about the identity and background of significant participants in the transaction. Accordingly, the Commission proposes to amend Instruction C to Schedules 13D, 14D–1 and 13E–3 and Instruction 2 to Schedule 14B. The revised instructions would require responses to specified items of the schedules relating to the identity, background, funding, and purposes of the filing person with respect to each person who (i) contributes more than 10 percent of the equity capital or (ii) has the right to receive, in the aggregate, more than 10 percent of the profits or assets upon liquidation or dissolution of the filing person. If the filing person is a group, for the purposes of the instructions, only the group would be considered the filing person. The disclosure would be required concerning persons contributing 10 percent or more of the group's capital or entitled to 10 percent or more of the profits or assets of the group upon liquidation or dissolution. The revised instructions would not apply if the filing person has a class of equity securities registered under section 12 of the Securities Exchange Act of 1934 ("Exchange Act").[5]

II. Background

The disclosure requirements for persons engaged in corporate control transactions are designed to publicize material facts concerning the nature of the transaction and the participants so that security holders have the opportunity to make informed investment decisions. Disclosure of this information is required primarily by the rules adopted under the Williams Act amendments [6] to the Exchange Act and the proxy rules [7] promulgated under section 14(a) of the Exchange Act.

Section 13(d) of the Exchange Act serves a pivotal role in this disclosure scheme. It requires that a Schedule 13D [8] be filed by any person that acquires beneficial ownership [9] of more than five percent of a class of equity securities.[10] Sections 14(d) and 14(e) of the Exchange Act provide for the regulation of tender offers and the filing of a Schedule 14D–1 by the bidder. Schedule 14D–1 requires that the bidder provide information about its identity and background, past contracts and transactions with the subject company, source and amount of funds, and purposes, plans, or proposals, among other items. A summary of the information contained in the Schedule 14D–1 must be adequately disseminated to security holders.[11] When corporate control is sought through a proxy contest for the election of directors, the proxy rules require that each participant in a contested solicitation to file with the Commission a Schedule 14B containing specified information about the persons conducting the solicitation. Shareholders of the affected issuer must receive a summary of this information.[12] Rule 13e–3[13] prescribes the filing, disclosure and dissemination requirements in connection with a going private transaction by an issuer or an affiliate. The Schedule 13E–3 is the primary disclosure document that must be filed with the Commission. The information presented in the Schedule 13E–3 must be disseminated to security holders.[14]

While the specific requirements of each of these disclosure schemes differ, each serves to provide material information to the marketplace, the sharholders, and to the issuer. This information includes the identity and background of the participants, the purpose of the acquisition or solicitation, any future plans or proposals for the company, the source and the amount of funds, and any borrowing to acquire the securities or engage in the solicitation.

Instruction C to Schedule 13D specifies the persons for whom information must be provided when making a required filing:

> If the statment is filed by a general or limited partnership, syndicate, or other group, the information called for by items 2–6 shall be given with respect to (i) each partner of such general partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such partner or member. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for by the above-referenced items shall

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[1] 17 CFR 240.13d–101.

[2] 17 CFR 14d–100.

[3] 17 CFR 240.14a–102.

[4] 17 CFR 240.13e–100.

[5] 15 U.S.C. 78a *et seq.*

[6] Sections 13(d) [15 U.S.C. 78m(d)], 13(e) [15 U.S.C. 78m(e)], 14(d) [15 U.S.C. 78n(e)], 14(e) [15 U.S.C. 78n(e)] and 14(f) [15 U.S.C. 78n(f)] of the Exchange Act.

[7] 17 CFR 240.14a–1 *et seq.*

[8] 17 CFR 240.13d–101.

[9] A beneficial owner of a security is defined in Rule 13d–3 as including any person who, directly or indirectly, through any contract, arrangement, understanding or otherwise has or shares voting power, which includes the power to vote or to direct the voting of such security, and/or investment power, which includes the power to dispose or to direct the disposition of the security. 17 CFR 240.13d–3.

[10] Acquisitions of equity securities that would have been registered under section 12 except for the insurance company exemption in section 12(g)(2)(G) [15 U.S.C. 78*l*(g)(2)(G)], or are issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 to 80a–52], also are subject to the beneficial ownership reporting requirements. In addition, if a person has the right to acquire beneficial ownership of a subject security within 60 days (A) through the exercise of any warrant, option, or right, (B) through the conversion of a security, (C) pursuant to the power to revoke a trust, discretionary account, or similar arrangement, such person shall be deemed to be the beneficial owner of the subject securities which may be acquired through the exercise or conversion of such security or power. If a security or power specified by (A), (B), or (C) is acquired with the purpose or effect of changing or influencing control, the person is deemed a beneficial owner of the subject security upon acquisition. Rule 13d–3(d)(1)(i) [17 CFR 240.13d–3(d)(1)(i)].

[11] Rules 14d–4 and 14d–6 [17 CFR 240.14d–4 and 14d–6].

[12] Item 5(b), Schedule 14A [17 CFR 240.14a–101].

[13] 17 CFR 240.13e–3.

[14] Rules 13e–3(e) and (f) [17 CFR 240.13e–3(e) and (f)].

be given with respect to (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of such corporation.

The language of Instruction C to Schedules 14D–1 and 13E–3 is identical in all relevant respects. Instruction 2 to Schedule 14B specifies that the information shall be given for each partner, officer, and director of a partnership, corporation or other business entity, and each person controlling such entity who is not a participant. Although this instruction does not distinguish between general and limited partners, the instruction has been construed consistently with Instruction C of the other schedules.

III. Discussion of Proposals

It has become a common practice to use limited partnerships, similar closely-held entities, or groups of such entities [15] to raise the capital to finance and conduct the acquisition of corporate control. Under the current regulatory framework, the acquiring entity is the person required to comply with the applicable disclosure provisions rather than the persons actually financing, benefiting from and, in some instances, structuring the transaction.[16] These persons (collectively, "substantial equity participants") directly or indirectly may contribute significant capital or be entitled to receive a significant interest in the profits or assets, including shares of the acquired entity, upon liquidation or dissolution of the filing entity. The items to the schedules, however, do not require discolsure concerning substantial equity participants, as such, because the current regulations elicit disclosure only from persons acting in an express or *de facto* control relationship with the acquiring entity.

Limited partnerships and similar closely-held entities are often used in hostile takeovers. In fiscal year 1988, approximately 27 percent of the hostile tender offers commenced used limited partnerships as a source of financing for the transaction.[17] In some cases, the bidder or purchaser is a newly formed entity with no operations and whose single purpose is to acquire control of the subject company. The controlling persons of the bidder may be identified as limited partnerships or similar closely-held entities for which information is reported only for the general partners, as is required by current Instruction C to the Schedule 14D–1. In many instances, related limited partnerships or other entities provide financing to the entity identified as the bidder.

Similar issues may arise in proxy contests. The identity and control exercised by the limited partners financing the proxy contest for Gillette Co., Inc., conducted by The Coniston Group,[18] became a central issue in the proxy contest subsequent litigation between the parties. Even after The Coniston Group amended its Schedule 13D to reveal the identify of limited partners of the filing persons, the amendment merely revealed another level of limited partnerships.[19] No information was provided about the limited partners, other than that capital contributions provided a source of funds for the acquisition of securities.

Although absent an actual control relationship additional disclosure may not be required under the current rules, information about significant equity participants and the terms and conditions of their participation may be material to shareholders and the market.[20] In many instances, the mere agreement to provide a significant equity contribution to a transaction may provide a form of implicit control or potential influence that may be difficult to quantify, describe, or define. Moreover, upon liquidation or dissolution of the filing entity or group, equity participants could become beneficial owners of a significant block of the acquired issuer's stock, without any prior disclosure of these persons' identities, backgrounds, or plans and proposals for the issuer. Information concerning equity participants also may be particularly material where the investor is participating in the transaction in another capacity, because without full disclosure of the entire interest of that person, investors may be misled as to the actual nature of that person's interest.[21] The continuing use of limited partnerships and similar entities to shield persons engaging in or otherwise benefiting from control transactions raises questions about the access of shareholders and of the marketplace to this important information.

In light of its experience in administering its disclosure requirements under the Williams Act and the proxy rules, the Commission has concluded that additional disclosure concerning significant equity participants in control transactions may be necessary in order to assure that security holder receive complete information about the persons participating in a control transaction. The proposed revisions to the current form of Instruction C would serve to assure that material information about significant equity participants would be disclosed. In addition, a person whose equity participation in the acquiring entity could provide an indirect form of influence over management, which may be difficult factually to prove, also would be identified.

The Commission proposes amendments to Instruction C of Schedules 13D, 14D–1, and 13E–3. Instruction 2 to the Schedule 14B also would be revised to conform to Instruction C. The proposals would apply a uniform standard of disclosure for schedules filed in connection with

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[15] Such entities include, but are not limited to, corporations, trusts or other vehicles that are not subject to the reporting provisions of the Exchange Act.

[16] *See, e.g., City Capital Associates Ltd v. Interco, Inc.*, 860 F.2d 60, 64 (3d Cir. 1988).

[17] *See, e.g.*, Schedules 14D–1 filed during FY 1988 relating to the tender offers for Telex Corp. (10/9/87); Singer Co., (11/13/87); Duratest (11/12/87); Wherehouse Entertainment, Inc. (11/24/87); High Voltage Engineering Corp. (1/6/88); Stop & Shop companies, Inc. (2/1/88); USG Corp. (2/1/88); J.P. Stevens (3/25/88); Wm. Carter Cos. (4/7/88); Arkansas Best Corp. (5/6/88); MacMillan & Co. (7/18/88); Interco (8/15/88); MacMillan & Co. (9/19/88); Damon Corp. (8/18/88); Polaroid Corp. (9/9/88).

[18] On February 1, 1988, RB Partners, a Bahamian limited partnership, the principal limited partner of which is Coniston Partners, and RB Associates of New Jersey, a New Jersey limited partnership, filed, and thereafter amended on several occasions, a Schedule 13D. The general partner of RB Partners and RB Associates is Gollust, Tierney and Oliver, a New Jersey general partnership. All three partnerships and related entities are known collectively as "The Coniston Groups."

[19] Amendment No. 4 to Schedule 13D filed April 11, 1988.

[20] The concept of control is intended to require disclosure regardless of whether the person otherwise falls within one of the enumerated categories in the instructions. Control, however, is a question of fact, difficult to verify absent extensive inquiry. As the Federal Trade Commission ("FTC") found in an analogous context, at the very least, it seems unlikely that an entity would continue to exist if it operated in a way that was adverse to the interests of a significant equity participant. *See* Adopting Release, 52 FR 20058, 20061 (May 29, 1987) (amending § 801.1(b) [16 CFR 801.1(b)] to define 50 percent ownership as "control" with respect to partnerships and other entities that do not have voting securities). The proposed amendments to the Schedules 13D, 14D–1, 14B and 13E–3 differ from the FTC rule because the revisions would not create a presumption of control.

[21] Failure to disclose the full nature of the equity participation of investment banking firms that also provide financial advice and arrange financing has been held to be a material omission. *MAI Basic Four, Inc.* v. *Prime Computer, Inc.*, No. 88–2512–MA (Mass. Dist. Ct. Dec. 29, 1988); *Koppers Co. Inc.* v. *American Express Co.*, 689 F. Supp. 1371 (W.D. Pa. 1988); and *Arkansas Best Corp.* v. *Pearlman*, 686 F. Supp. 976 (D. Del. 1988). *See also Polaroid Corp.* v. *Disney*, No. 88–3678, slip op. at n. 2 (3d Cir. Nov. 23, 1988); *City Capital Associates Limited Partnership* v. *Interco Inc.*, 860 F.2d 60.

change of control transactions. The proposed amendments would require disclosure concerning any person who contributes more than 10 percent of the equity capital of the filing person, or who, directly or indirectly, has a right to receive, through an ownership interest, capital contribution or otherwise, more than 10 percent of the profits or the assets (upon liquidation or dissolution) of the filing person, where the filing person does not have a class of equity securities registered with the Commission under section 12 of the Exchange Act. If the filing person is a group, disclosure would be required from persons contributing 10 percent or more of the group's capital or entitled to receive 10 percent or more in profits or assets upon liquidation or dissolution of the group. The instructions would focus on the assets and profits of the group rather than each individual filing person in order to limit the number of equity participants about whom disclosure would be required.

The instruction would apply to capital contributions to prevent evasion of the disclosure requirements by using special allocations to avoid a 10 percent interest in profits or assets upon liquidation or dissolution. The proposed instructions also would require aggregation of interests to determine whether disclosure is required. Thus, if a person contributes capital through a series of limited partnerships or closely-held entities, no one of which exceeds a 10 percent interest, ownership would be disclosed only on an aggregate basis, if the total interest in profits or assets of the filing person or group (upon liquidation or dissolution) exceeds 10 percent.

The Commission recognizes that application of the instructions to complicated financing schemes will, in many instances, present difficult interpretive issues. The Commission intends that the instructions be interpreted to require disclosure if information about a significant participant in the transaction would otherwise be omitted.

The revised instructions would not require disclosure of substantial participants in filing persons that are reporting entities with a class of equity securities registered under section 12 of the Act. Information concerning substantial equity participants is otherwise required to be disclosed under the beneficial ownership reporting requirements of sections 13(d) and 13(g) [22] of the Exchange Act, as well as in periodic reports and proxy materials filed by the issuer.[23]

The information called for by the revised instructions would be required regardless of whether the entity participant otherwise would be deemed a controlling person of the entity engaged in the control transaction. Controlling persons of a filing entity would continue to be disclosed as under the current instructions. The Commission also is proposing to revise Instruction C to Schedules 13D, 13E–3, 14D–1, and Instruction 2 to Schedule 14B to clarify that the instruction applies to any person who controls a limited partnership or other non-corporate entity. This revision is consistent with the application of the instruction to corporations and staff interpretation.

Commentators should address whether 10 percent is an appropriate level of participation at which to require disclosure, or whether a lower or higher threshold, *e.g.*, 5 percent, 15 percent, or 20 percent, should apply. The Commission also observes that more complex formulations can be used. For example, if there are two 25 percent participants, two 20 percent participants, and a 10 percent participant in a limited partnership, it is unlikely that the 10 percent participant will be able to assert significant equity-like influence in comparison with the influence asserted by the 20 percent participants. In order to focus disclosure requirements on persons most likely to assert direct or indirect influence, the disclosure requirement could be made to apply only to a specified number of the filing entity's largest participants, provided that each holds at least a 10 percent interest. For example, the amended rule could require disclosure from the four largest participants, provided that each has at least a 10 percent interest. The number of participants required to be disclosed by such a formulation can be increased or decreased, and the minimum threshold for disclosure can also be increased (to 15 percent or 20 percent) or decreased (to 7 percent or 5 percent). The Commission requests comment as to whether such more complex threshold reporting requirements are desirable, the appropriate parameters for such requirements, and the costs and benefits of relying on such more intricate threshold reporting criteria.

The Commission also requests comments on whether additional criteria should be considered in imposing a disclosure obligation, such as whether the acquiring entity was formed generally for acquisition purposes or solely for the acquisition of a single issuer. In addition, the Commission requests comments on the additional costs the revised instructions would impose on reporting persons and whether the proposals would result in duplicative or unnecessary disclosure of equity participation in the transaction. Specific cost data should be provided. Conversely, comment is required on whether the proposals, as drafted, would benefit shareholders and the marketplace, and whether the proposals would be subject to evasion.

The proposed revisions would neither subject additional persons to individual reporting requirements, nor amend the existing items of the relevant schedules to broaden the type of disclosure required.[24] Rather, the information required from the reporting person would be increased solely because information would be required concerning additional significant equity participants in the transaction. The information required by these items in most cases will have to be requested by the filing person from its equity participants. The filing person must certify that after reasonable inquiry and to the best of its knowledge and belief, the information provided concerning the equity participants is true, complete and correct.[25]

The information required by Instruction C to the Schedule 13D would apply only to Items 2–6, inclusive, as under the current instruction. Item 2 would require that the identity and background of the significant equity participants be provided. The revision also would require, under Item 3, a description of the terms under which the

[22] 15 U.S.C. 78m(d) and 78m(g).

[23] *See, e.g.*, Form 10–K, Item 12 (17 CFR 249.310) and Schedule 14A, Item 6(d).

[24] The identification of significant equity participants and certain additional information currently may be required under circumstances pursuant to specific items of the schedules. For example, Item 6 to the Schedule 13D requires the filing person to describe "any contracts, arrangements, understandings or relationships (legal or otherwise) among the persons named in Item 2 and between such persons and any person with respect to any securities of the issuer . . . naming the persons with whom such contracts, arrangements, understandings or relationships have been entered into." Item 7 requires that there be filed as an exhibit copies of all written agreements, contracts, arrangements, understandings, plans or proposals relating to the borrowing of funds or the acquisition, liquidation, sale of assets, merger, or change in business or corporate structure of the issuer. This item would require the filing, as an exhibit, of limited partnership agreements and any offering memoranda used to syndicate limited partnership interests in the filing person if the memoranda constitute a plan or proposal relating to these matters. Items 7 and 11, respectively, elicit similar disclosure in the Schedule 14D–1.

[25] *See generally* signature requirements with respect to the affected schedules.

equity contribution was made, and the terms of any financing arrangements to fund the contributions.[26] In response to Item 4, "Purpose of the Transaction," the filing person would be required to describe the purpose and any plans or proposals of a significant equity investor. Any interest in the securities of the issuer held by any significant equity participant would be described in response to Item 5, and any understandings or relationships with the filing person or other equity participants would be identified in Item 6. Similar responses would be required from the filing person responding to Items 2–7 of the Schedule 14D–1.

The proposed revisions would not necessarily require the disclosure of financial information from a significant equity participant. As under current rules,[27] if the interest and the control exercised by the equity participant were sufficient to render it a bidder,[28] financial information, if material, would be required. Item 9 of Schedule 14D–1 provides that adequate financial information concerning the bidder must be provided, where a bidder is other than a natural person and the bidder's financial condition is material to a decision by a security holder on whether to sell, tender, or hold the securities being sought.[29] In addition, Item 9 provides that entities controlling a bidder formed for the sole purpose of making a tender offer may have to provide adequate financial information.

The required disclosure in the Schedule 14B would be restricted to the information called for by Items 2, 3, 4(b), and 4(c). Those items require disclosure of the person's identity and background, interests in the securities of the issuer, transactions with management and others,[30] and any arrangements or understandings with respect to future employment or future transactions with the issuer or its affiliates. Revised Instruction C to the Schedule 13E–3 would apply only to Items 2, 3, 5, 6, 10 and 11, as under the current instruction. Items 7, 8 and 9, requiring, respectively, a discussion of the purpose, alternatives, reasons and effects of the transaction, a statement of belief as to the fairness of the transaction, and the identification and summary of any reports, opinions, appraisals and certain negotiations, would continue to affect only the issuer or affiliate engaging in the transaction.

IV. Cost-Benefit Analysis

To evaluate the benefits and costs associated with the proposed revisions to Schedules 13D, 14D–1, 14B and 13E–3, the Commission requests commentators to provide views and data as to the costs and benefits associated with amending the disclosure requirements. The proposed revisions would not subject additional persons to the reporting requirements, but could require that filing persons gather and disclose additional data, and could lead to additional information being disclosed about substantial investors in filing entities. Only the information required by the filer would be increased.

V. Initial Regulatory Flexibility Analysis

The Initial Regulatory Flexibility Analysis concerns the proposed amendments to Instruction C to Schedules 13D, 14D–1 and 13E–3 and Instruction 2 to Schedule 14B. The analysis has been prepared by the Commission in accordance with 5 U.S.C. 604.

The analysis notes that the proposed amendments would not increase the number of small entities required to file Schedules 13D, 14D–1, 13E–3 and 14B. Although a person otherwise required to file may incur an increased reporting obligation, the Commission does not believe that there will be a significant economic impact on a substantial number of small entities.

A copy of the Initial Regulatory Flexibility Analysis may be obtained by contacting Richard E. Baltz in the Office of Tender Offers, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

VI. Request for Comments

Any interested persons wishing to submit written comments on the proposals, to suggest additional changes, or to submit comments on other matters that might have an impact on the proposals, are requested to do so. In addition to the specific inquiries made throughout this release, the Commission solicits comments on the usefulness of the proposed revisions to Instruction 2 to Schedule 14B and Instruction C to Schedules 13D, 14D–1, and 13E–3 to reporting persons, registrants and the marketplace at large. The Commission also requests comment on whether the proposed rule, if adopted, would have an adverse effect on competition or would impose a burden on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act. Comments on this inquiry will be considered by the Commission in complying with its responsibilities under section 23(a)(2) of the Exchange Act.[31]

The Commission also encourages the submission of written comments with respect to any aspect of the initial regulatory flexibility analysis. Such written comments will be considered in the preparation of the final regulatory flexibility analysis if the proposed rules are adopted.

Persons wishing to submit written comments should file three copies thereof with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Comment letters should refer to File No. S7–9–89. All comments received will be available for public inspection and coying in the Commission's Public Reference Room, 450 Fifth Street NW., Washington, DC 20549.

VII. Statutory Basis and Text of Amendments

The amendments are being proposed pursuant to the authority set forth in sections 3(b), 13, 14 and 23 of the Securities Exchange Act of 1934.

List of Subjects in 17 CFR Part 240

Reporting and Recordkeeping Requirements, Securities.

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[26] Item 3 provides that "if any part of the purchase price is or will be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, trading or voting the securities, [provide] a description of the transaction and the names of the parties thereto." When capital is furnished by a limited partnership, disclosure of the source of funds often is restricted to stating that funds are derived from the working capital of the partnership. One court, addressing the question of whether the identities of limited partners must be provided in response to Item 3 on Schedule 13D, concluded that the "specific instruction, requiring information only from the general partner in a limited partnership controls over the more general instruction in Item 3 * * *." *HUBCO Inc.* v. *Rappaport*, 628 F. Supp. 345, 357–58 (D.N.J. 1985). To the extent that the court suggested that Instruction C does not require disclosure of limited partners even if control is demonstrated, the Commission disagrees and is proposing to revise the instruction to eliminate any confusion on that point. *See* Securities Exchange Act Release No. 13787 (July 21, 1987) (42 FR 38348).

[27] *See* Schedule 14D–1, Item 9; Rule 14d–6(e) [17 CFR 14d–6(e)].

[28] *See generally* cases cited *supra* n. 22.

[29] Courts also have required natural persons who aer bidders in a transaction to provide financial information. *See, e.g., Riggs National Bank of Washington, D.C. v. Allbritton*, 516 F. Supp. 164 (D.D.C. 1981). *But see Simon v. Culverhouse*, 609 F. Supp. 1050 (D. Fla. 1985) (in order for a natural person to be subject to the financial disclosure requirement of Item 9, special circumstances must be present).

[30] Item 401(a), Regulation S–K [17 CFR 229.401(a)].

[31] 15 U.S.C. 78w(a)(2).

VIII. Text of Proposals

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: Sec. 23, 48 Stat. 901, as amended (15 U.S.C. 78w) * * *

2. By amending § 240.13d–101 by revising General Instruction C as follows:

§ 240.13d–101 Schedule 13D—Information to be included in statements filed pursuant to § 240.13d–1(a) and amendments thereto filed pursuant to § 240.13d–2(a).

* * * * *

General Instructions.

* * * * *

C. If the statement is filed by a general or limited partnership, syndicate, or other group, the information called for by Items 2–6, inclusive, shall be given with respect to: (i) Each partner of such general partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such general or limited partnership, syndicate or other group or any partner or member thereof. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for by the above-referenced items shall be given with respect to (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of such corporation. If the person filing the statement is other than a natural person and does not have a class of equity securities registered under Section 12 of the Act, or if the statement is filed by a group that includes such entities, in addition to the information required above, information for Items 2–6, inclusive, shall be provided for each person who contributes more than 10 percent of the equity capital, or has a right to receive in the aggregate, directly or indirectly, more than 10 percent of the profits, or upon dissolution or liquidation, 10 percent of the assets of that person or group. Such disclosure shall be required notwithstanding the absence of a control relationship.

* * * * *

3. By amending § 240.13e–100 by revising General Instruction C as follows:

§ 240.13e–100 Schedule 13E–3 [240.13e–3], Rule 13e–3 transaction statement pursuant to section 13(e) of the Securities Exchange Act of 1934 and rule 13e–3 [240.13e–3] thereunder.

* * * * *

General Instructions

* * * * *

C. If the statement if filed by a general or limited partnership, syndicate, or other group, the information called for by Items 2, 3, 5, 6, 10, and 11, inclusive, shall be given with respect to: (i) each partner of such general partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such general or limited partnership, syndicate or other group or any partner or member thereof. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii), or (iv) of this Instruction is a corporation, the information called for by the above-referenced items shall be given with respect to (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation or other person utimately in control of such corporation. If the person filing the statement is other than a natural person and does not have a class of equity securities registered under section 12 of the Act, or if the statement is filed by a group that includes such entities, in addition to the information required above, information for Items 2, 3, 5, 6, 10, and 11, inclusive, shall be provided for each person who contributes more than 10 percent of the equity capital, or has a right to receive in the aggregate, directly or indirectly, more than 10 percent of the profits, or upon dissolution or liquidation, 10 percent of the assets of that person or group. Such disclosure shall be required notwithstanding the absence of a control relationship.

* * * * *

4. By amending 240.14a–102 by revising Instruction 2 as follows:

§ 240.14a–102 Schedule 14B. Information to be included in statements filed by or on behalf of a participant (other than the issuer) pursuant to 240.14a–11(c) (Rule 14a–11(c)).

Instructions. * * *

2. If the participant filing the statement is a general or limited partnership, syndicate, or other group, the information called for by Items 2, 3, and 4(b) and (c), inclusive, shall be given with respect to: (i) each partner of such general partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such general or limited partnership, syndicate or other group, or any partner or member thereof, who is not a participant. If the participant filing the statement is a corporation or if a person referred to in (i), (ii), (iii), or (iv) of this Instruction is a corporation, the information called for by the above-referenced items shall be given with respect to (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of such corporation, who is not a participant. If the participant filing the statement is other than a natural person and does not have a class of equity securities registered under section 12 of the Act, or if the statement is filed by a group that includes such entities, in addition to the information required above, information for Items 2, 3, and 4(b) and (c), inclusive, shall be provided for each person who contributes more than 10 percent of the equity capital, or has a right to receive in the aggregate, directly or indirectly, more than 10 percent of the profits, or upon dissolution or liquidation, 10 percent of the assets of that person or group. Such disclosure shall be required notwithstanding the absence of a control relationship.

* * * * *

5. By amending § 240.14d–100 by revising General Instruction C as follows:

§ 240.14d–100 Schedule 14D–1. Tender offer statement pursuant to section 14(d)(1) of the Securities Exchange Act of 1934.

* * * * *

General Instruction. * * *

C. If the statement is filed by a general or limited partnership, syndicate, or other group, the information called for by Items 2–7, inclusive, shall be given with respect to (i) each partner of such general partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such general or limited partnership, syndicate or other group or any partner or member thereof. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii), or (iv) of this Instruction is a corporation, the information called for by the above-referenced items shall be given with respect to (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of such corporation. If the person filing the statement is other than a natural person and does not have a class of equity securities registered under section 12 of the Act, or if the statement is filed by a group that includes such entities, in addition to the information required above, information for Items 2–7, inclusive, shall be provided for each person who contributes more than 10 percent of the equity capital, or has a right to receive in the aggregate, directly or indirecty, more than 10 percent of the profits, or upon dissolution or liquidation, 10 percent of the assets of that person or group. Such disclosure shall be required notwithstanding the absence of a control relationship.

* * * * *

By the Commission

March 6, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89–5672 Filed 3–10–89; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Parts 235, 240, 245, and 248

Indorsement and Payment of Checks Drawn on the United States Treasury

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Proposed rule.

SUMMARY: The proposed rule invites comments on changes to existing regulations governing the indorsement and payment of checks drawn on the United States Treasury and the processing of claims on Treasury checks. The changes are required by Title X of the Competitive Equality Banking Act of 1987 which (1) provides that Treasury may decline payment on a Treasury check unless it is negotiated within one year, (2) provides for the cancellation of Treasury checks outstanding after one year, and (3) decreases the time limit for claims on Treasury checks to be brought by or against the United States.

DATE: Comments must be received no later than May 12, 1989.

ADDRESSES: Send comments on the proposed rule to Joan Pesata, Director, Limited Payability Project, Financial Management Service, Room 816–C, Prince Georges Center II Building, 3700 East-West Highway, Hyattsville, Maryland 20782.

FOR FURTHER INFORMATION CONTACT: Joan Pesata, Director, Limited Payability Project, Financial Management Service, Room 816–C, Prince Georges Center II Building, 3700 East-West Highway, Hyattsville, Maryland 20782; telephone (301) 436–7172, (FTS) 436–7172.

SUPPLEMENTARY INFORMATION: On August 10, 1987, Congress enacted the Competitive Equality Banking Act of 1987 (CEBA), Pub. L. No. 100–86, 101 Stat. 552, 659. Title X of CEBA changes the existing laws with respect to the indorsement and payment of checks drawn on the United States Treasury. At present, Treasury checks may be negotiated at any time after they are issued. Under CEBA, Treasury is not required to pay a Treasury check issued on or after the effective date of the legislation unless it is negotiated to a financial institution within 12 months after the date of issuance of the check. Treasury is not required to pay a Treasury check issued before the effective date of the legislation unless it is negotiated to a financial institution within 12 months after the effective date. The legislation provides for the cancellation of Treasury checks which are outstanding for more than one year.

Title X of CEBA changes the existing laws concerning the filing of claims on account of Treasury checks. Under existing law, a claimant may bring a claim on a Treasury check for 6 years from the date of issuance. Under CEBA, a claim is barred unless presented to the agency that authorized the issuance of the check within one year after the date of issuance of the check. Claims on checks issued before the effective date of the legislation must be filed within one year after the effective date. The new law also reduces the time period during which Treasury may reclaim the amount of a check which has been paid over a forged or unauthorized indorsement.

Congress provided that the amendments contained in Sections 1002, 1003, and 1004 of Title X of CEBA would become effective 6 months after enactment or on such later date as the Secretary of the Treasury may prescribe. On February 8, 1988, Treasury published a Policy statement in the **Federal Register** (53 FR 3584) which extended the effective date of the statute to October 1, 1989. Section 1005 of Title X of CEBA authorizes the Secretary of the Treasury to prescribe rules, regulations and procedures as he deems necessary to implement the amendments made by Sections 1002, 1003 and 1004, including the recertification of Treasury checks which have been cancelled or for which a claim has been asserted or barred. In the proposed rule, Treasury amends the existing regulations concerning the payment of checks and check claims to implement the changes required by the statute. The proposed rule also provides explicit authority for agency recertification of payments. It is anticipated that the Final rule will be effective on October 1, 1989, which is the same date that the statutory provisions become effective.

Summary of Proposed Rule

Part 235

Part 235 governs the issuance of settlement checks for checks drawn on the United States Treasury and drawn on designated depositaries that have been negotiated and paid on a forged or unauthorized indorsement. Title X of CEBA addresses Treasury checks only and is silent on the subject of depositary checks. Therefore, the regulation preserves the existing authority in Part 235 for the issuance of settlement checks for checks drawn on depositaries. The authority to issue replacement checks for forged Treasury checks is found in Part 245 of the proposed rule.

Part 240

Part 240 governs the payment and indorsement of Treasury checks. Both § 240.3—*Limitations on payments* and § 240.4—*Cancellation and distribution of the proceeds of checks* are new. The time limitations on the payment of Treasury checks are contained in § 240.3. The regulation requires all Treasury checks issued after October 1, 1989 to bear the legend, "VOID AFTER ONE YEAR." Sections 240.3(c), (d) and (e) restate Treasury's existing rights with respect to Treasury checks: (1) Treasury has the right to examine checks and refuse payment of any check; (2) Treasury checks are deemed paid only after first examination by Treasury has been completed; and (3) If Treasury has notice of a question of law of fact about whether a check is properly payable, Treasury may defer payment until the Comptroller General settles the question.

Section 240.4 provides for the cancellation of checks which have been outstanding more than one year. The proceeds of checks issued on or after October 1, 1989 which are subsequently cancelled shall be returned to the agency which authorized the issuance of the check. The proceeds of checks issued before October 1, 1989 which are subsequently cancelled shall be applied as provided in Title X of CEBA (31 U.S.C. 3334) to eliminate the balances in accounts that represent uncollectible accounts receivable and other costs associated with the payment of checks and check claims by the Department of Treasury on behalf of all payment certifying agencies. Any remaining proceeds shall be deposited to the miscellaneous receipts of the Treasury.

Section 240.6 is renamed *Reclamation of amounts of paid checks* to reflect the usage of the term "reclamation" by Treasury for an action by Treasury to recover from the presenting bank or other endorser the amount of a check that has been paid over a forged or unauthorized endorsement. Section 240.6(d) contains the new time limits on reclamation actions. Treasury may reclaim within one year after the date of payment. The date of payment to the date on which the Federal Reserve Bank gives provisional credit for the item to the member bank or clearing bank. The one year period for reclamations is

extended by 180 days if a timely check claim is filed with the agency that authorized the issuance of the check.

The other changes in Part 240 are relatively minor. There are definitions for two additional terms—"Certifying official" and "Commissioner". In addition, several sections in the existing Part 240 have been renumbered to accomodate the new material, but the text of these sections remains unchanged. Sections 240.11 through 240.15 concerning Indorsement of Checks is essentially unchanged from the existing regulation. However, the proposed rule in § 240.11(f) deletes a provision in the existing § 240.10(f) permitting the presentation of Social Security benefit checks to the Treasury Regional Financial Center in certain cases. The provision is being deleted because, after the effective date, all claims on Treasury checks must originate with the agency that authorized the issuance of the check.

Part 245

The proposed rule would change Part 245 substantially. The title of the part would become "Claims on Account of Treasury Checks," which more accurately reflects the subject matter of the part.

The central feature of Part 245 is contained in § 245.5—*Recertification of Payment.* Section 1005 of CEBA authorizes the Secretary of Treasury to write regulations implementing the amendments made by sections 1002, 1003 and 1004 of the law, including recertification of Treasury checks which have been cancelled or for which a claim has been asserted or barred. Under existing law, Treasury can, subject to certain conditions, issue substitute checks when the original check is lost, destroyed, mutilated or defaced. 31 U.S.C. 3331. When the original check is forged, Treasury can, under existing law, issue a settlement check. 31 U.S.C. 3343. The Introductory section explains that Part 245 covers the issuance of replacement checks when (a) the original check has been lost, stolen, destroyed, or mutilated, (b) the original check has been negotiated and paid on a forged or unauthorized indorsement, and (c) the original check has been cancelled.

The proposed rule gives Federal agencies broad authority to recertify payments when there is a claim of non-receipt, loss, destruction, mutilation or defacement of a Treasury check. The regulation provides a certifying agency may recertify a new payment at any time after receipt of a claim. Therefore, Treasury will only issue a second check, which is called a "replacement check," pursuant to the recertification of the payment by the certifying agency. After the effective date, Treasury will no longer issue settlement checks or substitute checks.

Section 245.3 contains the basic time limit for filing a claim on a Treasury check. A claim must be filed within one year after the date of issuance of the check. Claims on checks issued before October 1, 1989, must be filed before October 1, 1990. In addition, the regulation states that claims must originate with the agency that authorized the issuance of the check. However, a claim by an indorser may be presented directly to Treasury.

After the effective date, Treasury will maintain checks and check records for 18 months from the date of issuance. During that 18 month period, Treasury will provide both information on the status of the check and a copy of the check to the agency that authorized its issuance. After 18 months, Treasury will transfer custody of the checks and check records to the agency that autorized the issuance of the check for its use in the settlement of any claim for an obligation represented by a check.

Part 248

The proposed rule contains minor changes to Part 248. Part 248 preserves the existing authority to issue substitutes for lost, stolen, or destroyed checks drawn on foreign depositary banks. Title X of CEBA does not address depositary checks.

Executive Order 12291

The Treasury Department has determined that the proposed regulation is not a "major rule" within the meaning of Executive Order 12291 (46 FR 13193, February 19, 1981). It is not likely to result in:

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

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

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

Therefore, preparation of a Regulatory Impact Analysis is not required.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603 and 604) are not applicable to this proposal because the proposed rule, if promulgated as a final rule, will not have a significant economic impact on a substantial number of small entities. The proposal will not impose, or otherwise cause, a significant increase in reporting, recordkeeping, or other compliance burdens on a substantial number of small entities. The proposal is not expected to have significant secondary or incidental effects on a substantial number of small entities.

Accordingly, it is hereby certified under the provisions of Section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this proposed rule, if promulgated as a final rule, will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)), the collection of information contained in this proposed rule has been submitted to the Office of Management and Budget for review. Comments on the collection of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for the Financial Management Service, with copies to the Financial Management Service at the address previously specified.

The collection of information in this regulation is in 31 CFR 245.4. The proposed rule requires that a person making a claim on a Treasury check provide information concerning the check to the government agency which authorized the issuance of the check. The information will be used by the agency to determine whether the claimant is entitled to a replacement check. The likely respondents are individuals.

The proposed rule imposes no new collection of information requirement nor does it increase the collection of information burden. The reporting burden is attributable to the various agencies that receive the information from check claimants. The estimated total reporting burden for all government agencies is as follows:

Estimated total annual reporting burden: 160,320 hours.

Estimated average annual burden per respondent: .167 hour.

Estimated number of respondents: 960,000.

Estimated annual frequency of responses: On occasion.

List of Subjects

31 CFR Part 235

Banks, Banking, Claims, Forgery.

31 CFR Part 240

Banks, Banking, Forgery.

31 CFR Part 245

Banks, Banking, Claims.

31 CFR Part 248

Banks, Banking, Claims, Foreign banking.

For the reasons set forth in the preamble, Treasury proposes to amend Title 31, Chapter II, Subchapter A of the Code of Federal Regulations as follows:

PART 235—ISSUANCE OF SETTLEMENT CHECKS FOR FORGED CHECKS DRAWN ON DESIGNATED DEPOSITARIES

1. Part 235 is amended by revising the part heading as set forth above.

2. The authority citation for Part 235 is revised to read as follows:

Authority: 31 U.S.C. 3343

§ 235.1 [Amended]

3. Section 235.1 is amended by removing "drawn on the United States Treasury and".

§ 235.3 [Amended]

4. Section 235.3 is amended by removing "the Commissioner, Financial Management Service, with respect to a check drawn on the United States Treasury, or".

5. Section 235.6 is revised to read as follows:

§ 235.6 Implementing instructions.

Procedural instructions implementing these regulations will be issued by the Commissioner of the Financial Management Service in Volume I, Part 4 of the Treasury Financial Manual.

Parts 240 and 245 are revised to read as follows:

PART 240—INDORSEMENT AND PAYMENT OF CHECKS DRAWN ON THE UNITED STATES TREASURY

General Provisions

Sec.

Indorsement of Checks

Appendix—Standard Forms for Power of Attorney and Their Application.

Authority: 5 U.S.C. 301; 12 U.S.C. 391; 31 U.S.C. 3328; 31 U.S.C. 3331; 31 U.S.C. 3343, 31 U.S.C. 3711; 31 U.S.C. 3716; 31 U.S.C. 3717; 332 U.S. 234 (1947); 318 U.S. 363 (1943).

General Provisions

§ 240.1 Scope of regulations.

The regulations in this part prescribe the requirements for indorsement and the conditions for payment of checks drawn on the United States Treasury. These regulations also establish procedures for collection of amounts due the United States Treasury because of payments on checks bearing forged or other unauthorized indorsements or other material defects or alterations.

§ 240.2 Definitions.

(a) "Certifying agency" means an agency for whom a Treasury disbursing officer or a non-Treasury disbursing officer makes payment in accordance with 31 U.S.C. 3325. The responsibilities of a certifying official are set forth at 31 U.S.C. 3528.

(b) "Check" or "checks" means a check or checks drawn on the United States Treasury.

(c) "Check payment" means the amount paid to a presenting bank in accordance with § 240.9(a)(3) of this part.

(d) "Commissioner" means the Commissioner of the Financial Management Service, Department of the Treasury, 401 14th Street, SW., Washington, DC 20227.

(e) "Days" means calendar days.

(f) "Financial institution" means any bank, savings bank, savings and loan association, Federal or State chartered credit union, or similar institution.

(g) "Item" means a reference in a monthly interest billing statement to a check for the amount of which Treasury has demanded refund from a presenting bank.

(h) "Monthly interest billing statement" means a statement prepared by Treasury and sent to a presenting bank which includes the following information regarding each outstanding demand for refund:

(1) The reclamation date;

(2) The reclamation number;

(3) Check identifying information; and

(4) The balance due, including interest.

(i) "Person" or "persons" means an individual or individuals, or an institution or institutions including all forms of financial institutions.

(j) "Presenting bank" means (1) a financial institution which, either directly or through a correspondent banking relationship, presents checks to and receives provisional credit from a Federal Reserve Bank, or (2) a depositary which is authorized to charge checks directly to the General Account of the United States Treasury and present them to Treasury for payment through a designated Federal Reserve Bank.

(k) "Protest" means a presenting bank's written statement and any supporting documentation tending to prove that it is not liable for refund of the reclamation balance.

(l) "Reclamation" means a demand by Treasury for refund of the amount of a check payment.

(m) "Reclamation date" means the date on which a demand for refund was prepared. Normally, demands are sent to presenting banks within two working days of the reclamation date.

(n) "Treasury" means the United States Treasury.

(o) "U.S. securities" means securities of the United States and securities of Federal agencies and wholly or partially Government-owned corporations for which the Treasury acts as the transfer agent.

(p) "Unauthorized indorsement" means (1) an indorsement made by a person other than the payee, except as authorized by and in accordance with § 204.5 and § 240.11 through § 240.15 of this part, (2) an indorsement by a financial institution under circumstances in which the financial institution breaches the guaranty required of it by 31 CFR 209.9(a) (*see*, 31 CFR 209.8), or (3) a missing indorsement where the depositary bank had no authority to supply the indorsement.

§ 240.3 Limitations on payment.

(a) As a general rule,

(1) The Commissioner shall not be required to pay a Treasury check issued on or after October 1, 1989 unless it is negotiated to a financial institution within 12 months after the date on which the check was issued; and

(2) The Commissioner shall not be required to pay a Treasury check issued before October 1, 1989 unless it is negotiated to a financial institution no later than October 1, 1990.

(b) All checks drawn on the United States Treasury and issued on or after October 1, 1989 shall bear a legend, stating "VOID AFTER ONE YEAR". The legend is notice to payees and indorsers of a general limitation on the payment of Treasury checks. The legend, or the

inadvertent lack thereof, does not limit, or otherwise affect, the rights of the Commissioner under the law.

(c) The Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks. The Treasury shall have a reasonable time to make such examination.

(d) Checks shall be deemed to be paid by the United States Treasury only after first examination has been completed.

(e) If the Treasury is on notice of a question of law or fact about whether a Treasury check is properly payable when the check is presented for payment, the Commissioner may defer payment until the Comptroller General settles the question.

§ 240.4 Cancellation and distribution of proceeds of checks.

(a) *Checks issued on or after October 1, 1989.* (1) Any check issued on or after October 1, 1989 that has not been paid and remains outstanding for more than 12 months shall be cancelled by the Commissioner.

(2) The proceeds from checks cancelled pursuant to paragraph (a) of this section shall be returned to the agency which authorized the issuance of the check and credited to the appropriation or fund account initially charged for the payment.

(3) Beginning January 1, 1991, and monthly thereafter, the Commission shall provide to each agency that authorizes the issuance of Treasury checks a list of those checks issued for such agency which were cancelled during the preceding month pursuant to paragraph (a) of this section.

(b) *Checks issued before October 1, 1989.* (1) Any check issued before October 1, 1989 that has not been paid and remains outstanding for more than 12 months shall be cancelled by the Commissioner no later than April 1, 1991.

(2) The proceeds from checks cancelled pursuant to paragraph (b) of this section shall be applied as required by 31 U.S.C. 3334.

§ 240.5 Guaranty of indorsements.

The presenting bank and the indorsers of a check presented to the Treasury for payment are deemed to guarantee to the Treasury that all prior indorsements are genuine, whether or not an express guaranty is placed on the check. When the first indorsement has been made by one other than the payee personally, the presenting bank and the indorsers are deemed to guarantee to the Treasury, in addition to other warranties, that the person who so indorsed had unqualified capacity and authority to indorse the check on behalf of the payee.

§ 240.6 Reclamation of amounts of paid checks.

(a) If, after a check has been paid by Treasury, it is found to:

(1) Bear a forged or unauthorized indorsement, or

(2) Contain any other material defect or alternation which was not discovered upon first examination, then, upon demand by the Treasury in accordance with the procedures specified in § 240.7 of this part, the presenting bank or other indorser shall refund the amount of the check payment.

(b) Interest on any unpaid item shall commence to accrue on the sixty-first day after the reclamation date. Interest shall be calculated at the rate set from time to time for purposes of 31 U.S.C. 323. Interest shall continue to accrue until the amount demanded is paid or the reclamation is abandoned by Treasury.

(c) In addition to its right to recover interest, Treasury shall have the right to recover such other applicable charges (*e.g.*, administrative collection costs, late payment penalties) as may be authorized or required by law.

(d) If the Treasury determines that a check has been paid over a forged or unauthorized indorsement, the Commission may reclaim the amount of the check from the presenting bank or any other indorser that breached its guarantee of indorsement prior to:

(1) The end of the one-year period beginning on the date of payment; or

(2) The expiration of the 180-day period beginning on the close of the period described in paragraph (d)(1) of this section if a timely claim under 31 U.S.C. 3702 is presented to the agency which authorized the issuance of the check.

§ 240.7 Demand and protest.

(a) For all reclamations an initial demand for refund of the amount of a check payment will be made by sending a "Request for Refund (Reclamation)," to the presenting bank or any other indorser. This Request shall advise the presenting bank of the amount demanded and the reason for the demand. Treasury will make follow-up demands by including each unpaid item on at least three monthly interest billing statements sent to the presenting bank. Monthly interest billing statements will identify any unpaid reclamation demands and will also show the amount of any accrued interest for each outstanding reclamation. Any discrepancies should be brought to Treasury's attention immediately at the address listed in paragraph (b) of this section. Monthly interest billing statements will contain or be accompanied by notice to the bank:

(1) That Treasury intends to collect the debt through administrative offset if the reclamation is not paid within 120 days of the reclamation date,

(2) That the bank has an opportunity to inspect and copy Treasury's records with respect to the reclamation,

(3) That the bank may, by filing a protest, request Treasury to review its decision that the bank is liable for the reclamation, and

(4) That the bank has an opportunity to enter into a written agreement with Treasury for the repayment of the amount of the reclamation. A request for a payment agreement must be accompanied by proof that satisfies the Treasury that the requesting bank is unable to repay the entire amount owed at the time that it is due.

(b) Requests for an appointment to inspect and copy Treasury's records with respect to a reclamation and requests to enter into repayment agreements should be sent in writing to: Department of the Treasury, Financial Management Service, Operations Division, Reclamation Branch, Room 700–D, 3700 East-West Highway, Hyattsville, MD 20782.

(c)(1) If a presenting bank wishes to contest its liability for the principal amount demanded, it shall send a protest, *i.e.*, a written statement and copies of all documentary evidence (*e.g.*, affidavits, account agreements, signature cards) and other written information raising a question of law or fact which, if resolved in the Bank's favor, would show that the bank is not liable, to: Department of the Treasury, Financial Management Service, Operations Division, Reclamation Branch, Room 700–D, 3700 East-West Highway, Hyattsville, MD 20782. The Director, Operations Division, who has supervisory authority over the Reclamation Branch, or his authorized subordinate, shall consider and decide any protest properly submitted under this paragraph. Neither the Director, Operations Division, nor any of his subordinates, shall have any involvement in the process of making findings or demands under § 240.6(a). In order to be considered, and to be timely, a protest must be received not later than 90 days after the reclamation date. Treasury will refrain from collection in accordance with § 240.8 while a timely protest is being considered. Unresolved protested items will be appropriately annotated on the monthly interest billing statement.

(2) If Treasury accepts the protest, the presenting bank shall be notified in writing that efforts to collect the item and any accrued interest have been abandoned.

(3) If the evidence sent by the presenting bank does not satisfy Treasury that refund of the amount demanded is not required under § 240.6(a), Treasury will notify the presenting bank in writing of its decision that the bank is liable for the amount demanded and the reasons for its decision. If the presenting bank fails to send the amount demanded within 30 days of the date of Treasury's decision, Treasury shall proceed to collect the amount owed in accordance with § 240.8, provided that no offset shall be taken sooner than 120 days after the reclamation date.

(4) If an item, and/or accrued interest relating to that item remains unpaid for 90 days after the reclamation date and if there is no unresolved protest associated with the item, the monthly interest billing statement will be annotated with a notice that the presenting bank has until the next billing date to make payment on the item or be subject to offset thereon.

§ 240.8 Offset.

(a) If an item, and/or accrued interest relating to that item, remains unpaid for 120 days after the reclamation date and the presenting bank has been sent at least one monthly interest billing statement informing it that Trausury intends to collect that item by offset, Treasury may refer the matter to any federal agency and request that agency to offset the indebtedness and other applicable charges against amounts otherwise owed by the federal agency to the presenting bank. Monthly interest billing statements will be annotated to identify those specific items that are to be referred to an agency for offset.

(b) If a bank wishes to make payment on an item referred to an agency for offset, it should contact Treasury at the address listed in § 240.7(b) of this part to reduce the possibility of a double collection. If an agency to which an indebtedness is referred in accordance with this paragraph is unable to effect offset in whole or in part, Treasury may then refer the debt to any other agency and request offset in accordance with this paragraph. Treasury designates each agency acting under this paragraph as its designee for the sole purpose of effecting offset. No such designee shall be liable to any party for any any loss resulting from its action under this paragraph.

(c) If Treasury is unable to collect an amount owed by use of the offset described in paragraph (a), Treasury shall take such action against the presenting bank as may be necessary to protect the interests of the United States, including referral to the Department of Justice.

(d) If Treasury effects offset under this section and it is later determined that the presenting bank paid the amount of the reclamation and accrued interest thereon, or that a presenting bank which had timely filed a protest was not liable for the amount of the reclamation, Treasury shall promptly refund to the presenting bank the amount of its payment.

§ 240.9 Processing of checks.

(a) *Federal Reserve Banks.* (1) Federal Reserve Banks shall cash checks for government disbursing officers when such checks are drawn by the disbursing officers to their own order. Payment of such checks shall not be refused except for alteration or counterfeiting of the check, or or forged signature of the drawer.

(2) Federal Reserve Banks shall be expected to cash government checks presented direct to them by the general public.

(3) As a depository of public funds, each Federal Reserve Bank shall: (i) Receive checks from its member banks, nonmember clearing banks, or other depositors, when indorsed by such banks or depositors who guarantee all prior indorsements thereon; (ii) give immediate credit therefor in accordance with their current Time Schedules and charge the amount of the checks cashed or otherwise received to the account of the Treasury, subject to examination and payment by the United States Treasury; (iii) forward payment records and copies of checks to Treasury; and (iv) upon notification from Treasury, release the original checks to a designated Federal Records Center. The Treasury shall return to the forwarding Federal Reserve Bank a photocopy of any check the payment of which is refused upon first examination. Federal Reserve Banks shall give immediate credit therefor in the United States Treasury's account, thereby reversing the previous charge to the account for such check.

(b) *Depositaries outside of the mainland of the United States.* Banks outside of the mainland of the United States designated as depositaries of public money and permitted to charge checks to the General Account of the United States Treasury shall be governed by the operating instructions contained in the letter of authorization to them from Treasury and shall assume the obligations of presenting banks set forth in §§ 240.5 and 240.6. Checks charged to the General Account of the United States Treasury along with the supporting credit voucher shall be shipped to the Federal Reserve Bank of Richmond. The Treasury shall return to the presenting depository bank a photocopy of any check the payment of which is refused. The depositary bank shall give immediate credit therefor in the General Account of the United States Treasury, thereby reversing the previous charge to the Account for such check.

§ 240.10 Release of original checks.

An original check may be released to a responsible indorser upon receipt of a properly authorized request showing the reason it is required and that the request is in conformity with all applicable law including the Privacy Act.

Indorsement of Checks

§ 240.11 Indorsement by payees.

(a) *Genearal requirements.* Checks shall be indorsed by the payee or payees named, or by another on behalf of such payees as set forth in this part.

(b) *Checks indorsed by the payee or payees named.* When a check is indorsed by the payee or payees named, the forms of indorsement shall conform to those recognized by general principles of law and commercial usage for negotiation, transfer or collection of negotiable instruments.

(c) *Checks indorsed by another on behalf of the named payee or payees—* (1) *Acceptable indorsement.* The only acceptable indorsement of a check by another on behalf of the named payee or payees (except when a check is indorsed by a financial institution under the payee's or payees' authorization) is one which indicates that the person indorsing is doing so on behalf of the named payee or payees. Such an acceptable indorsement shall include the signature of the indorser and sufficient wording to indicate that the indorser is indorsing on behalf of the named payee or payees, pursuant to authority expressly conferred by or under law or other regulation. An example would be: "John Jones by Mary Jones". This example states the minimum indication acceptable. However, §§ 240.12(a)(1), 240.13(a)(1) and 240.15(d) specify the addition of an indication in specified situations of the actual capacity in which the person other than the named payee is indorsing. Checks indorsed "for collection" or "for deposit only to the credit of the within named payee or payees", are acceptable without any signature. However, in the absence of a signature, the presenting

bank will be deemed to guarantee its good title to such checks to all subsequent indorsers and to Treasury.

(2) *Unacceptable indorsement.* The indorsement by another on behalf of the named payee or payees, which consists of the name(s) of the payee(s), whether as purported signature(s) or otherwise, and *not* the signature of the person other than the named payee or payees indorsing the check, regardless of the relationship between the indorser and the named payee or payees, will be rebuttably presumed to be a forgery and is unacceptable. The indorsement by a person who purports to indorse for the named payee(s) with an indorsement consisting of the name(s) of the payee(s), whether as purported signature(s) or otherwise, and the indorsing person's signature and no indication of the indorsing person's representative capacity, will create a rebuttable presumption that the indorsing person was not authorized to indorse for the named payee(s). In these circumstances it is the responsibility of the individual or institution accepting a check from a person other than the named payee(s) to determine that such person is authorized and has the capacity to indorse and negotiate the check. Evidence of the basis for such a determination may be required by the Treasury in the event of a dispute.

(d) *Indorsement of checks by a financial institution under the payee's authorization.* When a check is credited by a financial institution to the payee's account under the payee's or payees' authorization, the financial institution may use an indorsement substantially as follows: "Credit to the account of the within-named payee in accordance with the payee's or payees' instructions. XYZ". A financial institution using this form of indorsement will be deemed to guarantee to all subsequent indorsers and to the Treasury that it is acting as an attorney-in-fact for the payee or payees, under the payee's or payees' authorization, and that this authority is currently in force and has neither lapsed nor been revoked either in fact or by the death or incapacity of the payee or payees.

(e) *Indorsement of checks drawn in favor of financial institutions.* All checks drawn in favor of financial institutions, for credit to the accounts of persons designated payment so to be made, shall be indorsed in the name of the financial institutions as payee in the usual manner. Financial institutions receiving and indorsing such checks shall comply fully with Part 209 of this chapter.

(f) *Social Security benefit checks issued jointly to individuals of the same family.* A social security benefit check issued jointly to 2 or more individuals of the same family shall, upon the death of 1 of the joint payees prior to the negotiation of such check, be returned to the Social Security District Office. Payment of the check to the surviving payee or payees may be authorized by placing on the face of the check a stamped legend signed by an official of the Social Security Administration, redesignating such survivor or survivors as the payee or payees of the check. A check bearing such stamped legend, signed as herein prescribed, may be indorsed and negotiated by the person or persons named as if such check originally had been drawn payable to such person or persons.

§ 240.12 Checks issued to incompetent payees.

(a) *Classes of checks which may be indorsed by guardian or fiduciary.* Where the payee of a check of any class listed in § 240.11(a) has been declared incompetent:

(1) If a check is indorsed by a legal guardian or other fiduciary, such legal guardian or fiduciary shall include, as a part of the indorsement, an indication of the capacity in which the legal guardian or fiduciary is indorsing. An example would be: "John Jones by Mary Jones, guardian of John Jones". When a check indorsed in this fashion is presented for payment by a bank, it will be paid by the Treasury without submission to the Treasury of documentary proof of the authority of the guardian or other fiduciary, with the understanding that evidence of such claimed authority to indorse may be required by the Treasury in the event of a dispute.

(2) If a guardian has not been or will not be appointed, and if the check: (i) Was issued in payment of goods and services, tax refunds or redemption of currency, it shall be forwarded for advice to the certifying agency; or

(ii) Was issued in payment of principal or interest on U.S. securities, it shall be forwarded to the Bureau of the Public Debt, Division of Loans and Currency, Washington, DC 20226, with a full explanation of the circumstances.

(b) *Classes of checks which may not be indorsed by guardian or fiduciary.* Where the payee of a check of any other class has been declared incompetent, the check shall not be indorsed by a guardian or other fiduciary. The check shall be returned to the government agency for which issued with information as to the incompetency of the payee and submission of documentary evidence showing the appointment of the guardian or other explanation in order that a replacement check, and others to be issued subsequently, may be drawn in favor of the guardian.

§ 240.13 Checks issued to deceased payees.

(a)(1) *Classes of checks which may be indorsed by an executor or administrator.* Checks issued for the classes of payments indicated below, the right to which under law does not terminate with the death of the payee, when indorsed by an executor or administrator, shall include, as part of the indorsement, an indication of the capacity in which the executor or administrator is indorsing. An example would be: "John Jones by Mary Jones, executor of the estate of John Jones". Such checks, when presented for payment by a bank, will be paid by the Treasury without the submission of documentary proof of the authority of the executor or administrator, with the understanding that evidence of such claimed authority to indorse may be required by the Treasury in the event of a dispute. The classes of payments to which this subsection refers are:

(i) Payments for the redemption of currencies or for principal or interest on U.S. securities;

(ii) Payments for tax refunds; and

(iii) Payments for goods and services.

(2) If an executor has not been appointed, persons claiming as owners shall return the checks for appropriate handling to the Government agency that certified the payment. If there is doubt as to whether the proceeds of the check or checks pass to the estate of the deceased payee, the checks shall be handled in accordance with paragraph (b) of this section.

(b) *Classes of checks which may not be indorsed by an executor or administrator.* Checks issued for classes of payment other than those specified in paragraph (a) of this section may not be negotiated after the death of the payee, but must be returned to the Government agency that certified the payment for determination whether, under applicable laws, payment is due and to whom it may be made.

§ 240.14 Checks issued to minor payees in certain cases.

Checks issued to minors in payment of principal or interest on U.S. securities may be indorsed by either parent with whom the minor resides, or, if the minor does not reside with either parent, by the person who furnishes his chief support. The parent or other person indorsing in behalf of the minor shall present with the check his signed statement giving the minor's age, stating

that the payee either resides with the parent or receives his chief support from the person indorsing in his behalf, and that the proceeds of the checks will be used for the minor's benefit.

§ 240.15 Powers of attorney.

(a) *Specific powers of attorney.* Any check may be negotiated under a specific power of attorney executed after the issuance of the check and describing it in full.

(b) *General powers of attorney.* Checks issued for the following classes of payments may be negotiated under a general power of attorney in favor of an individual, financial institution or other entity:

(1) Payments for the redemption of currencies or for principal or interest on U.S. securities.

(2) Payments for tax refunds, but subject to the limitations concerning the mailing of internal revenue refund checks contained in 26 CFR 601.506(b).

(3) Payments for goods and services.

(c) *Special powers of attorney.* Under decisions of the Comptroller General of the United States, classes of checks other than those specified in paragraph (b) of this section may be negotiated under a special power of attorney which names a financial institution as attorney-in-fact, and recites that it is not given to carry into effect an assignment of the right to receive payment, either to the attorney-in-fact or to any other person.

(d) *Proof of authority.* Check indorsed by an attorney-in-fact shall include, as part of the indorsement, an indication of the capacity in which the attorney-in-fact is indorsing. An example would be: "John Jones by Paul Smith, attorney-in-fact for John Jones." Such checks when presented for payment by a bank, will be paid by Treasury without the submission of documentary proof of the claimed authority, with the understanding that evidence of such claimed authority to indorse may be required by the Treasury in the event of a dispute.

(e) *Revocation of powers of attorney.* Powers of attorney are revoked by the death of the grantor and may also be revoked by notice from the grantor to the parties known, or reasonably expected, to be acting on the power of attorney. Notice of revocation to the Treasury will not ordinarily serve to revoke the power.

(f) *Acknowledgment of powers of attorney.* Where desirable or where required by foreign, state or local law, powers of attorney shall be acknowledged before a notary public or other officer authorized by law to administer oaths generally.

(g) *Seal or certificate of attesting officers.* Where acknowledgment of powers of attorney is desirable or required pursuant to paragraph (f) of this section, seals of attesting officers shall be impressed or stamped upon the power of attorney form, or the power of attorney shall be accompanied by a certificate from an appropriate official showing that the officer was in commission on the date of acknowledgment.

(h) *Forms.* Power of attorney forms issued under this part are listed in the appendix to this part. They may be obtained from the Financial Management Service, Property and Supply Section, Ardmore East Business Center, 3361–L 75th Avenue, Landover, MD 20785.

Appendix—Standard Forms For Power of Attorney and Their Application.

Standard Form 231. A general power of attorney on this form may be executed by an individual, firm, or sole owner, for checks drawn on the United States Treasury, in payment: (1) For redemption of currencies or for principal or interest on U.S. securities, (2) for tax refunds, and (3) for goods and services.

Standard Form 232. A specific power of attorney on this form, which must be executed after the issuance of the check, describing the check in full, may be used to authorize the indorsement of any class of check drawn on the United States Treasury.

Standard Form 233. A special power of attorney on this form naming a financial organization as attorney-in-fact and reciting that it is not given to carry into effect an assignment of the right to receive payment, either to the attorney in fact or to any other person, may be used for classes of payments other than those shown under Standard Form 231.

Standard Form 234–5. A general power of attorney may be executed by a corporation for the classes of payment listed under Standard Form 231.

Standard Form 236–7. A specific power of attorney may be executed on this form by a corporation to cover a specific check for any class of payment.

PART 245—CLAIMS ON ACCOUNT OF TREASURY CHECKS

Sec.

Authority: R.S. 3646, as amended; 31 U.S.C. 3328; 31 U.S.C. 3331

§ 245.1 Introductory.

This part governs the issuance of replacement checks for checks drawn on the United States Treasury, when

(a) The original check has been lost, stolen, destroyed or mutilated or defaced to such an extent that it is rendered non-negotiable;

(b) The original check has been negotiated and paid on a forged or unauthorized indorsement, and

(c) The original check has been cancelled pursuant to § 240.4

§ 245.2 Definitions.

For purposes of this part:

(a) "Agency" means each authority of the United States for which the Treasury of the United States issues checks or for which checks drawn on the Treasury of the United States are issued.

(b) "Check" means a check drawn on the United States Treasury.

(c) "Certifying agency" means an agency for whom a Treasury disbursing officer or a non-Treasury disbursing officer makes payment in accordance with 31 U.S.C. 3325. The responsibilities of a certifying official are set forth at 31 U.S.C. 3528.

(d) "Commissioner" means the Commissioner of the Financial Management Service, Department of the Treasury, 401 14th Street, SW., Washington, DC 20227.

(e) "Person" means an individual, a partnership, a corporation, a labor organization, a government or a subdivision or instrumentality thereof, and any other entity to which a check may be issued.

(f) "Replacement check" means a check issued pursuant to the recertification of payment by a certifying official.

(g) "Secretary" means the Secretary of the Treasury.

§ 245.3 Time limit for check claims.

(a) Any claim on account of a Treasury check must be presented to the agency that authorized the issuance of such check within one year after the date of issuance of the check or within one year after October 1, 1989, whichever is later.

(b) Any claim by an indorser under § 245.6 will be considered timely if presented to the Commissioner within one year after the date of issuance of the check or within one year after October 1, 1989, whichever is later.

(c) Nothing in this subsection affects the underlying obligation of the United States, or any agency thereof, for which a Treasury check was issued.

§ 245.4 Advice of nonreceipt or loss.

(a) In the event of the nonreceipt, loss or destruction of a check drawn on the United States Treasury, or the mutilation or defacement of such a check to an extent which renders it nonnegotiable, the claimant should immediately notify the agency that authorized the issuance of such check, describing the check, stating the purpose for which it was issued and giving, if possible, its date, amount, Treasury symbol and number.

(b) In cases involving mutilated or defaced checks, the claimant should enclose the mutilated or defaced check with his communication to the agency.

§ 245.5 Recertification of payment.

Upon receipt of a claim concerning the nonreceipt, loss, destruction, mutilation or defacement of a check, or the cancellation of a check pursuant to § 240.4, the certifying agency may certify a new payment.

§ 245.6 Claim by an indorser.

When one or more Treasury checks are lost, stolen or destroyed in a single incident while in the possession of a person to whom the checks have been negotiated by the payee, and if the checks have not been paid, the Commissioner may issue a replacement check to the person to whom the checks had been negotiated.

§ 245.7 Check status inquiry.

(a) For a period not exceeding 18 months from the date of issuance of a Treasury check, the Commissioner will provide the status and a copy of the check, upon request, to the agency which authorized the issuance of the check.

(b) Upon expiration of the 18-month period beginning with the date of issuance of the check custody of the records concerning Treasury checks will be transferred to the agency which authorized the issuance of the check.

§ 245.8 Receipt or recovery of original check.

(a) If the original check is received or recovered by the claimant after he has requested the agency to issue a replacement check, but before a replacement check has been received, he should immediately advise the agency and hold such check until receipt of instructions with respect to the negotiability of such check.

(b) If the original check is received or recovered by the claimant after a replacement check has been received by him, the original shall not be cashed, but shall be forwarded immediately to the agency that authorized the issuance of such check. Under no circumstances should both the original and replacement checks be cashed.

§ 245.9 Procedural instructions.

The Commissioner of the Financial Management Service may issue procedural instructions, implementing these regulations, in Volume I, Part 4 of the Treasury Financial Manual.

§ 245.10 Performance of functions of the Commissioner.

The Commissioner of the Financial Management Service may authorize any officer of the Treasury Department to perform any of his functions under this part and to redelegate such authority within such limits as the Commissioner may prescribe.

PART 248—ISSUE OF SUBSTITUTES OF LOST, STOLEN, DESTROYED, MUTILATED AND DEFACED CHECKS OF THE UNITED STATES DRAWN ON ACCOUNTS MAINTAINED IN DEPOSITARY BANKS IN FOREIGN COUNTRIES OR UNITED STATES TERRITORIES OR POSSESSIONS

1. The authority citation for Part 248 is revised to read as follows:

Authority: 31 U.S.C. 3331.

2. Section 248.1 is revised to read as follows:

§ 248.1 Introductory.

This part governs the issuance of substitutes for checks of the United States drawn on United States dollar or foreign currency accounts, maintained with designated depositaries in foreign countries or territories or possessions of the United States. Checks of the United States drawn on such depositaries are hereafter referred to as "depositary checks."

§ 248.5 [Amended]

3. Section 248.5 is amended by removing "§ 368.4" and adding in its place § 248.4".

W. E. Douglas,

Commissioner.

[FR Doc. 89-5584 Filed 3-10-89; 8:45 am]

BILLING CODE 4810-35-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 05-89-06]

Special Local Regulations for Marine Events, Approaches to Annapolis Harbor, Spa Creek, and Severn River, Annapolis, MD

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish permanent special local regulations for the approaches to Annapolis Harbor, Spa Creek, and the Severn River, north to the Route 450 Bridge. This area is the site of several marine events each year, such as the Blue Angels and Insertion/Extraction Demonstrations and the Naval Academy Sailing Squadron Safety-at-Sea Seminar. The proposed regulations would govern vessel activities during these events. Notice of the precise dates and times that the regulations are effective will be published in the Local Notice to Mariners and by **Federal Register** Notice. The special local regulations are necessary to control vessel traffic due to the confined nature of the waterway and the expected congestion at the time of the events.

DATES: Comments should be received on or before April 27, 1989.

ADDRESSES: Comments should be mailed or hand delivered to Commander (bb), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704-5004. The comments will be available for inspection and copying at Room 209 of that address. Normal office hours are between 8:00 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: B.J. Stephenson, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704-5004 (804) 398-6204.

Drafting Information

The drafters of this notice are Billy J. Stephenson, project officer, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, and Lieutenant Commander Robin K. Kutz, project attorney, Fifth Coast Guard District Legal Staff.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this rulemaking by submitting written views, data, or arguments. Persons submitting comments should include their names

and addresses, identify this notice (CGD 05–89–06) and the specific section of the proposal to which their comments apply, and give reasons for each comment.

The regulations may be changed in light of comments received. All comments received before the expiration of the comment period will be considered before final action is taken on the proposal. No public hearing is planned, but one may be held if written requests for a hearing are received and it is determined that the opportunity to make oral presentations will aid the rulemaking process. The receipt of comments will be acknowledged if a stamped self-addressed postcard or envelope is enclosed.

Discussion of Regulation

The area covered by this proposal is the same as that covered by special local regulations issued for several events in 1988, such as the Blue Angels and Insertion/Extraction Demonstrations. Federal Aviation Administration regulations require, as a prerequisite to issuing permits for such demonstrations, that the waterway over which aircraft will fly be closed to vessel traffic for the duration of the demonstrations. For this reason, the Commander, Fifth Coast Guard District, will close portions of the regulated area to all vessel traffic during all airshows, airshow practice sessions, and helicopter rescue demonstrations. The special local regulations will provide safety for spectator craft during the events.

If adopted, this proposal will apply to the 10th Annual Safety-at-Sea Seminar scheduled from 11:40 a.m. to 12:40 p.m. on April 1, 1989. It also will apply to future Safety-at-Sea Seminars, and an annual notice of the precise dates and times of the seminar would be published in a Local Notice to Mariners and by **Federal Register** Notice.

Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). Because closure of the waterway is not anticipated for any extended period, commercial marine traffic will be inconvenienced only slightly. The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. Since the impact of this proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant economic impact on a substantial number of small entities.

Federalism Assessment

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment. Although closure of the proposed regulated area during marine events might have some small negative impact on the city of Annapolis, this impact pales when compared to the loss of revenue the local economy would face if these events could not be held due to a lack of regulation.

Environmental Impact

This rulemaking has been thoroughly reviewed by the Coast Guard and it has been determined to be categorically excluded from further environmental documentation in accordance with section 2.B.2.c of Commandant Instruction (COMDTINST) M16475.1B. A categorical Exclusion Determination statement has been prepared and has been placed in the rulemaking docket.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend Part 100 of Title 33, Code of Federal Regulations as follows:

PART 100—[AMENDED]

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

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

2. A new § 100.511 is added to read as follows:

§ 100.511 Approaches to Annapolis Harbor, Spa Creek, and Severn River, Annapolis, Maryland.

(a) *Definitions*—(1) *Regulated Area.* The approaches to Annapolis Harbor, the waters of Spa Creek, and the Severn River, shore to shore, bounded on the south by a line drawn from Carr Point, at latitude 38°58'58.0" North, longitude 76°27'40.0" West, thence to Horn Point Warning Light (LLNR 17935), at 38°58'24.0" North, longitude 76°28'10.0" West, thence to Horn Point, at 38°58'20.0" North, longitude 76°28'27.0" West, and bounded on the north by the State Route 450 Bridge.

(2) *The Coast Guard Patrol Commander.* The Coast Guard Patrol Commander is a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Group Baltimore.

(b) *Special Local Regulations.* (1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the immediate vicinity of this area shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard ensign.

(ii) Proceed as directed by any commissioned, warrant, or petty officer.

(3) Any spectator vessel may anchor outside of the regulated area specified in paragraph (a) of this section but may not block a navigable channel.

(c) *Effective Period.* The Commander, Fifth Coast Guard District publishes a notice in the **Federal Register** and the Fifth Coast Guard District Local Notice to Mariners that announces the times and dates that the section is in effect.

Dated: February 21, 1989.

A.D. Breed,

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

[FR Doc. 89–5734 Filed 3–10–89; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 100

[CGD 05–89–08]

Special Local Regulations; Marine Event; American Diabetes Association, Choptank River Swim, Choptank River Bridge, Cambridge, MD

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is considering a proposal that would establish permanent regulations for the swim portion of the American Diabetes Association Triathalon, an annual event held in May. Annual notice of the precise name, dates and times of the swim will be published in the Local Notice to Mariners and a **Federal Register** Notice. The special local regulations will restrict general navigation in the regulated area during the event to provide for the safety of the swimmers and accompanying safety personnel.

DATE: Comments must be received on or before April 27, 1989.

ADDRESS: Comments should be mailed or hand carried to Commander (bb), Fifth Coast Guard District, 431 Crawford Street, Portsmouth Virginia 23704–5004.

The comments will be available for inspection and copying at Room 209 of this address. Normal office hours are between 8:00 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Billy J. Stephenson, Chief, Boating Affairs Branch, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004 (804) 398–6204.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this rulemaking by submitting written views, data, or arguments. Persons submitting comments should include their names and addresses, identify this notice (CGD 05–89–08) and the specific section of the proposal to which their comments apply, and give reasons for each comment. The regulations may be changed in light of comments received. All comments received before the expiration of the comment period will be considered before final action is taken on the proposal. No public hearing is planned, but one may be held if written requests for a hearing are received and it is determined that the opportunity to make oral presentations will aid the rulemaking process. The receipt of comments will be acknowledged if a stamped self-addressed postcard or envelope is enclosed.

Drafting Information

The drafters of this notice are Mr. Billy J. Stephenson, project officer, Chief, Boating Affairs Branch, Fifth Coast Guard District, and Lieutenant Commander Robin K. Kutz, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Proposed Regulation

The area covered by this proposal is the same as that covered by the special local regulations for the American Diabetes Association Choptank River Swim (53 FR 16255; May 6, 1988) that was held on May 29, 1988. The swim portion of the triathalon is an annual event consisting of from 300 to 400 swimmers racing across the Choptank River from the north shore in front of the Ferry Boat Restaurant on the Talbot County side thence parallel to and within 200 feet of the Choptank River Bridge and ending at the south shore. It is necessary to close a portion of the Choptank River to all traffic except participants and their accompanying personnel for the safety of those competing in the swim. If adopted, this proposal will apply to the swim portion of the 1989 Reach the Beach Triathalon scheduled from 8:00 a.m. to 9:45 a.m. on May 28, 1989.

Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and non-significant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). Because closure of the waterway is not anticipated for any extended period, commercial marine traffic will be inconvenienced only slightly. The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. Since the impact of this proposal is expected to be minimal the Coast Guard certifies that if adopted it will not have a significant economic impact on a substantial number of small entities.

Federalism Assessment

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Impact

This proposed rulemaking has been thoroughly reviewed by the Coast Guard and it has been determined to be categorically excluded from further environmental documentation in accordance with section 2.B.2.c of Commandant Instruction (COMDTINST) M16475.1B. A Categorical Exclusion Determination statement has been prepared and has been placed in the rulemaking docket.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend Part 100 of Title 33, Code of Federal Regulations as follows:

PART 100—[AMENDED]

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

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

2. A new § 100.512 is added to read as follows:

§ 100.512 American Diabetes Association Reach the Beach Triathalon, Choptank River, Cambridge, MD.

(a) *Definitions*—(1) *Regulated Area.* The waters of the Choptank River, from shore to shore, between the Choptank River Bridge and a line drawn from the north shore at latitude 38°37'37" North, longitude 76°03'08" West, and the south shore at latitude 38°34'25" North, longitude 76°04'03" West.

(2) *Coast Guard Patrol Commander.* The Coast Guard Patrol Commander is a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Group Baltimore.

(b) *Special Local Regulations.* (1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the immediate vicinity of this area shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard ensign.

(ii) Proceed as directed by any commissioned, warrant, or petty officer.

(3) Any spectator vessel may anchor outside of the regulated area specified in paragraph (a) of these regulations but may not block a navigable channel.

(c) *Effective Period.* The Commander, Fifth Coast Guard District publishes a notice in the **Federal Register** and the Fifth Coast Guard District Local Notice to Mariners that announces the times and dates that the section is in effect.

Dated: March 2, 1989.

A.D. Breed,

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

[FR Doc. 89–5733 Filed 3–10–89; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 100

[CGD13–89–02]

Marine Parade: Seattle Yacht Club, Opening Day

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rule making.

SUMMARY: The Coast Guard is considering a proposal to close Portage Cut (Montlake Cut) to all vessel traffic during the annual parade of boats which transits this waterway during Seattle Yacht Club's Opening Day. This parade consists of several hundred vessels transiting from west to east, through the cut in a solid stream of vessels, thus restricting any opportunity for non

participating vessels to transit from east to west. This event is normally held the first weekend in May of each year. Although an inconvenience to non-participating vessels, the duration of this progression of vessels is approximately eight hours. Mass media attention is apparent weeks prior to this event, thus giving the general boating public ample time to plan alternate transit times.

DATES: Comments must be received on or before April 12, 1989.

ADDRESSES: Comments should be mailed to Commander, Coast Guard Group Seattle, 1519 Alaskan Way South, Seattle, WA 98134–1192, Attn: LTJG Ramsey. The comments and other materials referenced in this notice will be available for inspection and copying at Coast Guard Group Seattle, Operations Division. Normal office hours are between 8:00 a.m. and 3:00 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: LTJG R.T. Ramsey (206) 286–5412.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this rulemaking by submitting written views, data or arguments. Persons submitting comments should include their names and addresses, identify this notice (CGD13 89–02) and the specific section of the proposal to which their comments apply, and give reasons for each comment. A 30-day comment period will be provided in order to meet the time restraints of the upcoming 1989 parade. Only local interest in this event is anticipated. The regulations may be changed in light of comments received. All comments received before the expiration of the 30-day comment period will be considered before final action is taken on this proposal. No public hearing is planned, but one may be held if written requests for a hearing are received and it is determined that the opportunity to make oral presentations will aid the rulemaking process.

Drafting Information

The drafters of this notice are LTJG R.T. Ramsey, project officer, and LT D. Schram, project attorney, Coast Guard District Legal Office.

Discussion of Proposed Regulations

Seattle Yacht Club's Opening Day has become a community event which has been in effect for more than thirty years. Public viewing of the event is estimated to exceed 300,000 people. In addition, there are an estimated 1000 vessels which observe the event as non-participants. Prior to the start of the parade a crew race is held through the Portage Cut. The Portage Cut is ideal for crew racing and has historically been used by the University of Washington's crew team. Planning meetings for this event begin 3–4 months prior to the parade. These meetings include but are not limited to the following organizations; U.S. Coast Guard, local military officials, Seattle police, state police, local media, Seattle fire department, Washington State Bridge officials, state and city transportation officials, U.S. Army Corps of Engineers and local commercial marine industry officials.

Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this proposal is expected to be so minimal that full regulatory evaluation is unnecessary. The Portage Cut is generally utilized by pleasure craft. The limited commercial traffic affected by this event are given several months warning via the local media and local Notice to Mariners, to schedule their transits prior to or after the parade. Local businesses welcome the economic benefits of the estimated 300,000 spectators. Since the impact of this proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant negative economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 100

Regattas and Marine parades, Safety of life on navigable waters.

Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend Part 100 of Title 33, Code of Federal Regulations as follows:

PART 100—[AMENDED]

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

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

2. Section 100.1304 is added to read as follows:

§ 100.1304 Annual Seattle Yacht Club's "Opening Day" Marine Parade.

(a) *Regulated area.* All of Portage Bay, with the northwestern limit being the University Bridge, through the Portage Cut (Montlake Cut) into and including Union Bay, with the southeastern limit being an imaginary line from Webster Point to the eastern corner of Foster Island.

(b) *Effective period.* This regulation will be in effect from 8:00 a.m. to 3:00 p.m. on the first Saturday of May each year unless otherwise specified in the Thirteenth District Local Notice to Mariners.

(c) *Special Local regulations.* (1) The regulated area shall be closed for the duration of the event to all vessel traffic not participating in the event and authorized by the event sponsor or Coast Guard Patrol Commander.

(2) All persons or vessels not registered with the sponsor as participants or not part of the regatta patrol are considered spectators. Spectator vessels must be at anchor within a designated spectator area or moored to a waterfront facility in a way that will not interfere with the progress of the event. The following are established as spectator areas:

(i) Northwest of the University Bridge.

(ii) North of the log boom which will be placed in Union Bay.

(iii) East of Webster Point so as not to interfere with the participating vessels departing Union Bay.

(3) No spectators shall anchor, block, loiter in, or impede the through transit of participants or official patrol vessels in the regulated area during the effective dates and times unless cleared for such entry by the Patrol Commander.

(4) Due to the large number of craft confined within this small body of water, all vessels, both spectator and participants, will maintain a "NO WAKE" speed. This requirement will be strictly enforced to preserve the safety of both life and property.

(5) A succession of sharp, short signals by whistle or horn from vessels patrolling the area under the direction of the Patrol Commander shall serve as a signal to stop. Vessels signaled shall stop and shall comply with the orders of the patrol vessel. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

Dated: March 3, 1989.

R. E. Kramek,

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

[FR Doc. 89–5657 Filed 3–10–89; 8:45 am]

BILLING CODE 4910–14–M

33 CFR Part 117

[CGD7-89-04]

Drawbridge Operation Regulations; Atlantic Intracoastal Waterway, Florida

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

SUMMARY: At the request of Congressman Tom Lewis, the Coast Guard is considering adding regulations governing the PGA and Parker drawbridges at North Palm Beach by permitting the number openings to be limited during certain periods. This proposal is being made because of complaints received from highway users. This action should accommodate the needs of vehicular traffic and still provide for the reasonable need of navigation.

DATE: Comments must be received on or before April 27, 1989.

ADDRESSES: Comments should be mailed to Commander (oan), Seventh Coast Guard District, 909 SE. 1st Avenue, Miami, Florida 33131-3050. The comments and other materials referenced in this notice will be available for inspection and copying on the 4th Floor, of the Brickell Plaza Federal Building 908 SE. 1st Ave. Miami, Florida. Normal office hours are between 7:30 a.m. and 4 p.m., Monday through Friday, except holidays. Comments also may be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: Mr. Walt Paskowsky (305) 536-4103.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this rulemaking by submitting written views, comments, data, or arguments. Persons submitting comments should include their names and addresses, identify the bridge, and give reasons for concurrence with or any recommended change in the proposal. Persons desiring acknowledgement that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

The Commander, Seventh Coast Guard District, will evaluate all communications received and determine a final course of action on this proposal. The proposed regulations may be changed in light of comments received.

Drafting Information

The drafters of this notice are Mr. Walt Paskowsky, Bridge Administration Specialist, project officer, and Lieutenant Commander S.T. Fuger, Jr., project attorney.

Discussion of Proposed Regulations

The PGA and Parker drawbridges presently open on signal, except that, from 7 a.m. to 9 a.m. and 4 p.m. to 7 p.m. Monday through Friday, the PGA opens on the quarter and three quarter-hour while Parker opens on the hour and half-hour. On weekends and federal holidays both bridges open on the hour, 20 minutes after the hour, and 40 minutes after the hour between 8 a.m. and 6 p.m. This change which adds 15-minute scheduled opening from 9 a.m. to 4 p.m., Monday through Friday, during the busy Winter months is intended to space draw openings and virtually eliminate "back to back" opening which can contribute significantly to vehicular traffic delays during these periods.

Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal Regulations and nonsignificant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979).

The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. We conclude this because the regulations exempt tugs with tows. Since the economic impact of this proposal is expected to be minimal, the Coast Guard Certifies that, if adopted, it will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend Part 117 of Title 33, Code of Federal Regulations, as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05-1(g).

2. Section 117.261 (s) and (t) is revised to read as follows:

§ 117.261 Atlantic Intracoastal Waterway from St. Marys River to Key Largo

* * * * *

(s) *PGA Boulevard bridge, Mile 1012.6.* The draw shall open on signal; except that, from 7 a.m. to 9 a.m. and 4 p.m. to 7 p.m., Monday through Friday except federal holidays, the draw need open only on the quarter and three-quarter-hour. From November 1 through April 30 from 9 a.m. to 4 p.m. Monday through Friday, except federal holidays, the draw need open only on the hour, quarter-hour, half-hour and three quarter-hour. On Saturdays, Sundays, and federal holidays from 8 a.m. to 6 p.m, the draw need open only on the hour, 20 minutes after the hour, and 40 minutes after the hour.

(t) *Parker (US 1) bridge, mile 1013.7.* The draw shall open on signal; except that, from 7 a.m. to 9 a.m. and 4 p.m. to 7 p.m., Monday through Friday except federal holidays, the draw need open only on the hour and half hour. From November 1 through April 30 from 9 a.m. to 4 p.m. Monday through Friday, except federal holidays, the draw need open only on the hour, quarter-hour, half-hour and three quarter-hour. On Saturdays, Sundays, and federal holidays from 8 a.m. to 6 p.m., the draw need open only on the hour, 20 minutes after the hour, and 40 minutes after the hour.

* * * * *

Dated: February 27, 1989.

Martin H. Daniell,

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

[FR Doc. 89-5658 Filed 3-10-89; 8:45 am]

BILLING CODE 4910-14-M

VETERANS ADMINISTRATION

38 CFR Part 21

Dependents Education; Eligibility of Stepchildren

AGENCY: Veterans Administration.

ACTION: Proposed Regulation.

SUMMARY: The stepchildren of a veteran whose children are eligible for dependents' educational assistance are also eligible for that assistance on the same basis as those children. Occasionally, while such a stepchild is receiving assistance, the veteran will separate from or divorce his or her spouse. The child in question then ceases to be eligible for dependents' educational assistance, because he or she is no longer the veteran's stepchild. This proposal states how the Veterans Administration (VA) will determine when to discontinue the child's assistance.

DATES: Comments must be received on or before April 12, 1989. Comments will be available for public inspection until April 24, 1989.

ADDRESSES: Send written comments to: 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 a.m. and 4:30 p.m., Monday through Friday (except holidays) until April 24, 1989.

FOR FURTHER INFORMATION CONTACT: William G. Susling, Jr., Acting Assistant Director for Educational Policy and Program Administration, Vocational Rehabilitation and Education Service, Department of Veterans Benefits, (202) 233–2092.

SUPPLEMENTARY INFORMATION: The VA is proposing to amend § 21.3041 to state that when an individual ceases to be the stepchild of a veteran, his or her eligibility to dependents' educational assistance ends. The proposed amendment to § 21.4135 states when payments will be terminated in this situation.

The VA has determined that these proposed regulations do not contain a major rule as that term is defined by Executive Order 12291, Federal Regulation. The proposed regulations will not have a $100 million annual effect on the economy, and will not cause a major increase in costs or prices for anyone. They will have no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Administrator of Veterans Affairs has certified that these proposed regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. Pursuant to 5 U.S.C. 605(b), the proposed regulations, therefore, are exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

This certification can be made because the proposed regulations affect only individuals. They will have no significant economic impact on small entities, i.e., small businesses, small private and nonprofit organizations and small governmental jurisdictions.

The Catalog of Federal Domestic Assistance number for the program affected by these regulations is 64.117.

List of Subjects in 38 CFR Part 21

Civil rights, Claims, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Approved: February 17, 1989.

Thomas E. Harvey,

Acting Administrator.

38 CFR Part 21, Vocational Rehabilitation and Education, is proposed to be amended as follows:

PART 21—[AMENDED]

1. In § 21.3041, paragraph (d) introductory text is revised and paragraph (d)(9) is added to read as follows:

§ 21.3041 Periods of eligibility; child.

* * * * *

(d) *Modified ending date.* When one of the following occurs between ages 18 and 26, the ending date will be the eligible person's 26th birthday or 8 years from the date of happening specified in paragraphs (d)(1) to (7) of this section and 10 years in paragraph (d)(8) of this section; whichever is later. When paragraph (d)(9) of this section is applicable, the ending date will be as stated in paragraph (d)(9) of this section. Where the ending date is subject to modification under more than one of paragraph (d)(3), (4), (5), 6 or (7) of this section, the more favorable date will apply. In no case will the modified ending date extend beyond the eligible person's 31st birthday.

(Authority: 38 U.S.C. 1712)

* * * * *

(9) The child may lose eligibility through ceasing to be the veteran's stepchild either because the veteran and the child's natural parent divorce or because the veteran and the child's natural parent separate and the child is no longer a member of the veteran's household. If this occurs, the ending date of the child's period of eligibility will be determined as follows:

(i) If the child ceases to be the veteran's stepchild while the child is not in training the ending date of the child's eligibility shall be the date on which the child ceases to be the veteran's stepchild.

(ii) If the child ceases to be the veteran's stepchild while the child is in training in a school organized on a semester or quarter basis, the ending date of the child's eligibility will be the last date of the semester or quarter during which the child ceases to be the veteran's stepchild.

(iii) If the child ceases to be the veteran's stepchild while the child is in training in a school not organized on a semester or quarter basis, the ending date of the child's period of eligibility will be the end of the course or 12 weeks from the date on which the child ceases to be the veteran's stepchild, whichever is earlier. See § 21.4135(z).

Authority: 38 U.S.C. 1701.

2. In § 21.4135, paragraph (z) is added to read as follows:

§ 21.4135 Discontinuance dates.

* * * * *

(z) *Eligible child ceases to be a stepchild.* When an eligible child loses eligibility because he or she ceases to be the stepchild of the veteran, the VA will discontinue the dependent's educational assistance allowance on the last day of the child's eligibility as determined by § 21.3041(d)(9).

(Authority: 38 U.S.C. 1701)

[FR Doc. 89–5648 Filed 3–10–89; 8:45 am]

BILLING CODE 8320–01–M

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38 CFR Part 21

Due Process in Loss of Dependency Benefits

AGENCY: Veterans Administration.

ACTION: Proposed regulatory amendments.

SUMMARY: This proposed regulatory amendment sets out procedural protections to be followed when the Veterans Administration (VA) is considering reduction of the veteran's subsistence allowance because the VA has received evidence that the veteran has lost a dependent. This proposal will bring the procedures followed in these cases into agreement with procedural protections of due process when a veteran is receiving disability compensation or pension and the VA receives evidence that the veteran has lost a dependent. The effect of this proposal will be to improve and more clearly define procedural protections afforded the veteran.

DATES: Comments must be received on or before April 12, 1989. Comments will be available for public inspection until April 24, 1989. It is proposed to make these amendments effective upon final publication.

ADDRESSES: Send written comments to: Administrator of Veterans Affairs, 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 a.m. to 4:30 p.m., Monday through Friday (except holidays) until April 24, 1989.

FOR FURTHER INFORMATION CONTACT: Morris Triestman, Rehabilitation Consultant, Vocational Rehabilitation

and Education Service, Department of Veterans Benefits, (202) 233–2886.

SUPPLEMENTARY INFORMATION: The VA recently proposed regulatory amendments to 38 CFR Part 3 in order to provide additional procedural protections of due process for disability compensation and pension claimants and beneficiaries. At that time the VA indicated that its review was ongoing and that it might propose additional amendments to existing regulations in the future.

As a result of this ongoing review, the Agency has decided that when the VA receives evidence that the veteran has lost a dependent, the same procedural protections will be provided a veteran who is receiving subsistence allowance as when that event occurs while a veteran is receiving disability compensation. This proposal will provide these same procedural protections for veterans receiving benefits under the vocational rehabilitation program.

The current rule governing due process under the vocational rehabilitation program is contained in § 21.420. This rule is proposed to be amended to eliminate references to changes in dependency status due to the loss of a dependent. A new rule (§ 21.422) is established to govern due process procedural protections where there is a proposed reduction in the veteran's subsistence allowance because of the loss of a dependent.

These proposed regulatory amendments do not meet the criteria for a major rule as that term is defined by Executive Order 12291, Federal Regulation. These proposed regulatory amendments will not have a $100 million annual effect on the economy, will not cause a major increase in costs or prices and will not have any other significant adverse effects on the economy.

The Administrator of Veterans Affairs certifies that these proposed regulatory amendments, if promulgated, will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. Pursuant to 5 U.S.C. 605(b), the proposed regulatory amendments, therefore, are exempt from the initial and final regulatory flexibility analyses requirements of §§ 603 and 604. This proposal concerns only VA procedural protections followed in making certain adjustments in awards to individual beneficiaries. This certification can be made because the proposed regulatory amendments will have no significant economic impact on small entities, i.e., small business, small private and nonprofit organizations and small governmental jurisdictions.

The Catalog of Federal Domestic Assistance number for the program affected by the proposed regulatory amendments is 64.116.

List of Subjects in 38 CFR Part 21

Civil rights, Claims, Educational, Grant programs, Loan programs, Reporting requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Approved: February 21, 1989.

Thomas E. Harvey

Acting Administrator.

38 CFR Part 21, Vocational Rehabilitation and Education, is proposed to be amended as follows:

PART 21—[AMENDED]

1. in § 21.420, paragraph (d) introductory text is revised to read as follows:

§ 21.420 Informing the veteran.

* * * * *

(d) *Prior notification of adverse action.* The VA shall give the veteran a period of a least 30 days to indicated his or her disagreement with an adverse action other than one which arises as a consequence of a change in training time or other such alteration in circumstances. If the veteran disagrees, he or she shall be given the opportunity, before appealing the adverse action as provided in § 21.59 of this part, to:

* * * * *

2. Section 21.422 is added to read as follows:

§ 21.422 Reduction in subsistence allowance following the loss of a dependent.

(a) *Notice of redution required when a veteran loses a dependent.* (1) Except as provided in paragraph (a)(2) of this section, the VA not reduce an award of subsistence allowance following the veteran's loss of a dependent unless:

(i) The VA has notified the veteran of the adverse action, and

(ii) The VA has provided the veteran with a period of 60 days in which to submit evidence for the purpose of showing that subsistence allowance should not be reduced.

(2) When the reduction is based solely on written, factual, unambiguous information as to dependency provided by the veteran or his or her fiduciary with knowledge or notice that the information would be used to determine the monthly rate of subsistence allowance;

(i) The VA is not required to send a pre-reduction notice as stated in paragraph (a)(1) of this section, but;

(ii) The VA will send notice contemporaneous with the reduction in subsistence allowance.

(Authority: 38 U.S.C. 3012, 3013)

(b) *Pre-reduction notice.* Where a reduction in subsistence allowance is proposed by reason of information concerning dependency received from a source other than the veteran, the VA will: (1) Prepare a proposal for the reduction of subsistence allowance, setting forth material facts and reasons;

(2) Notify the veteran at his or her latest address of record of the proposed action;

(3) Furnish detailed reasons for the proposed reduction;

(4) Inform the veteran that he or she has an opportunity for a predetermination hearing, provided that the VA receives a request for such a hearing within 30 days from the date of the notice; and

(5) Give the veteran 60 days for the presentation of additional evidence to show that the subsistence allowance should be continued at its present level.

(Authority: 38 U.S.C. 3012, 3013)

(c) *Predetermination hearing.* (1) If the VA receives a timely request for a predetermination hearing as indicated in paragraph (b)(4) of this section:

(i) The VA will notify the veteran in writing of the date, time and place for the hearing; and

(ii) Payments of subsistence allowance will continue at the previously established level pending a final determination concerning the proposed reduction.

(2) The hearing will be conducted by a VA employee who:

(i) Did not participate in the preparation of the proposal to reduce the veteran's subsistence allowance, and

(ii) Will bear the decision-making responsibility.

(Authority: 38 U.S.C. 3012, 3013)

(d) *Final action.* The VA will take final action following the predetermination procedures specified in paragraph (c) of this section. (1) If a predetermination hearing was not requested or if the veteran failed to report for a scheduled predetermination hearing, the final action will be based solely upon the evidence of record at the expiration of 60 days. (2) If a predetermination hearing was conducted, the VA will base final action upon:

(i) Evidence presented at the hearing;

(ii) Evidence contained in the claims file at the time of the hearing; and

(iii) Any additional evidence obtained following the hearing pursuant to necessary development.

(3) Whether or not a predetermination hearing was conducted, a written notice of the final action shall be issued to the veteran setting forth the reasons for the decision, and the evidence upon which it is based. The veteran will be informed of his or her appellate rights and right of representation. (For information concerning the conduct of the hearing see § 3.103 (c) and (d) of this chapter).

(4) When a reduction of subsistence allowance is found to be warranted following consideration of any additional evidence submitted, the effective date of the reduction or discontinuance shall be as specified under the provisions of § 21.324 of this part.

(Authority: 38 U.S.C. 3012, 3013)

[FR Doc. 89-5647 Filed 3-10-89; 8:45 am]
BILLING CODE 8320-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL 3534-8]

Approval and Promulgation of Implementation Plans; Ohio

AGENCY: U.S. Environmental Protection Agency, (USEPA).

ACTION: Proposed rulemaking.

SUMMARY: USEPA is proposing to disapprove a plan submitted purusant to Section 111(d) of the Clear Air Act by the State of Ohio. Section 111(d) requires that each State submit plans to control emissions of designated pollutants These rules are for the control of total reduced sulfur (TRS) from existing Kraft Pulp Mills. USEPA is proposing to disapprove this plan because it does not meet all of USEPA's requirements for an approvable 111(d) plan. Portions of the rule that USEPA proposes action on today are in draft form. Therefore, before USEPA can take final action on the plan, the State would have to submit a final plan.

DATE: Comments on this revision and on the proposed USEPA action must be received by April 12, 1989.

ADDRESSES: Copies of the SIP revision are available at the following addresses for review: (It is recommended that you telephone Debra Marcantonio, at (312) 886-6088, before visiting the Region V office.)

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch, 230 South Dearborn Street, Chicago, Illinois 60604.

Ohio Environmental Protection Agency, Office of Air Pollution Control, 1800 Water Mark Drive, P.O. Box 1049, Columbus, Ohio 43266-0149.

Comments on this proposed rule should be addressed to: (Please submit an original and three copies, if possible.) Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Debra Marcantonio, Air and Radiation Branch (5AR-26), Environmental Protection Agency , Region V, Chicago, Illinois 60604, (312) 886-6088.

SUPPLEMENTARY INFORMATION: Section 111(d) of the Clear Air Act requires control of existing sources emitting pollutants that are or may be harmful to the public health or welfare, but are not controlled under Sections 108-110 or 112 of the Act. Such pollutants are referred to as "designated pollutants", and existing facilities emitting such pollutants are referred to as "designated facilities." On February 28, 1978, the standards of performance for eight source categories in the Kraft pulp industry were promulgated. The standards include emission limits for particulates and TRS, a designated pollutant. Subpart B of 40 CFR Part 60 requires the States to develop plans for the control of designated pollutants within Federal guidelines. A notice of availability of these Federal guidelines for the control of IRS emissions for existing sources was published on May 22, 1979 (44 FR 29828).

Specifically, 40 CFR 60.23(a)(2) requires that each State shall adopt and submit to USEPA and Plan revisions necessary to meet the requirements of this Subpart, unless no designated facilities exist within the State. Pursuant to this requirement, the State of Ohio submitted to USEPA on December 7, 1984, a plan to conrol emissions of TRS from Mead Paper in Chillicothe, Ohio, the only existing Kraft pulp mill in Ohio. On April 23, 1986, Ohio withdrew the emission test method portion of the submittal (OAC 3745-73-04) and resubmitted a revised draft rule for USEPA's review.

Review of Proposed Rules

1. Rule 3745-73-01—Definitions

—This section conforms with USEPA's guidelines for control of TRS emissions from existing Kraft pulp mills.

2. Rule 3745-13-02—Certification and Compliance Schedules

—This section states that compliance schedules shall commence from the effective date of the rules. This is consistent with the requirements of 40 CFR 60.24 for designated facilities.

—This section also requires that all owners or operators of designated facilities certify that they are in compliance with all the requirements of the proposed rules and submit to OEPA an application for an operating permit.

This section is consistent with the requirement of 40 CFR 60.23(b).

—Additionally, this section sets schedules of compliance for all sources emitting TRS that are currently in violation of the proposed emission limitation.

There appears to be a typewritten error in OAC 3745-73-02(C)(4)(d). The compliance schedule shows the source must complete construction within 24 months and achieve final compliance within 20 months. The State should correct or clarify this error.

This section is consistent with the requirements of 40 CFR 60.24.

3. Rule 3745-73-03—General Emission Limits

The numerical values of the emission limits are the same as the Federal emission guidelines for TRS in existing Kraft pulp mills. However, the proposed limits are based on a 24-hour averaging time, while the Federal emission guidelines are based on 12-hour averages. For this reason, the proposed emission limits are effectively less stringent than the Federal emission guideline for TRS emissions from Kraft pulp mills. Under 40 CFR 60.24, a State may apply a less stringent requirement if sufficient justification is proven. Such justification may include unreasonable control cost and physical limitation. Because Ohio has not made such a demonstration, the proposed limits are not approvable.

OAC Rule 3745-73-03(C) appears to be a "bubble" alternative control plan. It would allow a 111(d) source to establish an alternative emission limit which is different from the emission limit established in the 111(d) plan, in order to comply with the applicable standard. Because, if approved, the 111(d) plan would be the federally approved standard by which to define compliance, only a revision to the plan (approved by USEPA) could change the terms. Additionally, USEPA does not have a bubble policy applicable to 111(d) plans.

Therefore, before USEPA can approve this plan, Rule 3745-/3-03 (C) must be

deleted or revised to include a statement that any changes in the applicable limits would not be effective until they are submitted to and approved by USEPA.

4. Rule 3745-73-04—Test Methods and Procedures

The proposed test method references the method described in 40 CFR Part 60, Appendix A. This is consistent with the requirements of 40 CFR 60.24(b)(2) for determining compliance of designated pollutants. USEPA cannot, however, approve this rule independent of the entire plan. Therefore, USEPA also is proposing to disapprove this portion of the plan. Moreover, because this portion of the revision is a draft rule, before USEPA can take final action on the plan, the State must submit a final rule.

5. Monitoring Requirements

This plan does not contain monitoring requirements to ensure proper operation and maintenance of the affected facility. The regulations at 40 CFR 60.25(b) requires that the 111(d) plan shall provide for monitoring the status of compliance with the applicable standard. USEPA cannot approve this 111(d) plan without the appropriate monitoring requirements.

Proposed Action

For the reasons discussed above, USEPA is proposing to disapprove these rules for the control of TRS from existing Kraft pulp mills, pursuant to Section 111(d) of the Clean Air Act.

Under 5 U.S.C. 605(b), this action will not have a significant economic impact on a substantial number of small entities. These rules apply to Mead Paper in Chillicothe, Ohio, the only existing Kraft pulp mill in Ohio.

Under Executive Order 12291, today's action is not "Major". It has been submitted to the Office of Management and Budget (OMR) for review.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, sulfur oxides.

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

Dated: June 30, 1987.

Valdas V. Adamkus,

Regional Administrator.

Editorial note: This document was received at the Office of the Federal Register on March 8, 1989.

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40 CFR Part 52

[FRL-3534-6]

Approval and Promulgation of Implementation Plans; Federal Assistance Limitations and Construction Moratorium State of Indiana

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Proposed rulemaking.

SUMMARY: On November 18, 1988 (53 FR 46608), USEPA disapproved the Ozone State Implementation Plan (SIP) for Lake and Porter Counties, Indiana. Today, USEPA is proposing to also disapprove the enforcement program in the vehicle inspection and maintenance (I/M) portion of Indiana's Ozone plan for Lake and Porter Counties, the I/M enforcement program in Indiana's carbon monoxide (CO) plan for the CO nonattainment area in Lake County, and the overall CO SIP for the nonattainment area in Lake County (USEPA will address the I/M portion of Indiana's Ozone plan for Clark and Floyd Counties in future **Federal Register** notice(s).) It is retaining its July 14, 1987 (52 FR 26404) proposed approval of the remainder of Indiana's I/M program. Based on its proposed disapproval of the enforcement portion of the I/M program, USEPA is proposing to limit certain Federal highway, air quality, and sewage treatment funding assistance for Lake and Porter Counties and to impose in these same Counties under Section 173(4) of the Clean Air Act (Act), a volatile organic compound (VOC) major stationary source construction moratorium for failure to implement the I/M program as part of the 1979 Ozone SIP, and a CO major stationary source construction moratorium in the nonattainment area of Lake County for failure to implement the 1979 CO SIP. In addition, pursuant to Section 110(a)(2)(I) of the Act, USEPA is proposing to impose a ban on the construction of major sources of CO in the Lake County CO nonattainment area. (This construction ban has already been imposed in Lake and Porter Counties for major VOC sources.) USEPA's proposed actions today are based on Indiana's failure to submit an adequate permanent I/M enforcement program as part of its 1982 Ozone and CO SIP (Ozone/CO SIP) submittals for the respective counties.

The funding limitations apply to Federal funds provided under the Clean Air Act (Act) and Title 23 of the United States Code. The USEPA is reproposing to impose Federal funding and construction restrictions pursuant to sections 176(a), 176(b), and 173(4), of the Act. USEPA is also proposing to impose Federal sewage treatment funding restrictions pursuant to section 316(b) of the Act.

DATES: The public hearings on the proposed Federal funding restrictions will be held at the locations listed below. The hearing in Lake and Porter Counties, Indiana will be held on April 13, 1989, starting at 10:30 a.m. USEPA is keeping the public comment period open until May 13, 1989, to provide an opportunity for submission of rebuttal information and supplementary information. Written comments must be submitted by: May 15, 1989.

ADDRESS: The public hearing on these issues will be held at:

Lake and Porter Counties Public Hearing:

County Commissioners Court Room, Board of Commissiners of Lake County, 2293 North Main Street, Crown Point, Indiana 46307.

Copies of Indiana's SIP revision submittal, USEPA's proposals and rulemakings, and other documents pertinent to today's proposal are available at the following addresses for review: (It is recommended that you telephone Robert B. Miller, at (312) 353-0396, before visiting the Region V office.

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch, 230 South Dearborn Street, Chicago, Illinois 60604.

Indiana Department of Environmental Management, 105 South Meridian Street, P.O. Box 6015, Indianapolis, Indiana 64206-6015.

Comments on this proposed rule should be addressed to: (Please submit an original and three copies, if possible.)

Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Jay Bortzer, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, Chicago, Illinois 60604, (312) 886-1430.

SUPPLEMENTARY INFORMATON: Congress amended the Clean Air Act, 42 U.S.C. 7401 *et seq.*, in 1977 to address the major health problems posed by the failure of certain areas to attain the NAAQS. Congress required States to revise their SIPs to provide for attainment of the standards by December 31, 1982, and to submit the revised plans to USEPA by January 1, 1979. For areas with serious ozone or carbon monoxide (CO)

problems where the States demonstrated they were unable to attain these standards by the end of 1982, even with the implementation of all reasonably available measures, Congress allowed an extension of the attainment date to December 31, 1987 (section 172(a)(2)).

In return for this extension, the Act requires States to submit additional air pollution control measures in their 1979 ozone/CO SIP revisions (section 172(b)(11)). One such additional measure was a schedule for implementation of an I/M program, which included certification that the State and local governments had the legal authority to implement and enforce the program (sections 110(a)(2)(f), 172(b)(10), and 172(b)(11)(B)).

The State of Indiana requested an extension of the ozone attainment deadline to 1987 for Clark, Floyd, Lake and Porter Counties, and for carbon monoxide for a subportion of Lake County. USEPA approved the request on February 11, 1982 (47 FR 6274). Therefore, the Act requires Indiana to implement an I/M program in these counties.

On January 2, 1981 (46 FR 96), USEPA conditionally approved the revised 1979 Indiana ozone/CO SIP, including the State's commitment to implement I/M. The Indiana SIP included certification that the State had legal authority to implement and enforce an I/M program, and also contained a schedule for the completion of all actions necessary to implement the program by January 1, 1983. However, USEPA required the State, as part of the conditional approval, to submit a detailed description of its enforcement mechanism, including procedures, penalties, letters of commitment from responsible enforcement agencies, and other elements required in USEPA's I/M policy (see January 19, 1981 memorandum from the Deputy Assistant Administrator for Mobile Source Air Pollution Control to the Air and Hazardous Materials Division Directors, Region I–X; September 24, 1980; memorandum from the Assistant Administrator, Office of Air, Noise, and Radiation, to the Regional Administrator, Regions I–X; February 21, 1979; memorandum from the Assistant Administrator for Air, Noise, and Radiation, to the Regional Administrators, I–X; July 17, 1978; memorandum from the Assistant Administrator for Air and Waste Management to the Regional Administrators, Regions I–X; and the January 22, 1981, **Federal Register**, 46 FR 7182).

Indiana submitted its draft 1982 revisions to its ozone/CO SIP on September 2, 1982. If adopted, this plan would have formally withdrawn the 1979 commitment to implement an I/M program. The plan additionally stated that a new I/M program would not be readopted unless attainment would not otherwise occur by December 31, 1987, as indicated by future air quality data.

In a letter dated November 10, 1982, USEPA provided its evaluation of and comments on Indiana's September 2, 1982, submittal. In the letter, USEPA stated that the I/M portion of Indiana's September 2, 1982, plan did not contain the various elements required under USEPA's 1982 SIP policy, in that there were no commitments to implement I/M by December 31, 1982, and no rules and regulations for I/M were included.

On February 3, 1983 (48 FR 5106), USEPA proposed to disapprove the I/M portion of the 1982 Indiana ozone/CO SIP for these same reasons. On March 22, 1983, USEPA notified affected Federal, State, and local agencies, that the USEPA/Department of Transportation (DOT) procedures for imposing funding limitations under section 176(a) were being initiated. This notification started a 30-day consultation period in accordance with these procedures.

To ensure that Federal funds do not further contribute to the already serious air pollution problem and to encourage state cooperation, Congress adopted section 176(a) of the Act. Section 176(a) of the Act requires withholding of certain Federal assistance funds for highway construction and air quality programs, if the USEPA Administrator finds that a State has failed to submit, or to make reasonable efforts to submit, a SIP which considers each of the elements of section 172 of the Act, including the requirement for I/M. On April 10, 1980, after prior notice and public comment, USEPA and the Department of Transportation published their final policies and procedures for imposing funding restrictions under section 176(a) (45 FR 24692).

On August 3, 1983, USEPA proposed air quality funding restrictions and a construction moratorium under sections 176(b) and 173(4) of the Act for the State's failure to implement the approved 1979 Indiana ozone/CO SIP, in particular, the I/M commitment USEPA had approved and incorporated into the State's 1979 SIP (48 FR 35316).

Subsequently, the State of Indiana renewed its commitment to implement an I/M program and adopted Indiana rule 325 IAC 13.1–1, Motor Vehicle Inspection and Maintenance Requirements. A contract was established with Indiana Vocational Technical College to conduct the testing program. The program began inspecting vehicles on May 31, 1984. Throughout the development period, USEPA sought a detailed description of the I/M endorcement mechanism for review prior to the start of testing. The State explored several possible mechanisms, but failed to adopt any of them. Indiana submitted its final 1982 zone/CO SIP on December 2, 1983, and this SIP addressed I/M. However, the SIP lacked the required detailed I/M enforcement description. USEPA documented its concern regarding the I/M program in a memorandum dated January 23, 1984, which was forwarded to the State, as well as in direct correspondence to the State on September 28, 1984, and December 21, 1984. Additionally, USEPA published a revised Notice of Proposed Rulemaking (NPR) in the **Federal Register** on October 9, 1984 (49 FR 39574) addressing this issue. A Technical Support Document dated June 29, 1984, in support of the October 9, 1984, NPR extensively reviewed these issues.

Besides addressing I/M deficiencies, the October 9, 1984, NPR also proposed to approve Indiana's CO SIP for the nonattainment area of Lake County because the State's plan provided for an emissions reduction of over 50% from 1980 to 1987, which would result in NAAQS attainment in the nonattainment area by 1987.

On February 6, 1985, Governor Robert D. Orr proposed to enforce the I/M program by establishing a $100 fine to be shared evenly by the State and the local law enforcement agency issuing the citation. The Governor also proposed a one-time $5 vehicle excise tax credit to the owners of tested vehicles. The State included these two I/M enforcement elements in its February 8, 1985, official response to the October 9, 1984, NPR. The State also indicated its intention to pursue vehicle registration suspension for noncomplying vehicles.

On March 13, 1985, USEPA informed Governor Orr that the proposed July 1986 implementation of the shared fine was unacceptable since it potentially allowed violators to avoid compliance for longer than two years. USEPA indicated that a registration suspension of denial system would be more effective; however, USEPA acknowledged that such a program could not be started before January 1986. Therefore, USEPA informed the Governor that an interim enforcement mechanism was necessary to increase

compliance until the State established a permanent means of enforcement. USEPA subsequently notified the Federal Highway Administration (FHWA) on April 15, 1985, that the 30-day consultation period under Section 176(a) procedures was being reinitiated for the State of Indiana (45 FR 24692).

A meeting was held on May 9, 1985, between USEPA, FHWA, and the State to discuss the Federal highway funding restriction process and any action by the State to satisfactorily resolve the problem. At the conclusion of the meeting USEPA informed FHWA and the State that USEPA must continue its projected schedule to impose restrictions, due to the lack of concrete action by the State to immediately begin enforcement of the I/M program.

Because the State failed to submit a detailed description of an enforcement mechanism, USEPA proposed on January 21, 1986, (see 51 FR 2732) to disapprove the I/M portion of the ozone/CO SIP and to impose Federal funding restrictions on Clark, Floyd, Lake, and Porter Counties, pursuant to section 176(a) of the Act.

On March 7, 1986, Governor Orr signed legislation authorizing suspension of registration of non-complying vehicles. On April 7, 1986, (51 FR 11756), further action to limit Federal funding assistance and to impose the construction moratorium was indefinitely postponed because the State enacted the suspension of registration authorizing legislation.

A letter was sent to Indiana by USEPA on September 24, 1986, informing the State that it was acceptable to begin enforcement of the I/M program against non-compliers beginning with the then-current test cycle, which commenced on March 1, 1986. Accordingly, the Indiana Department of Environmental Management (IDEM) targeted December 15, 1986, as the date to send out the first non-compliance notices. Since then, the two agencies responsible for sending out the warning notices (IDEM) and the suspension notices (the Bureau of Motor Vehicles (BMV)), have fallen increasingly behind the notice schedule.

According to the State's calculations, the overall compliance rate for the second cycle of the program was 67.6%, and the State had only suspended 38 vehicle registrations.

On January 26, 1987, USEPA reproposed to approve Indiana's attainment demonstration for the CO nonattainment area in Lake County based on an eatimated 35% emission reduction from 1981 to 1987 provided by the Federal Motor Vehicle Control Program through pollution controls on late-model vehicles. Available monitoring data showed that a CO emission reduction of 10% from 1981 levels was necessary to achieve the NAAQS by 1987. (Because of the deficiencies in the I/M program discussed below, however, USEPA today is reproposing to disapprove the CO SIP for the nonattainment area of Lake County.)

On July 14, 1987, (52 FR 26404), USEPA proposed to disapprove the Indiana 1982 ozone plan as not meeting all the requirements of Part D.[1] This notice included a proposed disapproval of that portion of the I/M program which addresses funding and resources for enforcement, because of a failure by the State to provide funding for program enforcement. USEPA further proposed to approve all other portions of the I/M program because the State's submittal of September 30, 1986, and February 18, 1987, addressed the outstanding issues cited in the October 9, 1984, **Federal Register**. The State had not, however, adequately addressed funding and resources for enforcement.

On August 12, 1987, USEPA notified Indiana Governor Orr that because of the lack of an effective enforcement program, low compliance rate, and lack of program funding, USEPA was beginning the process to impose Federal highway and air quality funding restrictions, to impose a construction moratorium, and to initiate the 30-day consultation period as specified in the previously cited April 10, 1980, **Federal Register**. The 30-day consultation period was initiated in a letter dated August 12, 1987, to the Regional Administrator of the FHWA.

In a letter dated September 8, 1987, Governor Orr indicated that approximately $56,000 in new funds were being provided for the enforcement effort, and that IDEM and BMV had agreed to a new streamlined enforcement process. At Indiana's request, on September 11, 1987, the USEPA met with representatives of IDEM and the FHWA to discuss the reasons why USEPA was pursuing Federal funding and construction restrictions. USEPA representatives explained that, while the State's efforts are important steps towards enforcing the Emission Testing Program, USEPA will proceed to impose Federal highway and air quality funds, as well as a major stationary source construction moratorium, because the State's efforts, by themselves, do not assure that the suspension of registrations for noncomplying vehicles will be routine and expeditious, and that a sufficiently high level of compliance will be achieved and maintained.

In a December 23, 1987, letter to the Regional Administrator, Governor Orr informed USEPA that an additional $258,000 was being made available to enforce the program. In a response dated January 15, 1988, USEPA informed Governor Orr that while additional funding has been provided, the State must demonstrate that enforcement will be routine and expeditious.

Compliance and enforcement statistics from the first two cycles (May 1984 to December 1987) demonstrates that the State has failed to implement an enforcement program. Only 38 registrations have been suspended over the four years and each cycle has had in excess of 100,000 non-compliers. Further, even though significant amounts of additional funds for enforcement have been provided, no other enforcement action of a routine and expeditious nature has occurred.

USEPA believes that the State of Indiana (1) has failed to implement the I/M program approved as part of the 1979 Ozone/CO SIP in Lake and Porter Counties and (2) has also failed to submit an adequate enforcement mechanism as part of the 1982 Ozone/CO SIP. While it appeared that the September 30, 1986, enforcement mechanism was approvable, USEPA has concluded that the enforcement mechanism is not approvable because it has not met USEPA's requirement that violations are cited and prosecuted as routinely and expeditiously as are vehicle registration violations. (See January 19, 1981, policy memoranda from the Deputy Assistant Administrator for Mobile Source Air Pollution Control to Air and Hazardous Materials Division Directors, Regions I–X).

The State had initially pointed to the fact that insufficient resources was the reason registration suspensions did not occur in a routine and expeditious manner. However, even after additional resources were provided suspensions have not occurred. USEPA concludes that the enforcement mechanism established by the State is not workable due to systemic problems particular to the State of Indiana.

Prior to a vehicle's registration being suspended seven distinct steps must take place. The steps include: (1) An initial notice; (2) a determination of noncompliance after notices are returned; (3) IDEM notifies BMV by computer tape of violators; (4) BMV

[1] USEPA disapproved Indiana's overall Part D ozone plan for Lake and Porter Counties on November 18, 1988 (53 FR 46608). It will take action on the Clark and Floyd Counties plan in future **Federal Register** notice(s).

sends notices of registration suspensions and provides a listing of notices mailed to IDEM; (5) responses to notices of registration suspensions are returned to BMV by citizens; (6) BMV gives notices to IDEM after sorting into two categories; (7) IDEM determines and notifies BMV by computer tape of noncompliance after processing the notices provided by BMV; and, 8) BMV suspends registrations. Additional steps are required if a citizen requests an administrative hearing.

This process has proved to be cumbersome and lengthy and has not resulted in routine and expeditious enforcement. Even with additional enforcement resources, the enforcement process has not became routine and expeditious.

USEPA believes that the Indiana process cannot be routine and expeditious due to the following process characteristics: the large amounts of information that must be transferred between two State agencies; the assignment of comparable priority to the enforcement action by two State agencies; the necessary sorting and processing that each State agency must perform; and the quality control checks to ensure that the State does not inadvertently suspend the registration of a citizen who ultimately came into compliance. Therefore, the State has failed to submit an enforcement mechanism that results in routine and expeditious enforcement. Consequently, the State did not submit an enforcement mechanism that can be approved by USEPA as meeting the Ozone/CO SIP approval criteria.

Clark and Floyd Counties

This proposed rulemaking does not apply to Clark and Floyd Counties. Over the past few months local law enforcement officials in Clark and Floyd Counties have initiated a local enforcement program consisting of issuing citations to motorists not displaying a valid windshield sticker. Roadblocks have also been set up to check vehicles for valid windshield stickers. When a citation is issued the violator(s) must appear in court and is subject to a minimum $100.00 fine.

In a March 1985 letter to Governor Orr, the Governor was informed that, "If the State is to avoid the imposition of Federal construction and funding restrictions, State and Local law enforcement agencies need to * * * aggressively issue citations for I/M noncompliance * * *". The Governor was further informed that an interim enforcement mechanism was necessary to increase compliance until the State established a permanent means of enforcement.

Clark and Floyd Counties are not included in this proposal because local law enforcement officials are aggressively pursuing enforcement through an interim enforcement mechanism. However, for Federal funding and construction restrictions to be ultimately avoided by Clark and Floyd Counties, the State must establish a permanent means of enforcement. If the State fails to do this, then Federal restrictions will be imposed in Clark and Floyd Counties in addition to those proposed in Lake and Porter Counties. Were Lake and Porter Counties to initiate a similar sticker enforcement effort, USEPA would continue to view it as an interim measure and would only delay the imposition of sanctions in response to State establishment of a permanent, approvable mechanism. USEPA will rulemake on Indiana's ozone plan, including I/M and any possible sanctions, for Clark and Floyd Counties in future **Federal Register** notice(s).

Proposed Findings

On July 14, 1987 (52 FR 26404), USEPA proposed to find that the State of Indiana failed to appropriate adequate resources and funding for enforcement and oversight of the I/M program portion of the 1982 Ozone/CO SIP as required by section 172(b)(7) of the Act. Adequate resources and funding have been provided, but the State continues to experience serious problems with enforcement. The State has only suspended 38 vehicle registrations while tens of thousands of vehicles are not in compliance with program requirements. USEPA is proposing to disapprove Indiana's enforcement program in Lake and Porter Counties because it does not meet USEPA policy requirements that enforcement be as routine and expeditious as are vehicle registration violations. Consequently, USEPA, is:

1. Proposing to find that the State has failed to implement the I/M program approved as part of its 1979 Ozone/CO SIP in Lake and Porter Counties.

2. Re-proposing to impose the construction moratorium under section 173(4) and re-proposing to impose the air quality funding restrictions under 176(b) in Lake and Porter Counties for the State's failure to implement its approved 1979 Ozone/CO SIP.

The construction moratorium is for the construction of major sources of volatile organic compound emissions and the major modification of such existing major sources in Lake and Porter Counties, and the construction of new major sources and the major modification of such CO sources in the nonattainment area of Lake County.

3. Retaining its July 14, 1987, proposed approval of all elements of Indiana's 1982 I/M program, except for the enforcement program.

4. Proposing to find that the State has failed to submit an adequate enforcement program as part of its 1982 Ozone/CO SIP.

5. Proposing to disapprove the CO SIP for the nonattainment area of Lake County for the failure to submit an adequate I/M enforcement progam as part of its 1982 CO SIP.

6. Proposing to impose a construction ban for major new CO sources and major modifications of existing CO sources in the CO nonattainment area in Lake County, as required by section 110(a)(2)(I) of the Act. (This construction ban was imposed on December 18, 1988, in Lake and Porter Counties for major VOC sources. See USEPA's November 18, 1988, ozone plan disapproval notice.)

7. Re-proposing to impose the Federal highway and air quality funding restrictions in Lake and Porter Counties, under Section 176(a), for the State's failure to submit or to make reasonable efforts to submit an adequate 1982 Ozone/CO SIP revision.

8. Proposing to impose the section 316(b) sewage treatment funding restrictions in Lake and Porter Counties for the State's failure to implement the approved 1979 Ozone/CO SIP, and for failure to submit an approvable 1982 Ozone/CO SIP.

During the public comment period, USEPA will consider any comments on this issue. If Indiana fails to remedy this situation before USEPA takes final action, the resulting funding limitations and construction restrictions pursuant to sections 110(a)(2)(I), 176(a), 176(b), 173(4), and 316(b) will become effective 30 days after the final rulemaking is published in the **Federal Register**. Upon the effective date of the final rulemaking, the Secretary of Transportation will not approve any projects nor award any grants in Lake and Porter Counties, under Title 23 of the United States Code, except for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance.

On August 3, 1983, USEPA discussed the formulas for withholding Clean Air Act Section 105 air pollution control funds if that became necessary for any particular State (48 FR 35312). The formula USEPA proposed as the preferred formula, would add all Clean Air Act funds which would normally be awarded to all levels of government in the State, and would withhold from that

total a percentage which is equal to the percentage of the State's population residing in the nonimplementation I/M urbanized areas. Direct grants made to local government agencies responsible for I/M implementation would be affected first, with any remaining restrictions to be applied against State funds. If the State is the only level of government responsible for I/M implementation, which USEPA believes is the case for Lake and Porter Counties, USEPA would subtract from the amount to be withheld from the State any funds that are granted directly to local government agencies in the urbanized areas, because USEPA believes these local funds are exempt from the funding restrictions. This is the formula which will be used for Indiana. The U.S. Court of Appeals for the Tenth Circuit upheld this approach in *New Mexico Environmental Improvement v. Thomas*, 789 F.2d 825 (10th Cir. 1986).

In the August 11, **Federal Register** (45 FR 53382), USEPA published its policy and procedures for implementing the municipal wastewater treatment works construction grants limitations provided in section 316 of the CAA. Section 316 allows the Administrator of USEPA to withhold, condition or restrict grants for construction of sewage treatment works under the following situation: (1) Where the treatment works will not comply with new source performance standards or with National Emission Standards for Hazardous Air Pollutants; (2) where the State is not carrying out the SIP or there is not an USEPA approved SIP that provides for the increase of each pollutant that is reasonably anticipated to result either directly or indirectly from proposed new sewage treatment construction; (3) where construction of the proposed treatment works will create new sewage treatment capacity that may reasonably be anticipated to cause or contribute to, directly or indirectly, an increase in emissions of any pollutant in excess of the increase provided for under the SIP; (4) where the proposed new sewage treatment capacity will otherwise not be in conformity with the SIP; and, (5) where the increased emissions associated with the proposed new sewage treatment capacity will interfere with, or be inconsistent with the SIP for any other State. The reader should refer to the August 11, 1980, **Federal Register** in conjunction with today's proposal.

It is noted that because of the period of time since the above policy and procedures were first published and because of changes in USEPA's construction grants program, USEPA is giving consideration to revising the policy to update it. Any such revisions will be the subject of a future **Federal Register**. However, the current policy will remain in effect until any new policy is published.

USEPA solicits comments on what action the State would have to take before USEPA should lift these restrictions, if it is the Agency's final decision to impose these restrictions.

Opportunity for Public Hearing

USEPA is announcing a public hearing on its proposed actions regarding Federal funding and construction restrictions for Lake and Porter Counties. The hearing will be held on April 13, 1989 at 10:30 am, County Commissioners Courtroom, Board of Commissioners of Lake County, 2293 North Main Street, Crown Point, Indiana 46307.

Request for Public Comment

Interested parties are invited to comment on all aspects of the proposed findings including USEPA's proposed action to impose Federal funding and construction restrictions. USEPA will consider all testimony received at the public hearing. Additionally, USEPA will keep the public comment period open until 30 days after the last public hearing date to provide an opportunity for submission or rebuttal information and supplementary information.

Regulatory Impact

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. Under 5 U.S.C. 605(6), this requirement may be waived if the Agency certifies that the rule will not have a significant economic effect on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and governmental entities with jurisdiction over populations of less than 50,000.

If USEPA takes final action, a moratorium on construction and modification of major stationary sources of the pollutant for which an attainment extension was granted for a specific area will go into effect. A major stationary source for this purpose is any source which emits, or has the potential to emit, 100 tons per year or more of the relevant pollutant (see 40 CFR 52.24(f)(4) (1986)). The moratorium would also prohibit major modifications, which are physical changes in the operation of a source that would result in a significant net increase of a pollutant. (See 40 CFR 52.24(f)(5) (1986).) Thus, some small entities might be affected by final Agency action.

USEPA has, in the past, made efforts to quantify the impact of the Act rules on the construction and modification of sources, but has been unable to do so. USEPA's lack of success is due, in part, to the need to obtain information on future plans for business growth. This information is difficult to obtain, as businesses are understandably reluctant to make their plans public. Consequently, USEPA is making no quantified assessment of the potential economic impact on small entities from today's proposal.

Although USEPA believes that a final action to impose the construction restrictions might have some impact on small entities, this impact cannot affect the Agency's actions. Under the Clean Air Act, the imposition of the construction moratorium is automatic and mandatory whenever the Agency determines that an approved or promulgated SIP is not being implemented in a nonattainment area.

Final action on today's proposal also could result in withholding of portions of air pollution control funds, provided for under Section 105 of the Act, from certain areas in Indiana. However, since today's proposal does not affect any areas with populations of less than 50,000, the governmental entities affected by any funding limitations do not fall within the definition of "small entities".

If USEPA takes final action and finds that the State has failed to submit, and is not making reasonable efforts to submit, a SIP that considers each of the elements required by Section 172, certain highway construction funds under Title 23 of the United States Code, and air quality planning funds under the Clean Air Act, and certain sewage treatment plant funds will be withheld. Thus, some small entities probably will be affected by final USEPA action.

USEPA cannot predict reliably the impact of Clean Air Act restrictions under Section 176(a) because of the exemptions authorized for highway and air quality planning projects. Careful review and evaluation of each project is necessary to determine whether or not a project is exempt. Consequently, USEPA is making no quantified assessment of the potential economic impact on small entities that may result from today's proposal.

While a final action to impose Federal highway and air quality funding restrictions might have some impact on small entities this impact cannot affect the Agency actions under the Act because the imposition of Section 176(a)

funding restrictions are automatic and mandatory whenever the Agency determines that a State has failed to submit or made reasonable efforts to submit a SIP which addresses each of the elements of Section 172, Similarly, USEPA can not reliably predict the impact of the Clean Water Act restrictions under Section 316(b), because growth projections specifically related to impact projects are not available. However, the Agency believes that the number of small entities (cities and towns) affected by these restrictions will not be substantial.

Under Executive Order 12291, this action is not "Major". It has been submitted to the Office of Management and Budget (OMB) for review.

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Ozone.

Authority: 42 U.S.C. 7401–7642.

Dated: December 11, 1987.

Frank M. Covington,

Acting Regional Administrator.

Editorial Note: This document was received at the Office of the Federal Register on March 8, 1989.

[FR Doc. 89–5696 Filed 3–10–89; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 228

[FRL–3534–1]

Ocean Dumping; Proposed Designation of Sites

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA today proposes to designate two new dredged material disposal sites located in the Gulf of Mexico offshore of Freeport Harbor, Texas. One site is for the one time disposal of 5.1 million cubic yards (mcy) of construction material; the other site is for the disposal of 2.1 mcy of future maintenance material dredged annually for the expanded and relocated Freeport Harbor Entrance and Jetty Channels. This action is necessary to provide acceptable ocean dumping sites for the disposal of material from the Army Corps of Engineers 45-Foot Project at Freeport Harbor, Texas. This proposed site designation is for an indefinite period of time.

DATE: Comments must be received on or before April 27, 1989.

ADDRESSES: Send comments to: Norm Thomas, Chief, Federal Activities Branch (6E–F), U.S. E.P.A., 1445 Ross Avenue, Dallas, Texas 75202–2733.

Information supporting this proposed designation is available for public inspection at the following locations:

EPA, Region 6 (E–FF), 1445 Ross Avenue, 10th Floor, Dallas, Texas 75202–2733.

Corps of Engineers, Galveston District, 444 Barracuda Avenue, Galveston, Texas 77550.

FOR FURTHER INFORMATION CONTACT: Norm Thomas 214/655–2260 or FTS/255–2260.

SUPPLEMENTARY INFORMATION:

A. Background

Seciton 102(c) of the Marine Protection, Research, and Sanctuaries Act of of 1972, as amended, 33 U.S.C. 1401 et seq. ("the Act") gives the Administrator of EPA the authority to designate sites where ocean dumping may be permitted. On December 23, 1986, the Administrator delegated the authority to designate ocean dumping sites to the Regional Administrator of the Region in which the site is located. This proposed site designation is being made pursuant to that authority.

The EPA Ocean Dumping Regulations (40 CFR Chapter I, Subchapter H, § 228.4) state that ocean dumping sites will be designated by publication in Part 228. This site designation is being published as proposed rulemaking in accordance with § 228.4(e) of the Ocean Dumping Regulations, which permits the designation of ocean disposal sites for dredged material. Interested persons may participate in this proposed rulemaking by submitting written comments within 45 days of the date of this publication to the EPA Region 6 address given above.

B. EIS Development

Section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, ("NEPA") requires that Federal agencies prepare Environmental Impact Statements (EISs) on proposals for major Federal actions significantly affecting the quality of the human environment. While NEPA does not apply to EPA activities of this type, EPA has voluntarily committed to prepare EISs in connection with its ocean dumping site designations (30 CFR 16186, May 7, 1974).

EPA has prepared a Draft Environmental Impact Statement entitled "Environmental Impact Statement (EIS) for the Freeport Harbor, Texas (45-Foot Project) Ocean Dredged Material Disposal Site Designation." On February 17, 1989 a notice of availability of the Draft EIS for public review and comment was published in the Federal Register. The public comment period of this Draft EIS closes on April 3, 1989. Limited copies of the Draft EIA are available from the EPA address given above.

The proposed action discussed in the EIS is designation of two ocean disposal sites for dredged material. The purpose of the designation is to provide environmentally acceptable locations for ocean disposal. The appropriateness of ocean disposal is determined on a case-by-case basis.

The EIS discusses the need for the action and examines ocean disposal sites and alternatives to the proposed action. The general alternatives examined were the no-action alternative; upland disposal; and ocean disposal, including a mid-shelf site, a continental slope site, and three near-shore sites, including the existing or historically-used site. The no-action alternative would require the Corps to develop an alternative disposal method (e.g., land based) or modify or cancel the project. The no action alternative was not considered feasible. Upland disposal was determined not practicable because there are not sufficient upland sites available to accomodate both the virgin and maintenance material from the 45-Foot Project and the Corps routine maintenance material.

The mid-shelf and continental slope alternatives were not considered feasible because of safety and economic considerations, limits on monitoring and surveillance, and the lack of any environmental benefits by utilizing sites that far offshore.

Ocean disposal sites were identified by determining a zone of siting feasibility (ZSF) and then screening out those sites which impacted biologically sensitive areas, beaches and recreational areas, the navigation channel, cultural or historical rersources, etc.

Evaluation of the historically-used disposal site, which is still utilized by the Corps for disposal of routine maintenance material, showed the site to be located in the biological buffer zone area and that it contained an inappropriate grain-size regime for disposal of the construction material. Because of these reasons the existing, historically-used site is not being proposed for designation.

The preferred ocean disposal site for the virgin material is located in the 55-foot isobath and in the silty-clay regime. The preferred size of the virgin ocean dredged material disposal site (ODMDS) was determined, based on models of the ocean discharge of dredged material, to

be 5,280 feet in a direction parallel to the Channel (northwest/southeast) and 11,380 feet in a direction perpendicular to the Channel (northeast/southwest). The maintenance material disposal site is located in a silty-sand regime closer to shore. The preferred size of the maintenance material ODMDS is 4,500 feet parallel to the Channel and 12,500 feet perpendicular to the Channel.

EPA is coordinating with the National Marine Fisheries Service in accordance with the requirements of Section 7 of the Endangered Species Act. EPA is also coordinating, as a part of the NEPA/EIS process, with the State of Texas regarding any requirements under the Coastal Zone Management Act.

C. Proposed Site Designation

The preferred site for disposal of the virgin material is located about six miles from the coast and occupies an area of 2.64 square nautical miles. The coordinates of the site are as follows:

28°51'22" N, 95°14'25" W; 28°50'28" N, 95°13'30" W; 28°48'58" N, 95°15'24" W; 28°49'55" N, 95°16'19" W.

The preferred site for disposal of the maintenance material is located about three miles from the coast and occupies an area of 1.53 square nautical miles. The coordinates of the site are as follows:

28°54'00" N, 95°15'49" W; 28°53'28" N, 95°15'16" W; 28°52'00" N, 95°16'59" W; 28°52'32" N, 95°17'32" W.

D. Regulatory Requirements

Five general criteria are used in the selection and approval of ocean disposal sites for continuing use. Sites are selected so as to minimize interference with other marine activities, to keep any temporary perturbations from the dumping from causing impacts outside the disposal site, and to permit effective monitoring to detect any adverse impacts at an early state. Where feasible, locations off the continental shelf are chosen. If disposal operations at a site cause unacceptable adverse impacts, further use of the site may be terminated or limitations placed on the use of the site to reduce the impacts to acceptable levels. The general criteria are given in § 228.5 of the EPA Ocean Dumping Regulations; § 228.6 lists eleven specific factors used in evaluating a proposed disposal site to assure that the general criteria are met. The characteristics of the proposed sites are reviewed below in terms of the eleven factors.

1. Geographical Position, Depth of Water, Bottom Topography and Distance from Coast (40 CFR 228.6(a)(1).)

The geographical positions of the sites are given above. The water depth at the site for the construction material is from 54 to 63 feet; the topography is flat; and the site is located about six miles from the coast at its closest point. The water depth at the site for the maintenance material ranges from 31 to 38 feet; the topography is flat; and the site is located about three miles from shore at its closest point.

2. Location in Relation to Breeding, Spawning, Nursery, Feeding, or Passage Areas of Living Resources in Adult or Juvenile Phases (40 CFR 228.6(a)(2).)

At the southeast border of the ZSF, there is a white shrimp breeding area, a sport and commercial fishing harvest area, and a reef area. At the northeast border, there is a small collection of coral heads (reefs), providing habitat which improves fishing. This area and the jetties, plus buffer zones are excluded from consideration. Also excluded are lighted platforms and non-submerged shipwrecks which improve fishing.

3. Location in Relation to Beaches and Other Amenity Areas (40 CFR 228.6(a)(3).)

The preferred sites for virgin and maintenance material disposal are roughly six miles and three miles, respectively, from beaches or other amenity areas.

4. Types and Quantities of Wastes Proposed to be Disposed of, and Proposed Methods of Release, Including Methods of Packing the Wastes, If Any (40 CFR 228.6(a)(4).)

Virgin construction material (5.1 mcy) only will be discharged into the virgin material disposal site. Only maintenance dredged material from the Freeport Harbor Entrance and Jetty Channels will be disposed in the maintenance material disposal site. Historically, an average of one mcy/yr is dredged from the channel at roughly ten-month intervals. This material has historically been transported by hopper dredges but could be transported by pipeline. With the proposed modifications, it is anticipated that future maintenance material will equal 2.1 mcy annually.

5. Feasibility of Surveillance and Monitoring (40 CFR 228.6(a)(5).)

The preferred sites are amendable to surveillance and monitoring. The proposed monitoring and surveillance program for the virgin material consists of: 1) a method for recording the location of each discharge; 2) bathymetric surveys; and 3) grain size analysis, sediment chemistry characterization and benthic infaunal analysis at selected stations. For future maintenance material, the program consists of water, sediment and elutriate chemistry; bioassays; bioaccumulation studies; and bethic infaunal analyses.

6. Dispersal, Horizontal Transport and Vertical Mixing Characteristics of the Area, Including Prevailaing Current Direction and Velocity, If Any (40 CFR 228.6(a)(6).)

Predominant longshore currents, and thus predominant longshore transport, is to the southwest. Long-term mounding has not historically occurred. Therefore, steady longshore transport and occasional storms, including hurricanes, remove the disposed material from the site. Both proposed disposal sites were sized on the basis of modeling of short-term transport.

7. Existence and Effects of Current and Previous Discharges and Dumping in the Area (Including Cumulative Effects) (40 CFR 228.6(a)(7).)

The discussion of the results of chemical and bioassay testing of past maintenance material and material from the existing disposal site plus chemical analyses of water from the area concluded that there were no indications of water or sediment quality problems in the ZSF, including the preferred sites. Testing of past maintenance material indicates that it was acceptable for ocean disposal under 40 CFR Part 227. Studies of the benthos at the existing site and nearby areas have not indicated any significant decrease or change in composition of the benthos.

8. Interference with Shipping, Fishing, Recreation, Mineral Extraction, Desalination, Fish and Shellfish, Culture, Areas of Special Scientific Imporance and Other Legitimate Uses of the Ocean (40 CFR 228.6(a)(8).)

Legitimate uses of the ocean which are pertinent to the Freeport disposal area are shipping, mineral extraction, commercial and recreational fishing, recreational areas and historic sites. The preferred sites were selected so that their use will not interfere with other legitimate uses of the ocean since the alternative screening process was designed to prevent the selection of sites which would interfere. Disposal operations in the past have not interfered with other uses.

9. The Existing Water Quality and Ecology of the Site as Determined by Available Data or by Trend Assessment or Baseline Surveys (40 CFR 228.6(a)(9).)

Monitoring studies indicated only short-term water column perturbations of turbidity, and perhaps Chemical Oxygen Demand (COD), have resulted from disposal operations. No short-term sediment quality perturbation could be directly related to disposal operations. In general, the water and sediment quality is good throughout the ZSF, including the historically-used disposal site. This indicates that there have been no long-term impacts on water and sediment quality. There also appear to be no long-term impact on the benthos at the existing site.

10. Potentiality for the Development or Recruitment of Nuisance Species in the Disposal Site (40 CFR 228.6(a)(10).)

With a disturbance to any benthic community, initial recolonization will be by opportunistic species. However, these species are not nuisance species in the sense that they would interfere with other legitimate uses of the ocean or that they are human pathogens. The disposal of virgin or maintenance material in the past has not, and disposal of the proposed material should not, attract or promote the development or recruitment of nuisance species.

11. Existence at or in Close Proximity to the Site of Any Significant Natural or Cultural Features of Historical Importance (40 CFR 228.6(a)(11).)

The nearest site of historical importance to the virgin material preferred site is approximately 0.5 miles away from the edge of this site in a cross-current direction. For the maintenance material site, the nearest site of historical importance is roughly 1.2 miles from the edge of the site in a cross-current direction. Therefore, use of the preferred sites would not adversely impact known sites of historical importance.

E. Proposed Action

Based on the Draft EIS, EPA proposes to designate two new Freeport Harbor (45-Foot Project) sites for future use for the ocean disposal of dredged material. The sites are compatible with the five general criteria and eleven specific factors used for site evaluation.

Before ocean dumping of dredged material at the sites may occur, the Corps of Engineers must evaluate the project according to EPA's ocean dumping criteria. EPA has the authority to approve or to disapprove or to propose conditions upon dredged material permits for ocean dumping. While the Corps does not administratively issue itself a permit, the requirements that must be met before dredged material derived from Federal projects can be discharged into ocean waters are the same as where a permit would be required.

F. Regulatory Assessments

Under the Regulatory Flexibility Act, EPA is required to perform a Regulatory Flexibility Analysis for all rules which may have a significant impact on a substantial number of small entities. EPA has determined that this action will not have a significant impact on small entities since the site designation will only have the effect of providing a disposal option for dredged material. Consequently, this rule does not necessitate preparation of a Regulatory Flexibility Analysis.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This action will not result in an annual effect on the economy of $100 million or more or cause any of the other effects which would result in its being classified by the Executive Order as a "major" rule. Consequently, this rule does not necessitate preparation of a Regulatory Impact Analysis.

This Proposed Rule does not contain any information collection requirements subject to the Office of Management and Budget review under the paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 228

Water pollution control.

Date: February 28, 1989.

Robert E. Layton, Jr.,

Regional Administrator of Region 6.

In consideration of the foregoing, Subchapter H of Chapter I of Title 40 is proposed to be amended as set forth below.

PART 228—[AMENDED]

1. The authority citation for Part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

2. Section 228.12 is amended by removing the entry for "Freeport Harbor, Texas" from paragraph (a)(3) and by adding paragraphs (b) (76) and (77) to read as follows:

§ 228.12 Delegation of management authority for interim ocean dumping sites.

* * * * *

(b) * * *

(76) Freeport Harbor (45-Foot Project), Texas—Region 6

Location: 28°51'22" N, 95°14'25" W; 28°50'28" N, 95°13'30" W; 28°48'58" N, 95°15'24" W; 28°49'55" N, 95°16'19" W.

Size: 2.64 square nautical miles.

Depth: 54 to 63 feet.

Primary Use: Construction (new work) dredged material.

Period of Use: Indefinite period of time.

Restriction: Disposal shall be limited to dredged material from the Freeport Harbor Entrance and Jetty Channels, Texas.

(77) Freeport Harbor (45-Foot Project), Texas—Region 65.

Location: 28°54'00" N, 95°15'49" W; 28°53'28" N, 95°15'16" W; 28°52'00" N, 95°16'59" W; 28°52'32" N, 95°17'32" W.

Size: 1.53 square nautical miles.

Depth: 31 to 38 feet

Primary Use: Maintenance dredged material.

Period of Use: Indefinite period of time.

Restriction: Disposal shall be limited to dredged material from the Freeport Harbor Entrance and Jetty Channels, Texas.

[FR Doc. 89-5699 Filed 3-10-89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Parts 260, 261, 262, 264, 265, 268 and 270

[FRL-3534-7]

Hazardous Waste Management System; Testing and Monitoring Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of extension of comment period.

SUMMARY: The purpose of this notice is to extend the public comment period on a Notice of Proposed Rulemaking (NPRM) published on January 23, 1989 (54 FR 3212). The NPRM proposed to: (1) Incorporate the Third Edition of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," (SW-846) into the RCRA regulations; (2) update SW-846 with additional methods and information; and (3) mandate minimum Quality Control (QC) procedures for all RCRA testing.

The reason for this extension is to give interested persons additional time to review the many SW-846 analytical methods and the incumbent QC requirements in order to develop meaningful comments. In addition, the Government Printing Office was unable to supply SW-846 subscribers and other interested parties with the proposed update to SW-846 for more than a month following the publication of the NPRM.

Therefore, to ensure that commenters have adequate time to understand the proposed rule, review the proposed update package, and prepare their comments, we are extending the comment period from March 9, 1989 to April 24, 1989.

DATES: The deadline for submitting written comments on the January 23, 1989 notice is extended from March 9, 1989 to April 24, 1989.

ADDRESSES: The public should submit an original and two copies of their comments on this proposed rule to: Docket Number F–89–WTMP–FFFFF, EPA RCRA Docket, OS–305, (Room SE–205), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Please place Docket number on all comments. The collected comments and other information regarding this rulemaking are available for public review in the EPA RCRA docket. The EPA RCRA Docket is located in Room M–2427 at the above address and is open from 9:00 a.m. to 4:00 p.m., Monday through Friday, except Federal holidays. The public must make an appointment to review docket materials by calling (202) 475–9327. The public may copy 100 pages of material from any one regulatory docket at no cost; additional copies cost $0.15 per page.

Copies of the Third Edition of SW–846 of the proposed first update to the Third Edition are available from the Government Printing Office, Superintendent of Documents, Washington, DC 20402, (202) 783–3238. The document number is 955–001–00000–1 and the cost is $110.00 for the four-volume set plus updates. Update packages are being mailed to all subscribers. The proposed first update package may also be ordered from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, (703) 487–4600. The document number is PB89–148–076 and the cost is $61.95 for paper copies and $15.50 for microfiche.

Copies of the Second Edition of SW–846 are also available from NITS. The document number is PB87–120–291 and the cost is $48.95 for paper copies and $13.50 for microfiche.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline at (800) 424–9346 (toll free) or (202) 382–3000. For information on the technical aspects of this proposed rule contact Charles Sellers, Office of Solid Waste, OS–331, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (202) 382–3282.

Jonathan Z. Cannon,

Acting Assistant Administrator.

[FR Doc. 89–5698 filed 3–10–89; 8:45 am]

BILLING CODE 6560–50–M

Notices

Federal Register
Vol. 54, No. 47
Monday, March 13, 1989

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

Agricultural Stabilization and Conservation Service

Feed Grain Donations for the Fort Peck Tribe Indian Reservation in Montana

Pursuant to the authority set forth in section 407 of the Agricultural Act of 1949, as amended (7 U.S.C. 1427) and Executive Order 11336, I have determined that:

1. The chronic economic distress of the needy members of the Fort Peck Tribe Indian Reservation in Montana has been materially increased and become acute because of severe and prolonged drought, thereby creating a serious shortage of feed and causing increased economic distress. This reservation is designated for Indian use and is utilized by members of the Fort Peck Tribe for grazing purposes.

2. The use of feed grain or products thereof made available by the Commodity Credit Corporation (CCC) for livestock feed for such needy members of the Tribe will not displace or interfere with normal marketing of agricultural commodities.

3. Based on the above determinations, I hereby declare the reservation and grazing lands of the Tribe to be acute distress areas and authorize the donation of feed grain owned by the CCC to livestock owners who are determined by the Bureau of Indian Affairs, United States Department of the Interior, to be needy members of the Tribe utilizing such lands. These donations by the CCC may commence upon March 1, 1989, and shall be made available through May 15, 1989, or such other date as may be stated in a notice issued by the USDA.

Signed at Washington, DC on March 7, 1989.

Milton J. Hertz,

Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 89-5685 Filed 3-10-89; 8:45 am]

BILLING CODE 3410-05-M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget

DOC 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).

Agency: Bureau of the Census
Title: 1990 Decennial Census—Field Coding
Form Number: D-374, D-722
Type of Request: New collection
Burden: 41,974 hours
Number of Respondents: 3,228,795
Avg Hours Per Response: 45 seconds
Needs and Uses: This survey is used by the Bureau of the Census to update U.S. Postal Service and commercial vendor address lists.
Affected Public: Individuals or households
Frequency: One time only
Respondent's Obligation: Mandatory
OMB Desk Officer: Francine Picoult, 395-7340

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, Room H6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: March 8, 1989

Edward Michals,

Department Clearance Officer, Office of Management and Organization.

[FR Doc. 89-5726 Filed 3-10-89; 8:45 am]

BILLING CODE 3510-07-M

Agency Form Under Review by the Office of Management and Budget

DOC 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).

Agency: Bureau of the Census
Title: 1990 Decennial Census—Special Place Prelist Operation
Form Number: D-351, D-351(GQ), D-351(HU)
Agency Approval Number: 0607-0621
Type of Request: Revision
Burden: 198,810 hours
Number of Respondents: 265,000
Avg Hours Per Response: 45 minutes
Needs and Uses: The prelist operation is a coverage improvement procedure used by the Bureau of the Census to obtain a complete and correct list of Special Place names and addresses for the 1990 Decennial Census of Population and Housing.
Affected Public: Individuals or households, State or local governments, Farms, Businesses or other for-profit, Federal agencies or employees, Non-profit institutions, and Small businesses or organizations
Frequency: One time only
Respondent's Obligation: Mandatory
OMB Desk Officer: Francine Picoult, 395-7340

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, Room H6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: March 8, 1989.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 89-5727 Filed 3-10-89; 8:45 am]

BILLING CODE 3510-07-M

Agency Form Under Review by the Office of Management and Budget

DOC 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).

Agency: Bureau of the Census
Title: 1990 Decennial Census—Vacant/Delete Check
Form Number: D–160
Type of Request: New Collection
Burden: 144,069 hours
Number of Respondents: 8,626,891
Avg Hours Per Response: 1 minute
Needs and Uses: The Bureau of the Census will use the Vacant/Delete Check to verify that housing units enumerated as 'vacant' or 'delete' during previous census operations were correctly classified.
Affected Public: Individuals or households
Frequency: One time only
Respondent's Obligation: Mandatory
OMB Desk Officer: Francine Picoult, 395–7340

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377–3271, Department of Commerce, Room H6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: March 8, 1989.

Edward Michals,

Department Clearance Officer, Office of Management and Organization.

[FR Doc. 89–5728 Filed 3–10–89; 8:45 am]

BILLING CODE 3510–07–M

Foreign-Trade Zones Board

[Order No. 425]

Resolution and Order Approving the Application of the Indianapolis Airport Authority for a Special-Purpose Subzone at the Subaru-Isuzu Plant in Tippecanoe County, IN

Proceedings of the Foreign-Trade Zones Board, Washington, DC.

Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zone Board (the Board) has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Indianapolis Airport Authority, filed with the Foreign-Trade Zone Board (the Board) on November 6, 1987, requesting special-purpose subzone status for the automobile and truck manufacturing plant of Subaru-Isuzu Automotive, Inc., located in Tippecanoe County, Indiana (Lafayette area), the Board, finding that the requirements of the Foreign-Trade Zone Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the application.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

Grant of Authority To Establish a Foreign-Trade Subzone at the Subaru-Isuzu Plant in Tippecanoe County, Indiana

Whereas, by an act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the Indianapolis Airport Authority, grantee of Foreign-Trade Zone 72, has made application (filed November 6, 1987, FTZ Docket 31–87, 52 FR 44620), in due and proper form to the Board for authority to establish a special-purpose subzone at the automobile and pickup truck manufacturing plant of Subaru-Isuzu Automotive, Inc. (SIA), located in Tippecanoe County, Indiana (Lafayette area);

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and

Whereas, the Board has found that the requirements of the Act and the Board's regulations are satisfied;

Now, Therefore, in accordance with the application filed November 6, 1987, the Board hereby authorizes the establishment of a subzone at the Subaru-Isuzu plant, designated on the records of the Board as Foreign-Trade Subzone No. 72H at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and regulations, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto the Grantee shall obtain all necessary permits from federal, state, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and thoughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve the Grantee from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and the Army District Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zone Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer at Washington, DC, this 6th day of March, 1989, pursuant to Order of the Board.

Foreign-Trade Zone Board.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 89–5720 Filed 3–10–89; 8:45 am]

BILLING CODE 3510–DS–M

International Trade Administration

[A–401–802]

Initiation of Antidumping Duty Investigation; Dry Aluminum Sulfate from Sweden

AGENCY: Import Administration, International Trade Administration; Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating an antidumping duty investigation to determine whether imports of dry aluminum sulfate from Sweden are being, or are likely to be, sold in the United States at less than fair value. We are notifying the U.S. International Trade Commission (ITC) of this action so that it may determine whether imports of dry aluminum sulfate materially injure, or threaten material injury to, a U.S. industry. If this investigation proceeds normally, the ITC will make its preliminary determination on or before March 30, 1989. If that determination is affirmative, we will make a preliminary determination on or before July 24, 1989.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Jim Terpstra, or Kathleen Doering, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 377–4103 or (202) 377–8498, respectively.

SUPPLEMENTARY INFORMATION: .

The Petition

On February 13, 1989, we received a petition filed in proper form by the Delta Chemical Corporation on behalf of the domestic dry aluminum sulfate industry. In compliance with the filing requirements of 19 CFR 353.36, petitioner alleges that imports of dry aluminum sulfate from Sweden are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports materially injure, or threaten material injury to, a U.S. industry.

If any interested party as described under paragraphs (C), (D), (E), or (F) of section 771(9) of the Act wishes to register support of or opposition to this petition, please file written notification with the Commerce officials cited in the **"FOR FURTHER INFORMATION CONTACT"** section of this notice.

United States Price and Foreign Market Value

Petitioner's estimate of United States price (USP) is the declared F.A.S value per ton of aluminum sulfate imported from Sweden. This figure is based on IM–145 statistics for November 1988. Petitioner made no adjustments to USP. Petitioner's estimate of foreign market value (FMV) is based on a home market F.O.B. price quote for November 1988. Petitioner made no adjustments to FMV. Based on a comparison of FMV to the USP, petitioner alleges a dumping margin of 60.80 percent.

Petitioner also alleges that "critical circumstances" exist, within the meaning of section 733(e) of the Act, with respect to imports of dry aluminum sulfate from Sweden.

Initiation of Investigation

Under section 732(c) of the Act, we must determine, within 20 days after a petition is filed, whether it sets forth the allegations necessary for the initiation of an antidumping duty investigation, and whether it contains information reasonably available to the petitioner supporting the allegations.

We examined the petition on dry aluminum sulfate from Sweden and found that it meets requirements of section 732(b) of the Act. Therefore, in accordance with section 732 of the Act, we are initiating an antidumping duty investigation to determine whether imports of dry aluminum sulfate from Sweden are being, or are likely to be, sold in the United States at less than fair value. If our investigation proceeds normally, we will make a preliminary determination by July 24, 1989.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the United States fully converted to the *Harmonized Tariff Schedule* (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item number(s). The product covered by this investigation is dry aluminum sulfate from Sweden, a dry white granular material used in water purification, waste water treatment, and for industrial uses. Petitioner has specifically excluded liquid aluminum sulfate from the scope of the investigation. The dry aluminum sulfate covered by this investigation has a minimum of 17 percent aluminum oxide content, a maximum of 0.2 percent iron, a maximum of 0.5 percent water insolubles, and a range of from 6 to 200 mesh in particle size. Prior to January 1, 1989, such merchandise was classifiable under item 417.1600 of the *Tariff Schedules of the United States Annotated* (TSUSA). This merchandise is currently classifiable under HTS item 2833.22.00. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Notification of ITC

Section 732(d) of the Act requires us to notify the ITC of this action and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonproprietary information. We will allow the ITC access to all privileged and business proprietary information in our files, provided it confirms in writing that it will not disclose such information either publicly or under administrative protective order without the written consent of the Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by March 30, 1989, whether there is a reasonable indication that imports of dry aluminum sulfate from Sweden materially injure, or threaten material injury to, a U.S. industry. If its determination is negative, the investigation will terminate; otherwise, it will proceed according to the statutory and regulatory procedures.

This notice is published pursuant to section 732(c)(2) of the Act.

March 6, 1989.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 89–5722 Filed 3–10–89; 8:45 am]

BILLING CODE 3510–DS–M

[A–401–004]

Certain Carton-Closing Staples and Staple Machines From Sweden, Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration/ Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On October 25, 1988, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on certain carton-closing staples and staple machines from Sweden. The review covers Josef Kihlberg AB and the period December 1, 1985 through November 30, 1986.

We gave interested parties an opportunity to comment on our preliminary results. We received comments from the respondent. Based on our analysis of comments received,

the final results are changed from those presented in the preliminary results of review.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Barbara Victor or Laurie A. Lucksinger, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–5222/5253.

SUPPLEMENTARY INFORMATION:

Background

On October 25, 1988, the Department of Commerce ("the Department") published in the **Federal Register** (53 FR 42991) the preliminary results of its administrative review of the antidumping duty order on certain carton-closing staples and staple machines from Sweden (48 FR 38250, December 20, 1983). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of certain carton-closing staples in strip form and certain non-automatic carton-closing staple machines. Carton-closing staples are U-shaped wide crown fastening devices used to secure and close the flaps of corrugated paperboard cartons. They are commonly referred to as wide-crown staples and are available in either 50 or 60 piece sticks of 2,000 or 2,500 per box.

Staples are made of steel, most often copper coated or galvanized. Carton-closing wide crown staples differ from office, desk-type, and other industrial staples primarily in the width of the crown and wire dimensions. Carton-closing wide crown staples have crown widths of 1¼ inches or more. The cross-sectional dimensions vary from .037–.040 inches by .074–.092 inches.

Non-automatic wide crown carton-closing staple machines use the wide crown staples described above and divided into two categories, hand-held top closing staple machines and free-standing bottom closing machines.

During the review period, such merchandise was classifiable under items 646.2000 and 662.2065, respectively, of the Tariff Schedules of the United States Annotated. This merchandise is currently classifiable under item numbers 8305.20.00 and 8422.30.90 of the Harmonized Tariff Schedule (HTS). The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers one manufacturer/exporter of certain carton-closing staples and staple machines from Sweden and the period December 1, 1985 through November 30, 1986.

Analysis of Comments Received

We invited interested parties to comment on the preliminary results. We received comments from Josef Kihlberg AB ("Kihlberg").

Comment 1: Kihlberg maintains that the Department misinterpreted its quantity discount policy. The Department did not compare Kihlberg's U.S. sales to home market sales at comparable quantities and didn't make the correct deduction for discounts.

Department's Position: We agree. In the preliminary determination we applied the quantity discount based on quantities shipped. We have revised our calculations applying the discount based on the total quantity ordered and invoiced.

Comment 2: Kihlberg argues that the Department erred in deducting export selling expenses in its calculation of exporter's sales price. Kihlberg has documented in the past that none of the indirect selling expenses of Kihlberg's export department in Sweden are incurred "by or for the account of the exporter in the United States".

Department's Position: After review of the record in this case, we agree that Kihlberg's export department in Sweden does not incur any expenses in selling to the United States. Therefore, we have not accounted for those expenses in our calculation of exporter's sales price.

Comment 3: Kihlberg points out a clerical error made in the credit calculation for five invoices.

Department's Position: We agree and have corrected this error in our final determination. We have also corrected two programming errors found after publication of the preliminary determination.

Final Results of Review

Based on our analysis of comments received, we determine that the following margins exist:

Manufacturer/ Exporter	Period	Margin (Percent)
Josef Kihlberg AB		
Staples	12/01/85–11/30/86	0.57
Staple Machines	12/01/85–11/30/86	0.57

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, as provided for in section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties of 0.57 percent shall be required. For any future entries of this merchandise from a new exporter, not covered in this or prior administrative reviews, whose first shipments occurred after November 30, 1986, and who is unrelated to Josef Kihlberg AB or any previously reviewed firm, a cash deposit of 0.57 percent shall be required. These deposit requirements are effective for all shipments of Swedish carton-closing staples and staple machines entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of the next administrative review.

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 § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Jan W. Mares,

Assistant Secretary for Import Administration.

Date: March 6, 1989.

[FR Doc. 89–5724 Filed 3–10–89; 8:45 am]

BILLING CODE 3510–DS–M

[A–122–804]

Preliminary Determination of Sales at Less Than Fair Value: New Steel Rail, Except Light Rail, From Canada

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We preliminarily determine that new steel rail, except light rail, (hereinafter referred to as new steel rail) from Canada is being, or is likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to suspend liquidation of all entries of new steel rail from Canada as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by May 22, 1989.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or Louis Apple, Office of Antidumping Investigations, Import Administration, International Trade

Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone: (202) 377–5050 or (202) 377–1769.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that new steel rail from Canada is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). The estimated weighted-average margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since our notice of initiation (53 FR 41392, October 21, 1988), the following events have occurred. On November 10, 1988, the ITC determined that there is a reasonable indication that imports of new steel rail from Canada are materially injuring a U.S. industry (USITC Pub. No. 2135, November 1988).

On November 4, 1988, a questionnaire was presented to The Algoma Steel Corporation, Ltd. ("Algoma"), which accounts for a substantial portion of exports from Canada to the United States during the period of investigation. We received replies to the questionnaire from Algoma on Novemer 23, 1988 and December 12, 1988. We sent deficiency letters to Algoma on December 2, 1988, January 10, 1989 and February 9, 1989. We received responses to the deficiency letters during the period December 12, 1988 through February 28, 1989.

On January 19, 1989, petitioner requested that the Department initiate a cost of production investigation pursuant to section 773(b) of the Act to determine whether Algoma was selling the subject merchandise at prices below the cost of production. Petitioner supplemented this request on Febraury 3 and February 14, 1989. We have determined from available information that there are reasonable grounds to believe or suspect that sales of new steel rail in Canada were being made at less than the cost of production and we have presented Algoma with a cost of production questionnaire. Analysis of the reply will be taken into account for the final determination.

Scope of Investigation

Steel rail, whether of carbon, high carbon, alloy or other quality steel, includes, but is not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail (or "third rail") and crane rails. Rails are used by the railroad industry, by rapid transit lines, by subways, in mines and in industrial applications.

Specifically excluded from this investigation are light rails which are 60 pounds or less per yard. Also excluded are relay rails which are used rails taken up from a primary railroad track and relaid in a railroad yard or on a secondard track.

Prior to January 1, 1989, such merchandise was classifiable under items 610.2010, 610.2025, 610.2100 and 688.4280 of the *Tariff Schedules of the United States Annotated* (TSUSA). This merchandise is currently classifiable under HTS items 7302.10.1020, 7302.10.1040, 7302.10.5000. 8548.00.0000. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Period of Investigation

The period of investigation is April 1, 1988, through September 30, 1988.

Fair Value Comparisons

To determine whether sales of new steel rail from Canada to the United States were made at less than fair value, we compared the United States price to the foreign market value.

United States Price/Purchase Price

As provided in section 772(b) of the Act, we used the purchase price to represent the United States price for sales of new steel rail where sales were made to unrelated purchasers prior to importation of the product into the United States. We also used the purchase price to represent the United States price for sales of the subject merchandise where sales were made to an indirectly related purchaser, who was the end-user of the product, prior to importation of the product into the United States.

We calculated purchase price based on packed, F.O.B. prices. We made deductions, where appropriate, for inland freight, duty, and brokerage and handling. We made an addition, where appropriate, for duty drawback in accordance with section 772(d)(1)(B) of the Act. We also made an addition, where appropriate, for sales taxes which were not collected because the product was being exported, in accordance with section 772(d)(1)(C) of the Act. The adjustment for taxes was based on the weighted-average tax rate for each category of such or similar merchandise in the home market. The one U.S. sale of industrial rail was not included in our analysis as it represented a small portion of the total value of rail sales during the period of investigation and because no industrial rail was sold in the home market during this period.

Foreign Market Value

In accordance with section 773(a) of the Act, we calculated foreign market value based on the packed, delivered or ex-works prices to related and unrelated customers in the home market. For purposes of this preliminary determination, we included sales to related customers, pursuant to 19 CFR 353.22(b), since we preliminarily determine that the prices paid by those customers were comparable to the prices paid by unrelated customers. If we are unable to ascertain at verification that the prices to related and unrelated customers in the home market are comparable, we will use only the sales to unrelated customers in calculating the foreign market value in our final determination.

We made deductions from the home market price, where appropriate, for inland freight. We deducted the home market packing cost from the foreign market value and added all U.S. packing costs. We made circumstance of sale adjustments, where appropriate, for differences in credit terms and sales taxes between the two markets.

Where appropriate, we made further adjustments to the home market price to account for differences in the physical characteristics of the merchandise, in accordance with § 353.16 of the Regulations.

Currency Conversion

We made currency conversions in accordance with 19 CFR 353.36(a)(1). All currency conversions were made at the rates certified by the Federal Reserve Bank.

Verification

We will verify the information used in making our final determination in accordance with section 776(b) of the Act.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of new steel rail from Canada that are entered or withdrawn from warehouse for consumption on or after the date of publication of this notice in the **Federal Register**. The U.S. Customs Service shall require a cash deposit or posting of a bond equal to the estimated amounts by which the foreign market value of new steel rails from Canada exceeds the United States price as shown below. This suspension of liquidation will remain in effect until

further notice. The weighted-average margins are as follows:

Manufacturer/Producer/ Exporter	Weighted-average margin percentage
Algoma Steel Corporation, Ltd.	2.72
All others	2.72

This suspension of liquidation covers imports of new steel rail meeting the definition outlined in the "Scope of Investigation" section of this notice.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

The ITC will determine whether these imports are materially injuring, or threaten material injury to, a U.S. industry before the later of 120 days after the date of this determination, or 45 days after the final determination, if affirmative.

Public Comment

In accordance with 19 CFR 353.47, if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 9:30 a.m. on April 20, 1989, at the U.S. Department of Commerce, Room 3708, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Individuals who wish to participate in the hearing must submit a request to the Assistant Secretary for Import Administration, Room B-099, at the above address within ten days of the publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; (3) the reasons for attending; and (4) a list of the issues to be discussed.

In addition, prehearing briefs in at least ten copies must be submitted to the Assistant Secretary by April 13, 1989. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, at the above address, in at least ten copies, not less than 30 days before the date of the final determination, or, if a hearing is held, within seven days after the hearing transcript is available.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)).

March 6, 1989.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 89-5725 Filed 3-10-89; 8:45 am]

BILLING CODE 3510-DS-M

[A-475-603]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Italy; Termination of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration/ Commerce.

ACTION: Notice of termination of antidumping duty administrative review.

SUMMARY: On September 27, 1988, the Department of Commerce initiated an administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished and unfinished, from Italy.

The Department has now determined to terminate that review.

Background: On September 27, 1988, the Department of Commerce published a notice of initiation of administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished and unfinished, from Italy (53 FR 37617). That notice stated that we would review RIV-SKF for the period February 1, 1987 through July 31, 1988.

RIV-SKF subsequently withdrew its request for review on November 30, 1988. As a result, the Department has determined to terminate the review.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Eugenio Parisi or John R. Kugelman, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202)377-3601.

SUPPLEMENTARY INFORMATION: This notice is in accordance with section 751(a)(1) of the Tariff Act of 1930 (19 U.S.C. 1675(a)(1)) and 19 CFR 353.53a.

Jan W. Mares,

Assistant Secretary for Import Administration.

Date: February 17, 1989.

[FR Doc. 89-5723 Filed 3-10-89; 8:45 am]

BILLING CODE 3510-DS-M

[C-508-064]

Fresh Cut Roses From Israel; Preliminary Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration; 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 fresh cut roses from Israel. We preliminarily determine the total bounty or grant to be 10.59 percent *ad valorem* for the period October 1, 1985 through September 30, 1986. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Cynthia Sewell or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On December 10, 1986, the Department of Commerce ("the Department") published in the **Federal Register** (51 FR 44498) the final results of its last administrative review of the countervailing duty order on fresh cut roses from Israel (45 FR 58516; September 4, 1980). On September 30, 1987, the Government of Israel requested in accordance with section 355.10 of the Commerce Regulations on administrative review of the order. We published the initiation on October 20, 1987 (52 FR 38952). 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, under the auspices of the Customs Cooperation Council, has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule (HTS) as provided for in section 1201 et seq. of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item number(s).

Imports covered by the review are shipments of Israeli fresh cut roses. During the review period, such merchandise was classified under item numbers 192.1810 and 192.1890 of the Tariff Schedules of the United States Annotated. Such merchandise is currently classifiable under item number 0603.10.60 of the Harmonized Tariff Schedule. The review covers the period October 1, 1985 through September 30, 1986 and twelve programs.

Analysis of Programs

(1) Government-Guaranteed Minimum Price Program

The Ministry of Agriculture ("MOA") operates this program to guarantee a minimum price to farmers for their crops in case of bad marketing conditions. The MOA determines a national level of production to be covered by the guarantee program, sets a minimum (guaranteed) price based on export market conditions, and pays 50 percent of the difference between the guaranteed price and the actual average market price if the market price is lower than the guaranteed price. Payments are based on claims submitted to the MOA after the close of the growing season.

Because these payments are available only to growers that export, we preliminarily determine that they are countervailable. We calculated the benefit from this program by dividing the total payments received for roses by the total value of rose exports to all markets during the review period. On this basis, we preliminarily determine the benefit from this program to be 0.95 percent *ad valorem.*

(2) Export Promotion Financing Fund

The MOA operates the Export Promotion Financing Fund to promote the development of export markets for Israeli agricultural products. Exporters submit proposals to the MOA for promotional expenses, and the MOA determines whether to approve the request based on the development potential for the product and the availability of funds. For proposals that are approved, exporters receive reimbursements for up to 50 percent of actual expenses. We verified that during the review period Agrexco, Bickel and Hillron received funds for the promotion of flowers to all markets.

Because this program provides assistance only to exporters, we preliminarily determine that it is countervailable. To calculate the benefit, we divided total payments received by each company by the value of its total flower exports to all markets during the period of review. We then weight-averaged the resulting benefits by each company's proportion of total rose exports to the United States during the period of review. On this basis, we preliminarily determine the benefit from this program to be 0.14 percent *ad valorem.*

At verification, we found that the Export Promotion Committee had renounced funding of promotional activities for flowers exported to the United States, and that no funds had been budgeted for the 1987/88 growing season for the promotion of flowers in the U.S. market. Therefore, for purposes of cash deposit of estimated countervailing duties, we preliminarily determine the benefit from this program to be zero.

(3) Insurance From Israel Foreign Trade Risks Insurance Corporation (IFTRIC)

The Exchange Rate Risks Insurance Scheme ("EIS"), which is operated by IFTRIC, insures exporters against losses occurring when the rate of devaluation of the shekel does not keep pace with the rate of inflation. If the rate of inflation is higher than the rate of devaluation, the exporter is compensated in an amount equal to the difference between the two rates multiplied by the value added by each exporter to the exported merchandise.

In determining whether an export insurance program provides a countervailable benefit, we examine whether the premiums and other charges are adequate to cover the program's long-term operating costs and losses. We determined in the *Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from Israel* ("Flowers") (52 FR 3316, February 3, 1987) that this program conferred a countervailable benefit on exports of cut flowers from Israel because the EIS operated at a loss in the five years from 1981 through 1985, and that five years is a sufficiently long period to establish that the premiums and other charges are inadequate to cover the long-term operating costs and losses of the program.

Based on this determination, we preliminarily determine that this program is countervailable.

We calculated the benefit from this program by dividing the amount of compensation each company received by the value of its total flower exports to all markets during the period of review. We then weight-averaged the resulting benefits by each company's proportion of total rose exports to the United States during the period of review. On this basis, we preliminarily determine the benefit from this program to be 9.18 percent *ad valorem.*

(4) Short-Term Fuel Advances to Rose Growers

In 1982, the Israeli Institute for Farm Research published a survey on the profitability of rose production in the 1980/81 season. This study stated that gross income for rose growers included grants for fuel expenses and interest savings on low-cost credit. In past reviews, we determined on the basis of best information available that these grants conferred a countervailable benefit.

At verification, we found that on December 12, 1980, the MOA had disbursed short-term interest-free loans or advances to four rose growers for the purchase of fuel. Three of the four growers repaid their fuel advances before the current review period. The remaining grower had an outstanding debt balance for fuel advances during the review period. We consider the balance outstanding during the review period to be a short-term interest-free loan. To calculate the benefit, we used as our benchmark the nominal annual short-term commercial interest rate for Israeli shekels, as published in the Bank of Israel Annual Report. We then allocated the total interest savings over total rose production during the review period. On this basis, we preliminarily determine the benefit from this program to be 0.32 percent *ad valorem.*

(5) Government Funding of Agrexco and Purchase of Agrexco Shares

In 1978/79 and 1979/80, the MOA provided funds to Agrexco specifically to finance the expansion of Agrexco's air freight terminal at Ben Gurion Airport. In past administrative reviews, we determined on the basis of the best information available that these funds were grants and, therefore, countervailable. In the current administrative review, we verified that these government funds to Agrexco consisted of government purchases of shares in the company.

When Agrexco was established in 1957, the Israeli government purchased 50 percent of the company's founders (voting) shares. From 1957 through 1979, the purchase of all subsequent issues of nonvoting (ordinary) shares was equally split between government and nongovernment entities (*i.e,* growers and producer organizations). Between 1980 and 1982, the government's percentage of new shares purchased dropped slightly below 50 percent and then substantially declined in 1983 and 1984. All shares issued in 1985 and 1986 were purchased entirely by nongovernment investors. However,

Agrexco remains 50 percent government-controlled because no new voting shares have been issued since Agrexco's founding.

Agrexco is a nonprofit company that acts as a seller, marketer and distributor of all types of Israeli agricultural products. While precluded from making a profit, Agrexco always covers its operating costs. If Agrexco had surplus funds in any one year, the company may redistribute such funds to the growers and producer organizations that are shareholders. Agrexco does not pay dividends to its shareholders, and shares may be sold by individual investors only at the normal share value (original purchase price).

We have consistently held that government equity ownership *per se* does not confer a subsidy. Government ownership confers a subsidy only when it is on terms inconsistent with commercial considerations. When a government and private investors purchase shares in a company at the same price, we normally do not consider such government provision of capital to confer a subsidy. In this case, however, both government and private investors paid the same price for Agrexco shares, but with different prospects.

Producer organizations and growers invest in Agrexco with the expectation of benefiting from the use of Agrexco's export facilities and services. Most growers are too small to export on their own.

The growers' ability to export and the profits from those export sales constitute the "return" on their investment in Agrexco.

The Israeli government, on the other hand, could anticipate no such benefit because it does not use the services of the company (*i.e.*, Agrexco's export facilities). Moreover, the Israeli government could not expect any return on its investment either from dividends or an increase in the value of Agrexco's shares (because the shares can only be sold at their nominal value). In effect, the rate of return for the nonuser investor is always zero. Thus, the purchase of shares in Agrexco by the Israeli government cannot be considered a reasonable commercial investment. We preliminarily determine that the government's purchases of Agrexco shares were inconsistent with commercial considerations and, therefore, countervailable.

For commercially unreasonable equity infusions, we normally apply our "rate of return shortfall" methodology (a comparison of the company's rate of return on equity with the national average rate of return on equity). Such a methodology, however, is inappropriate when applied to a nonprofit company such as Agrexco. Absent the possibility of earning a rate of return, the Israeli government's ownership of shares in Agrexco does not fit the normal characteristics of equity. Because the Israeli government has held these shares, some of them for more than 30 years, without receiving any return or exercising any claim on them, the benefit somewhat resembles a grant. On the other hand, the benefit to Agrexco is not truly a grant because the Israeli government still has a claim on Agrexco and could redeem the shares.

As a practical matter, however, we note that the amount of benefit from any program can be no greater than if the program were an outright grant. Were we to consider this program a grant, our allocation period would be the average useful life of agricultural assets according to the "Asset Guideline Classes" of the U.S. Internal Revenue Service (which is 10 years), and our declining balance grant methodology would yield a benefit of 0.0006 percent *ad valorem*.

Because this maximum possible benefit has an inconsequential effect on the total bounty or grant to Agrexco (because we carry out the countervailing duty rate to only two decimal places), we believe it is unnecessary to determine the methodology that would be more appropriate for calculating the benefit to Agrexco from the Israeli government's ownership of shares in Agrexco. Therefore, for purposes of these preliminary results, our calculation of the total bounty or grant does not include the benefit from this program.

(6) Government Support of the Flower Board of Israel

The Flower Board of Israel ("FBI") was established by the Ornamental Plants Production and Marketing Board Law of 1976. The FBI is appointed by the Israeli Cabinet acting through the Ministers of Agriculture and Commerce and Industry.

In the final determination on Flowers, we determined, on the basis of best information available, that the Government of Israel provided financial support to the FBI and that such financial support is countervailable.

At verification, we found that beginning in the 1985/86 growing season, the government no longer funds the FBI. On this basis, we preliminarily determine that this program is not countervailable.

(7) Rebate of Export Insurance Premiums

This program, which was administered by IFTRIC, operated to rebate insurance premiums to exporters. At verification, we established that this program was terminated on June 1, 1985, and that no claims for rebates of premiums were accepted after that date. Therefore, we preliminarily determine that there were no countervailable benefits received under this program.

(8) Long-Term Industrial Development Loans to Agrexco

Agrexco received four long-term industrial development loans which had outstanding balances during the review period. In the *Final Affirmative Countervailing Duty Determination: Industrial Phosphoric Acid from Israel* (52 FR 25448; July 7, 1987), we determined that long-term industrial development loans are countervailable only to the extent that the applicable interest rates are less than those on loans to companies located in the Central Zone (*i.e.*, the heavily populated and developed zone). Because Agrexco is located in the Central Zone, it paid the highest rate charged for long-term loans at that time. Therefore, we preliminarily determine that these loans to Agrexco are not countervailable.

(9) Other Programs

In past reviews, we found that the programs listed below conferred countervailable benefits on the basis of best information available. In the final determination on Flowers (which covered the same period of review and the same companies), we found that these programs were not countervailable. Therefore, we did not reinvestigate the following programs in this review:

1. Encouragement of Capital Investment Law (Agriculture) (ECILA)
   (a) Investment Grants
   (b) Accelerated Depreciation Tax Reductions/Exemptions
   (c) Drawback Grants
   (d) Reduction of Corporate Tax Liability
   (e) Interest Subsidy Payments
2. Preferential Short-term Financing under the Export Credit Funds
   (a) Export Shipments Fund
   (b) Imports-for-Exports Fund
   (c) Export Production Fund
3. Cash Payments to Growers for Greenhouses
4. Cash Payments to Packing Houses

Preliminary Results of Review

As a result of the review, we preliminarily determine the total bounty

or grant to be 10.59 percent *ad valorem* for the period October 1, 1985 through September 30, 1986.

The Department intends to instruct the Customs Service to assess countervailing duties of 10.59 percent of the f.o.b. invoice price on all shipments of this merchandise exported on or after October 1, 1985 and on or before September 30, 1986.

Further, due to the elimination of the Export Promotion Financing Fund, 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 10.45 percent of the f.o.b. invoice price on all shipments of Israeli fresh cut roses entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this 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 following workday. 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 § 355.22 of the Commerce Regulations published in the **Federal Register** on December 27, 1988 (53 FR 53206) (to be codified at 19 CFR 355.22).

Jan W. Mares,

Assistant Secretary for Import Administration

Date: March 6, 1989.

[FR Doc. 89-5721 Filed 3-10-89; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Announcement of Western Washington Outer Coast, Washington as an Active Candidate for National Marine Sanctuary Designation; Intent To Prepare a Draft Environmental Impact Statement and Management Plan; Intent To Hold Public Scoping Meetings.

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice.

SUMMARY: NOAA is naming the Western Washington Outer Coast as an Active Candidate for designation as a National Marine Sanctuary and will proceed with the subsequent steps in the designation process. The study area extends from Duntze Rock (north of Tatoosh Island on the northwestern tip of Washington State), 90 mi (145 km) southward along the coast to Point Grenville. For purposes of gathering information for developing a Draft Environmental Impact Statement (DEIS) and Draft Management Plan, the study area will extend landward to mean high water adjacent to State or federally owned lands, and to mean low water where such boundary is contiguous to the Makah, Quileute, Quinault, Hoh, and Ozette Indian Reservations, and include the waters seaward to the 12 mile limit of the territorial sea. The Western Washington Outer Coast study area encompasses an area of approximately 1,242 square nautical miles (2,432 km^2).

Selection of a site as an Active Candidate formally begins the National Environmental Policy Act (NEPA) process; NOAA will prepare an environmental impact statement and management plan to examine the management, boundary, and regulatory alternatives associated with Sanctuary designation. To initiate this process NOAA will hold scoping meetings in Washington State to solicit information and comments on the range of issues related to Sanctuary designation and management. Individuals and representative of interested organizations and government agencies, including tribal governments are invited and encouraged to attend.

Scoping meetings will be held on April 10, 11, 12, and 13, 1989. The first scoping meeting will be held on April 10, 1989 at 7:00 p.m. in Phillips Lecture Hall, Aberdeen High School, 414 North I Street, Aberdeen, Washington. The second scoping meeting will be held on April 11, 1989 at 7:00 p.m. in the Little Theater, Peninsular College, 502 E. Lauridsen Boulevard, Port Angeles, Washington. A third scoping meeting will be held on April 12, 1989 at 7:00 p.m. in the multi-purpose room in Forks Intermediate School, First Avenue and A Street, SE., Forks, Washington. A fourth scoping meeting will be held on April 13, 1989 at 7:00 p.m. in the NOAA Auditorium, Building 9, 7600 Sand Point Way, NE., Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Joseph A. Uravitch, Chief, or Franklin Christhilf, Regional Manager, Marine and Estuarine Management Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue NW., Suite 714, Washington, DC 20235, (202/673-5126).

SUPPLEMENTARY INFORMATION

Selection Procedures

Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431 *et seq.*, authorizes the Secretary of Commerce to designate discrete areas of the marine environment as National Marine Sanctuaries to protect their special conservation, recreational, ecological, historical, research, educational, or esthetic qualities. The Act is administered by the National Oceanic and Atmospheric Administration (NOAA) through the Office of Ocean and Coastal Resource Management (OCRM), Marine and Estuarine Management Division (MEMD). Selection of a site as an an Active Candidate formally triggers the National Environmental Policy Act (NEPA) environmental impact assessment process.

On November 7, 1988, Pub. L. 100-627 was signed into law. Pub. L. 100-627 reauthorized, with amendments, Title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 *et seq.*) (the "Act"). Section 205 of Pub. L. 100-627 directs the Secretary of Commerce to designate a Western Washington Outer Coast National Marine Sanctuary not later than June 30, 1990. This notice of Active Candidate status for the Western Washington Outer Coast is the formal initiation of the documentation development phase of the Sanctuary designation process.

Initially, a draft designation document, including terms of the proposed designation, a draft management plan to implement the proposed designation, and any proposed regulations needed to implement the terms of the proposed designation are prepared. Subsequent steps include scoping meetings; public hearings; preparation of a final environmental impact statement, final management plan, and final regulations; preparation of Designation Documentation and Findings; and designation by the Secretary of Commerce. Opportunities for comment exist throughout this process and will be announced in the **Federal Register**, the local media, and other appropriate channels.

In the development of Sanctuary designation materials, NOAA will describe the extent to which designation will fulfill the purposes and policies of the Act, and discuss the degree to which:

(1) The area is of special national significance due to its resource or human-use values;

(2) Existing State and Federal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;

(3) Designation of the area as a National Marine Sanctuary will facilitate coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education; and

(4) The area is of a size and nature that will permit comprehensive and coordinated conservation and management. Pursuant to section 303(b) of the Act (16 U.S.C. 1433(b)), NOAA will consider:

(1) The area's natural resource and ecological qualities, including its contribution to biological productivity, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, and the biographic representation of the site;

(2) The area's historical, cultural, archeological, or paleontological significance;

(3) The present and potential uses of the area that depend on maintenance of the area's resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education;

(4) The present and potential activities that may adversely affect the factors identified in the # 1–3 listed above;

(5) The existing State and Federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of the Act;

(6) The manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities;

(7) The public benefits to be derived from Sancturary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism;

(8) The negative impacts produced by management restrictions on income-generating activities such as living and non-living resources development; and

(9) The socioeconomic effects of Sanctuary designation. NOAA will also include an assessment of its fiscal capability to manage the area as a National Marine Sanctuary.

In preparing the environmental impact statement and management plan (EIS/MP) to examine the management and regulatory alternatives associated with Sanctuary designation, NOAA will solicit comments from interested persons, groups and organizations, the appropriate congressional committees, heads of interested Federal agencies, the responsible officials of State, local and tribal governments, and the appropriate officials of the affected Regional Fishery Management Council. This will be done during scoping meetings to be held in the State of Washington prior to preparation of the EIS/MP, and during public hearings to receive comments on the draft EIS/MP.

History

The Western Washington Outer Coast site was first reorganized for its high natural resource potential and human resource values by placement on the National Marine Sanctuaries Program Site Evaluation List (SEL) in August of 1983 (48 FR 35568). In 1988, Congress reauthorized and amended the Act and directed the Secretary, in section 205 of Pub. L. 100–627, to issue a notice of designation with respect to the Western Washington Outer Coast National Marine Sanctuary, as generally described in the **Federal Register** Notice of August 4, 1983, not later than June 30, 1990.

Natural Resources

Oceanographic Characteristics

The Western Washington Outer Coast site is affected by major oceanic currents, and by nearshore currents which are influenced by tide, wind, river discharges, and offshore submarine canyons. The Kuroshio, a principal North Pacific offshore current, splits to form the California current (flowing south) and the Alaska gyre (flowing north). The point of divergence of these two currents migrates north and south seasonally. In the winter months the California current flows south well offshore of the study area and the Davidson current, which originates in southern latitudes, flows north, inshore along the Washington coast. In the summer months, the Davidson current disperses and the California current moves inshore flowing south along the coast. Upwelling, which brings nutrient rich waters to the surface, occurs in the summer months due to prevailing northerly winds.

Geological Features and Habitat

Active plate tectonics caused by stresses between the Juan de Fuca, Pacific, Explorer, and American crustal plates provide the geologic setting for the Western Washington Outer Coast study area. Characteristic of the west coast, the continental shelf within the study area is narrow and steep, creating a sharp transition between the continental shelf and the deep abyssal zone. Glacial deposits compose the underlying sediments of the continental shelf. Deposits of sand and gravel, and less significant deposits of gold placers, coal, and gemstones are found along the shoreline and in coastal waters. A number of submarine canyons traverse the shelf at various intervals, although only the Juan de Fuca canyon extends within the boundary of the study area. These submarine canyons enhance upwelling to further enrich the productivity of coastal waters.

The coastline environments include rocky headlands, seastacks and sea arches, exposed beaches, protected bays, and extremely diverse and productive tidepools. Fourteen rivers, which originate in the Olympic Mountains, empty into the study area. The Western Washington Outer Coast is one of the few regions of the U.S. coastline which has remained rustic and undeveloped. The high wave energy and steep rocky cliffs make accessibility difficult, contributing to the lack of development along the shoreline. The abundance of offshore rocks and islands creates an ideal environment for a variety of seabirds and mammal populations.

Flora and Fauna

The study area lies within the Columbia biogeographical province. A variety of marine algae contribute significantly to the foodweb which supports the significant fisheries, bird and mammal populations. Lush plankton blooms are characteristic of the northern temperate region and occur periodically in the summer months. Eelgrass beds are important primary producers, serving as a food source and substrate for birds and intertidal species. The tidepools which form around the seastacks and rocky outcrops provide an ideal environment for the extremely complex community of intertidal organisms.

The diverse assemblages of algae and marine invertebrates support commercially and ecologically important

species of fish. Salmon, halibut, groundfish, and finfish, as well as numerous species of shellfish are abundant in the study area.

Many species of birds migrate through or permanently reside along the coastline of the study area. Tatoosh Island, Destruction Island, Quillayute Needles and Point Grenville serve as nesting and breeding grounds for a number of bird species. The area supports the primary U.S. nesting area and the highest continental population density of the bald eagle, federally listed as endangered under the Endangered Species Act. Other birds which nest and breed in the study area include: auklets, black oystercatchers, glaucous-winged gulls, pigeon guillemonts, sooty shearwaters, three species of cormorants, common murres, petrels, tufted puffins, peregrine falcons (federally listed as endangered and threatened), osprey, scoters, and grebes.

A variety of marine mammals inhabit the offshore rocks and islands of the study area. Tatoosh Island and the islands of the Quillayute Needles are used as a haul-out for northern and California sea lions. Destruction Island, Point Grenville, and areas off Cape Alava house harbor seals and are important habitats for the southern sea otter, federally listed as threatened. Sea otters have been transferred and released at Point Grenville and the population has successfully extended north along the coast. A variety of cetaceans are present off Washington throughout the year. The grey whale, federally listed as threatened, migrates through the region annually.

Human Uses

The waters of the study area are used primarily for commercial (Indian and non-Indian) and recreational fishing. Tribal ceremonial and subsistence fisheries, as well as aquaculture are also dependent on the waters of the region. The Olympic National Park borders a large portion of the study area along the coast. Hiking and wilderness camping are permitted along the Park's shoreline. Of the estimated 3.5 million annual visits to the Park, approximately one third are visits to the shoreline. The coastal area is available to the public for marine educational and scientific research opportunities. University researchers use portions of the study area for field research and the gathering of baseline data.

Four Indian Tribal governments, The Makah, Quileute, Hoh, and Quinault, live along the eastern boundary of the study area. These tribes harvest anadromous fish that pass through their usual and accustomed fishing grounds. These tribes also operate a series of salmon hatcheries, some of which are maintained in cooperation with the Washington Department of Fisheries and the U.S. Fish and Wildlife Service. Extensive archaeological work, oriented toward late prehistoric culture, has been conducted within the study area. A major excavation, considered to be one of the most significant in North America, was conducted near Cape Alava. This excavation began in the later 1960's and spanned approximately 10 years. The archaeological dig uncovered a village that had been buried 400 years. Ozette Historic sites are found along the coast of the Olympic Peninsula, and a record exists of shipwrecks in the nearshore. Some historic sites include: Tatoosh Island Lighthouse, remains of WWII Army bunkers at Shi Shi Beach, and evidence of placer mining.

Commercial vessels sail into the Strait of Juan de Fuca to enter ports along the strait and in Puget Sound. Cargo-carrying vessels traverse the western portion of the study area.

Oil and gas exploration in the study area is being considered by the Minerals Management Service (MMS) of the U.S. Department of Interior. In April of 1992, MMS plans to conduct Lease Sale #132 for offshore oil and gas exploration and development in Federal waters off the Washington and Oregon coasts. Proposed Lease Sale #132 includes a portion of the study area. According to present MMS plans members of the oil and gas industry will be requested to individual their level of interest in Lease Sale #132 in November of 1989. If industry representatives indicates sufficient interest, MMS plans to proceed with the lease sale process.

Navigational projects (dredge and spoil disposal) in waters adjacent to the study area are maintained by the U.S. Army Corps of Engineers, Seattle District. The U.S. Navy conducts defense operations in the study area, and while conducting these activities restricts access to certain parts of the study area including the islands of Copalis, Queets (Sea Lion Rock), Washington Coastal Warning Area, Submarine Test and Trail Areas 3 and 4, and Cape Flattery Warning Area.

Existing Protection of Marine Resources

Several agencies operate programs to protect significant resources within the Western Washington Outer Coast study area and to provide recreational and interpretive opportunities. The Olympic National Park, which includes much of the shoreline, rain forests and mountains of the Olympic Peninsula, is managed by the National Park Service. Commercial and recreational fisheries are managed by the State and Federal fisheries agencies. The U.S. Coast Guard is responsible for vessel traffic within the study area.

The Park has been dedicated as a World Heritage Site and as a Biosphere Reserve. Most of the rocky islands within the study area are divided among three National Wildlife Refuges (Quillayute Needles, Flattery, and Copalis Wildlife Refuges) and are managed by the U.S. Fish and Wildlife Service. All three refuges (excluding Destruction Island), Washington Island, the coastal area bordering the Makah Tribe, and some coastal areas within the Quinault reservation are designated as wilderness area.

The Designation Process

The management plan to be prepared for the proposed Sanctuary will specify the goals and objectives of Sanctuary designation and describe programs for resource protection, research and interpretation. The various administrative and regulatory alternatives for Sanctuary management will be analyzed in the environmental impact statement.

Opportunities for public participation in NOAA's development of an environmental impact statement and management plan will be provided through scoping meeting, solicitation of comments on the draft environmental impact statement/management plan and proposed regulations, and public hearings.

The April scoping meetings will identify issues regarding the designation of the Western Washington Outer Coast National Marine Sanctuary and generate suggestions for resolving them. The following are examples of discussion topics: (1) Boundary alternatives, (2) management alternatives, (3) resource protection, (4) research opportunities and (5) interpretive opportunities.

Dated: March 8, 1989.

Thomas J. Maginnis,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 89-5678 Filed 3-10-89; 8:45 am]

BILLING CODE 3510-08-M

Ocean Salmon Fisheries Off the Coasts of Washington, Oregon, and California

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

ACTION: Notice of availability of reports; notice of public meetings and hearings.

SUMMARY: The Pacific Fishery Management Council (Council) has

begun its annual preseason management process for the 1989 ocean salmon fisheries. As required by the 1984 framework amendment to the Fishery Management Plan for Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California, this notice announces: (1) The availability of Council documents and (2) dates and locations of Council meetings and public hearings which comprise the complete schedule for determining proposed and final ocean salmon management measures for the 1989 fishing season.

DATES: See **"SUPPLEMENTARY INFORMATION"** for the dates of the scheduled meetings and public hearings. For the public hearings being held, written comments will be accepted until March 30, 1989, at the Council office. All public hearings begin at 7 p.m. on the dates and at the locations specified below.

ADDRESS: Send written comments to Lawrence Six, Executive Director, Pacific Fishery Management Council, Metro Center, Suite 420, 2000 SW. First Avenue, Portland, OR 97201; 503–326–6352.

FOR FURTHER INFORMATION CONTACT: Lawrence Six, 503–221–6352.

SUPPLEMENTARY INFORMATION: Council meetings are open to the public and public comment on pertinent issues is solicited at specific times during the meetings. Written comments may be addressed to the Council office. Further details of each meeting will be available in Council news releases and the **Federal Register** or by contacting the Council office directly.

The Council's schedule for development of ocean salmon fishery management recommendations for the 1989 season follows:

March 2, 1989—Council reports which summarize the 1988 salmon season and project the expected salmon stock abundance for 1989 are available to the public from the Council office.

March 6–10, 1989—Council and its advisory entities meet at the Clarion Hotel-San Francisco Airport to adopt 1989 regulatory options for public review. On March 6, with assistance from the Salmon Technical Team (STT), the Salmon Advisory Subpanel (SAS) develops coordinated preliminary regulatory options for the 1989 season. On March 7, working from the SAS options and other advisory, tribal, and public input, the Council formulates up to three proposed options for collation by the STT. The STT and staff prepare a draft of the proposed options for Council review and tentative adoption for STT analysis on March 8. On March 10 the Council reviews its advisors analyses and tribal and public comment on the tentative options and adopts final 1989 regulatory options for public hearing.

March 16, 1989—Newsletter describing proposed management options is mailed to the public (includes options and condensed summary of biological and economic impacts).

March 24, 1989—The STT "Preseason Report II, Analysis of Proposed Regulatory Options for 1989 Ocean Salmon Fisheries" will be distributed with the Council briefing book.

March 28–29, 1989—Public hearings are held to receive comments on the proposed 1989 ocean salmon fishery management options adopted by the Council. All public hearings begin at 7 p.m. on the dates and at the locations specified below.

March 28, 1989—Thunderbird Motor Inn, North and South Umpqua Rooms, 1313 North Bayshore Drive, Coos Bay, Oregon

March 28, 1989—Seattle Airport Hilton, 17620 Pacific Highway S., Seattle, Washington

March 28, 1989—Redwood Acres Fairgrounds, Eureka, California

March 29, 1989—Astoria Middle School, 1100 Klaskanine Avenue, Astoria, Oregon

March 29, 1989—California Department of Fish and Game, Resources Building, Room 133, 1416 Ninth Street, Sacramento, California

April 3–7, 1989—Council and its advisory entities meet at the Red Lion Inn—Columbia River, Portland, Oregon, to adopt final 1989 regulatory measures. On April 3, with assistance from the STT, the SAS develops its final recommendations for the 1989 regulatory measures. On April 4, working from the SAS recommendations and other advisory, tribal, and public input, the Council tentatively adopts final 1989 regulatory measures for analysis by the STT and staff economist. On April 6 the Council reviews its advisor analyses and tribal and public comment and adopts the final 1989 regulatory measures.

April 6–7, 1989—The STT completes drafting of "Preseason Report III Analysis of Council Adopted Regulatory Measures for 1989 Ocean Salmon Fisheries."

May 1, 1989—Federal ocean salmon fishery management regulations implemented and "Preseason Report III" available for distribution.

Dated: March 8, 1989.

Richard H. Schaefer,

Director of Office of Fisheries, Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89–5753 Filed 3–10–89; 8:45 am]

BILLING CODE 3510–22–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Indonesia

March 8, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing limits.

EFFECTIVE DATE: March 15, 1989.

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) 535–9480. For information on embargoes and quota re-openings, call (202) 377–3715.

SUPPLEMENTARY INFORMATION:

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)

The current limits for Categories 340, 347/348 and 635 are being increased, variously, for swing and carryover.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 53 FR 24477, published on June 29, 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

March 8, 1989.

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 June 24, 1988 by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Indonesia and exported during the period which began on July 1, 1988 and extends through June 30, 1989.

Effective on March 15, 1989, the directive of June 24, 1988 is being amended to increase the limits for cotton and man-made fiber in the following categories as provided under the provisions of the current bilateral agreement between the Governments of the United States and Indonesia:

Category: Levels in Group I—	Adjusted 12-mo limit [1]
340	473,694 dozen.
347/348	892,071 dozen.
635	103,875 dozen.

[1] The limits have not been adjusted to account for any imports exported after June 30, 1988.

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,

Janes H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89-5706 Filed 3-10-89; 8:45 am]

BILLING CODE 3510-DR-M

Amendment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Macau

March 8, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending limits.

EFFECTIVE DATE: March 15, 1989.

FOR FURTHER INFORMATION CONTACT: Diana Solkoff, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 343-6495. For information on embargoes and quota re-openings, call (202) 377-3715.

SUPPLEMENTARY INFORMATION:

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).

Based upon the implementation of the Harmonized Commodity Code on January 1, 1989, the Governments of the United States and Macau agreed to amend the current bilateral textile agreement to establish a designated consultation level for Category 631 and to increase the aggregate and Group I limits.

A copy of the agreement is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State, (202) 647-1998.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 53 FR 51297, published on December 21, 1988.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

March 8, 1989.

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 16, 1988 by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Macau and exported during the period which began on January 1, 1989 and extends through December 31, 1989.

Effective on March 15, 1989, the directive of December 16, 1988 is being amended to increase the limits for the following categories:

Category:	12-mo. limit [1]
200-239, 300-369, 400-469, 600-670 and 800-899, as a group.	76,590,824 square meters equivalent.
Group I: 200-239, 300-369, 600-670 and 800-899 as a group.	73,759,677 square meters equivalent.
Sublevel in Group I: 631	231,386 dozen pairs.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1988.

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. 89-5707 Filed 3-10-89; 8:45 am]

BILLING CODE 3510-DR-M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve a revision of a currently approved information collection pertaining to SF 28, Affidavit of Individual Surety.

ADDRESS: Send comments to Ms. Eyvette Flynn, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Office of Federal Acquisition and Regulatory Policy, (202) 523-3847.

SUPPLEMENTARY INFORMATION:

a. *Purpose:* The Affidavit of Individual Surety (Standard Form (SF) 28) will be used by all executive agencies including the Department of Defense, to obtain

information from individuals wishing to serve as sureties of Government bonds. In order to qualify as a surety on a Government bond, the individual must show a net worth not less than the penal amount of the bond on the SF 28. It is an elective decision on the part of the maker to use individual sureties instead of other available sources of surety or sureties for Government bonds. We are not aware if other format exists for the collection of this information. The information on SF 28 will be used to assist the contracting officer in determining the acceptability of individuals proposed as sureties.

b. *Annual reporting burden:* The annual reporting burden is estimated as follows: Respondents, *500*; responses per respondent, *1.43*; hours per response, *.4*; and total burden hours, *286*.

Obtaining Copies of Proposals

Requester may obtain copies from General Services Administration, FAR Secretariat (VRS), Room 4041, Washington, DC 20405, telephone (202) 523–4755. Please cite OMB Control No. 9000–0001, SF 28, Affidavit of Individual Surety.

Dated: March 6, 1989.

Margaret A. Willis,

FAR Secretariat.

[FR Doc. 89–5633 Filed 3–10–89; 8:45 am]

BILLING CODE 6820–JC–M

DELAWARE RIVER BASIN COMMISSION

Meeting and Public Hearings

Notice is hereby given that the Delaware River Basin Commission will conduct a series of hearings on March 20 and March 21, 1989. These hearings concern a proposed amendment to the Comprehensive Plan and Water Code relating to water conservation performance standards for plumbing fixtures and fittings; a possible drought emergency declaration; and applications for project approvals.

The subject of the March 20, 1989 hearing will be as follows:

Proposed Amendment to Comprehensive Plan and Water Code of the Delaware River Basin Relating to Water Conservation Performance Standards for Plumbing Fixtures and Fittings. Notice was given in the February 6, 1989 **Federal Register**, Vol. 54, No. 23, page 5638, that the Commission would hold a public hearing on March 20, 1989 to receive comments on proposed amendments to the Comprehensive Plan and Water Code in relation to water conservation performance standards for plumbing fixtures and fittings. The proposed amendment would revise a rule adopted by the Commission on January 13, 1988. That rule, Resolution No. 88–2, established Basinwide water conservation performance standards for plumbing fixtures and fittings installed in new construction and renovation. The regulation required that all water conservation performance standards for plumbing fixtures and fittings adopted by the four Basin States or political subdivisions within the Basin comply with specified minimum standards for sink and lavatory faucets, shower heads, water closets, urinals and associated flushing mechanisms. Compliance dates were specified as were certain specialized fixtures and fittings not covered by the regulation. The regulation also required certification by manufacturers that their plumbing fixtures and fittings comply with the water conservation performance standards. In addition, Pennsylvania political subdivisions or their agencies seeking Commission permit approval or renewal must document that water conservation performance regulations consistent with the adopted standards have been adopted within their area of jurisdiction. Finally, periodic review of the performance standards was also required to allow for incorporation of more stringent water conservation performance standards as technology advances.

Subsection 2.1.5(4) of the regulation required the Executive Director to conduct an initial review of the standard within a year to consider modification of the current standard for water closets (a maximum of 3.5 gallons per flush) to require low consumption water closets (a maximum of 1.6 gallons per flush) effective January 1, 1990. A summary report documenting the results of this review was submitted to the Commission in January 1989. Based upon this review, the Commission is now proposing that the regulation be revised to require low consumption water closets effective January 1, 1991. The proposal would also require that all water conservation performance standards for plumbing fixtures and fittings adopted by the Basin States or political subdivisions within the Basin comply with the low consumption water closet requirement by January 1, 1991. In addition, the proposal would modify the schedule for state or local compliance with the performance standards in the Commonwealth of Pennsylvania which does not yet have statewide performance standards for plumbing fixtures and fittings. The other Basin States already have statewide standards.

Accordingly, the proposal encourages the Commonwealth of Pennsylvania to adopt water conservation performance standards for plumbing fixtures and fittings which comply with the Commission's standards by January 1, 1991. In the absence of Pennsylvania standards, the proposal would require the Commission to notify all municipalities within the Pennsylvania portion of the Basin of the requirement to adopt and enforce local regulations which comply with the Commission standards. Upon such notification by the Commission, municipalities would have one year to adopt local regulations.

The public hearing is scheduled for Monday, March 20, 1989. A presentation on the proposed rule revision will begin at 1:30 p.m. and will be followed at 2:00 p.m. by the first of the day's two hearing sessions. The second and final hearing session will begin at 7:00 p.m. Written comments received or postmarked by April 24, 1989 will be included in the hearing record.

Written comments should be submitted to Susan M. Weisman, Delaware River Basin Commission, P.O. Box 7360, West Trenton, New Jersey 08628.

The public hearing will be held at the Holiday Inn King of Prussia, 260 Goddard Boulevard, King of Prussia, Pennsylvania.

The Commission will also hold a public hearing on Tuesday, March 21, 1989 beginning at 1:30 p.m. at the Holiday Inn, 260 Goddard Boulevard, King of Prussia, Pennsylvania. The hearing will be part of the Commission's regular business meeting which is open to the public.

An informal pre-meeting conference among the Commissioners and staff will be open for public observation at about 11:00 a.m. at the same location. Topics scheduled for discussion at the conference session include status reports on the Upper Delaware Ice Jam Project, the Delaware River Striped Bass Restoration Program and Proposed Amendment of Compact Reservation, section 15.1(b) to Fund F. E. Walter Modifications.

The subjects of the 1:30 p.m. hearing will be as follows:

Possible Drought Emergency Declaration

Section 10.4 of the Delaware River Basin Compact provides that in the event of a drought or other condition which may cause an actual and immediate shortage of available water supply within the Basin, or within any part thereof, the Commission may, after

public hearing, determine and delineate the area of such shortage and declare a water supply emergency therein. For the duration of such emergency, the Commission could limit the extent to which water users may divert or withdraw water for any purpose. The Commission is considering whether current and developing conditions of water supply and demand require the declaration of a water supply emergency.

The purpose of this hearing is to permit the public to comment on these matters and to make suggestions or recommendations concerning possible Commission actions. The Commission will consider possible drought actions following the hearing.

Applications for Approval of the Following Projects Pursuant to Article 10.3, Article 11 and/or Section 3.8 of the Compact

1. *Warwick Township Water & Sewer Authority D–88–80 CP.* An application for approval of a ground water withdrawal project to supply up to 3.72 million gallons (mg)/30 days of water to the applicant's Meyer-Walker Tract from new Well No. 3, and to limit withdrawal from all wells to 8.4 mg/30 days. Well No. 3 is located 1000 feet east southeast of the intersection of Turkey Trot and Land Roads. Well Nos. 2, 5 and 8 will be included in this docket. The project is located in Warwick Township, Bucks County, and is located in the Southeastern Pennsylvania Ground Water Protected Area.

2. *Lehman-Pike Development Corporation D–88–89.* An application to expand a 0.1 million gallon per day (mgd) sewage treatment plant to process a design flow of 0.8 mgd. The plant is located at the Saw Creek/Winona development in southern Lehman Township, Pike County, Pennsylvania. The two-phase project is designed to serve the build-out population of 7,500 people. The existing treatment plant units will be converted to sludge holding tanks. The proposed plant will include six sequencing batch reactor units that are designed for combined carbon oxidation and nitrification. The plant effluent will continue to be discharged to Saw Creek through the existing outfall. The discharge point is less than 0.2 mile upstream from the Delaware Water Gap National Recreation Area, which was included in the Comprehensive Plan by Docket No. D–87–65 CP.

3. *Pinecrest Development Corporation D–89–4.* An application to construct a 0.5 mgd sewage treatment plant to serve the Pinecrest/Locust Lakes Resort located in Tobyhanna Township, Monroe County, Pennsylvania. The plant will be constructed in three phases (Phase I, 0.2 mgd; Phase II, 0.4 mgd; Phase III, 0.5 mgd) to ultimately serve an equivalent population of 5,000 persons. The applicant proposes to construct a sequencing batch reactor process which features carbon oxidation and nitrification. Treatment plant effluent will be discharged to the headwaters of Beaver Creek, which is a tributary of Upper Tunkhannock Creek.

Documents relating to these applications may be examined at the Commission's offices. Preliminary dockets are available in single copies upon request. Please contact George C. Elias concerning docket-related inquiries.

Persons wishing to testify at the March 20 or March 21, 1989 hearings are requested to register with the Secretary prior to the hearing.

Susan M. Weisman,

Secretary.

March 6, 1989.

[FR Doc. 89–5748 Filed 3–10–89; 8:45 am]

BILLING CODE 6360–01–M

DEPARTMENT OF ENERGY

Bonneville Power Administration

Amended Model Conservation Standards Surcharge Policy Extension

AGENCY: Bonneville Power Administration (Bonneville), DOE.

ACTION: Notice of Bonneville's amended model Conservation Standards (MCS) Surcharge Policy Extension.

SUMMARY: Bonneville is releasing its Amended MCS Surcharge Policy Extension (Policy). The Policy is a slightly modified version of Bonneville's Policy Extension adopted November 9, 1988. When the Policy was adopted, Bonneville requested public comment on two proposed amendments to that Policy. One public comment was received. However, it was not related to either of the two proposed amendments. Bonneville is now releasing an amended Policy which contains the two proposed amendments. This amended Policy supersedes all other versions of the Policy.

DATE: The Policy is effective immediately.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Procter at 503–230–3961, or call Bonneville's Public Involvement office. Telephone numbers, voice/TTY, for the Public Involvement office are: 503–230–3478 in Portland; toll-free 800–452–8429 for Oregon outside of Portland; 800–547–6048 for Washington, Idaho, Montana, Utah, Nevada, Wyoming, and California. Information may also be obtained from:

Mr. George Gwinnutt, Lower Columbia Area Manager, Room 243, 1500 Plaza Building, 1500 NE. Irving Street, Portland, Oregon 97232, 503–230–4552.

Mr. Robert Rasmussen, Acting Eugene District Manager, Room 206, 211 East Seventh Avenue, Eugene, Oregon 97401, 503–687–6952.

Mr. Wayne R. Lee, Upper Columbia Area Manager, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509–456–2518.

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406–329–3060.

Mr. Ronald K. Rodewald, Wenatchee District Manager, Room 307, 301 Yakima Street, Wenatchee, Washington 98801, 509–662–4377.

Mr. Terrence G. Esvelt, Puget Sound Area Manager, 201 Queen Anne Avenue North, Suite 400, Seattle, Washington 98109, 206–442–4130.

Mr. Thomas V. Wagenhoffer, Snake River Area Manager, 101 West Popular, Walla Walla, Washington 99362, 509–522–6226.

Mr. Robert N. Laffel, Idaho Falls District Manager, 1527 Hollipark Drive, Idaho Falls, Idaho 83401, 208–523–2706.

Mr. Thomas H. Blankenship, Boise District Manager, Room 376, Federal Building, 550 W. Fort Street, Boise, Idaho 83724, 208–34–9137.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background of Policy

A. Introduction

The Surcharge Policy is a response to recommendations made by the Northwest Power Planning Council (Council) in its 1986 Northwest Conservation and Electrical Power Plan (Plan) and its Model Conservation Standards (MCS) for New Residential and Commercial Construction of March 26, 1987 (Plan Amendment). The purpose of this Policy is to encourage utilities to achieve additional electrical savings through improved residential and commercial building construction which can ultimately result in region-wide adoption of the Council's MCS in buliding codes. There are two additional policy objectives: (1) To identify the criteria that will be used to evaluate a utility's proposed approach to achieving MCS level electrical savings; and (2) to identify the method for calculating and collecting a surcharge.

As the Council states in its Plan Amendment, "By the end of 1989, the Council expects the region to achieve residential sector savings equivalent to at least 85 percent of those that would be achieved with full implementation of the MCS." One long-run goal is to achieve MCS level savings through code adoption.

B. Statutory Direction

Section 4(e)(3) of the Pacific Northwest Electric Power Planning and Conservation Act (Act) provides for the development of MCS as part of the Council's Plan. The standards, as described in section 4(f)(1) of the Act, are to include standards applicable to new and existing structures and to utility and government conservation programs. Such standards should reflect geographic and climatic differences and produce all power savings that are cost effective for the region and economically feasible for consumers.

Section 4(f)(2) of the Act provides that the Council may recommend to the Bonneville Administrator the imposition of a surcharge on customers of the Administrator for those portions of their loads within the region that are within States or political subdivisions which have not, or on the Administrator's customers which have not, implemented the standards or other conservation measures that the Administrator determines achieve energy savings comparable to the standards. Finally, section 4(e)(3)(G) of the Act mandates that the Council develop a methodology for calculating the surcharge.

II. Past and Present Surcharge Policy Development Efforts

Part A of this section summarizes past MCS and surcharge actions undertaken by the Council. Part B summarizes Bonneville's past surcharge-related activities. Part C describes the Council's 1987 surcharge recommendation as contained in its Plan Amendment of January 30, 1987.

A. Council Activities to Date

On April 27, 1983, the Council adopted its first Plan. As required by the Act, the Council's 1983 Plan contained MCS for newly constructed residential and commercial buildings and for conversion of existing residential and commercial buildings to electric space heating and conditioning.

In the 1983 Two-Year Action Plan (chapter 10 of the 1983 Plan), the Council identified tasks to be undertaken by Bonneville, the Council, and other regional entities. That Plan mandated that Bonneville include in its surcharge policy a consistent procedure for certifying compliance with MCS and a procedure for reviewing and evaluating alternative plans.

In accordance with the 1983 Plan, State governments, local governments, or utilities were to adopt and enforce the MCS as building codes or utility service standards by January 1, 1986. Where such standards were not adopted, an alternative plan to achieve comparable savings should have been in place by January 1, 1986. Where neither action had occurred, the Council recommended that the Administrator impose a surcharge.

The Council voted on October 31, 1984, to adopt an amendment which simplified the surcharge calculation. The Council recommended that a 10-percent surcharge be levied on the customer's power bill for that portion of its loads which were not complying with the standard.

On July 26, 1985, the Council proposed to enter rulemaking to amend the MCS. On December 4, 1985, the Council voted to amend that portion of the 1983 Plan dealing with MCS. The amended MCS thermal performance levels for both new residential and new commercial buildings were equivalent to the MCS set forth and amended by the Council in its 1983 Plan. The Council also recommended that Bonneville develop a surcharge policy based on MCS implementation and performance.

In the 1986 Action Plan, the Council identified specific actions that Bonneville should take towards region-wide implementation of the MCS. Bonneville was to: (1) Have utilities submit to Bonneville a plan declaring how they intended to comply with the MCS, (2) design a process to collect utility-specific data on the savings that would be achieved if all buildings were constructed to MCS levels, (3) continue development and implementation of a procedure to measure compliance with the MCS, (4) review alternative plans for achieving compliance with the MCS,and (5) develop a new surcharge policy.

On November 20, 1986, the Council proposed to enter further rulemaking to amend part of its 1986 Plan dealing with MCS and the surcharge. After public comment, the Plan amendment was published on January 30, 1987. Notice of the Plan Amendment, which included the Council's 1987 MCS, was published in the **Federal Register** on March 26, 1987 (52 FR 9738).

B. Bonneville Activities to Date

Bonneville began the development of a surcharge policy in early 1984 through a series of informal meetings with State government, local government, utility, and Council representatives. Bonneville staff informally discussed the various issues that might surround the development of a policy to implement the Council recommendation to impose a surcharge. These informal discussions formed the basis of a **Federal Register** Notice of Intent to Develop a Policy to Implement the Council Recommended Conservation Surcharge. The notice (49 FR 34891, September 4, 1984) was mailed to the public on August 28, 1984.

Bonneville elected to delay publication of a proposed policy until after final Council action on amendment of the surcharge methodology. Public review and comment on the proposed policy took place between March 13, 1985, and May 17, 1985.

Bonneville suspended action on the surcharge policy when the Council entered rulemaking to amend the MCS in the summer of 1985. After the Council amended its MCS recommendation in December 1985, Bonneville developed a revised proposed policy and received public comment on that proposal during July and August 1986.

As part of the Administrator's decision on whether to finalize the revised proposed surcharge policy, Bonneville undertook an analysis of the cost-effectiveness and consumer

economic feasibility of the MCS contained in the Council's 1986 Plan. Bonneville concluded that some of the recommended measures were not cost effective, and on December 19, 1986, Bonneville's MCS findings were published.

Based in part on that analysis, the Council entered rulemaking to amend its MCS and surcharge recommendations. In turn, Bonneville suspended the development of a final surcharge policy. Following publication of the Council's Plan Amendment on January 30, 1987, Bonneville undertook a second revision of the proposed surcharge policy.

On May 26, 1987, Bonneville released its proposed surcharge policy for public comment. The comment period closed on July 15, 1987. During the comment period there was one public meeting which was held on June 22, 1987. A number of changes were made in the proposed version of that policy, based on the public comment received. That policy, entitled "Model Conservation Standards Surcharge Policy," was Bonneville's response to Council recommendations to develop a surcharge policy.

In response to the 1988 Policy, utilities submitted plans for the residential and commercial sectors within their service areas. Those plans covered calendar year 1988. With the adoption of a Policy extension on November 10, 1988, Bonneville also announced proposed amendments to the Policy to allow for public comment on several issues which arose during comment on the Policy extension. Public comment on the proposed amendments closed on December 16, 1988. While one public comment was received, it did not address the proposed amendments. Bonneville is now publishing an amended Policy which adopts the two proposed amendments.

C. Council's 1987 Surcharge Recommendation

The Council's Plan Amendment of January 30, 1987, made several major changes to its 1986 Plan. The most significant change in the surcharge recommendation was a move away from a performance-based surcharge, where utilities could face a surcharge if their performance was poor relative to the performance of other utilities. A summary of the Council's 1987 surcharge recommendation appears below.

1. *Residential Surcharge Recommendation.* The Council recommended that a 10 percent surcharge be imposed on utilities which do not submit, by a deadline set by Bonneville: (1) An initial plan for implementation of the Bonneville/Utility Residential MCS Program; (2) a plan for implementation of an alternative program which is approved by Bonneville as being equivalent; or (3) a declaration, approved by Bonneville, that the MCS for residential buildings will be met by building codes. This surcharge would continue in effect until a utility has filed an initial plan and has obtained the necessary Bonneville approvals.

2. *Commercial Surcharge Recommendation.* The Council recommended that a 10 percent surcharge be imposed on utilities which do not submit, by a date set by Bonneville: (1) An initial plan for implementation of the Bonneville/Utility Commercial MCS Program; (2) a plan for implementation of an alternative program which is approved by Bonneville as equivalent to the Bonneville/utility MCS Program, or (3) a declaration, approved by Bonneville, that the MCS for commercial buildings will be met by building codes at the MCS levels. The Council recommended that the surcharge continue in effect until a utility has filed an initial plan and has obtained the necessary Bonneville approvals.

3. *Conversion Surcharge Recommendation.* The Council's MCS for residential and commercial buildings converting to electric space heating/conditioning stated that State or local governments or utilities should take actions through codes and/or alternative programs to achieve electric power savings from buildings which convert to electric space heating/conditioning. The savings should be comparable to those savings that would be achieved if each building converting to electric space heating/conditioning were upgraded to include all cost-effective electricity conservation measures. The Council recommended this conversion standard, but did not recommend that a surcharge be imposed for failure to adopt the standard.

4. *Combined Commercial/Residential Code.* One provision of the Plan amendment allowed for a combined residential/commercial MCS strategy by a utility. This approach allowed for less than MCS program savings to be achieved in one sector as long as the shortfall is recouped in the other sector. This alternative was to be applicable only to the submission of alternative codes or utility service standards.

5. *Exemptions.* The Council has determined that no exemptions are needed at this time.

6. *Federal Loads and Generic MCS.* The council did not make any surcharge recommendation in these areas.

III. Surcharge Policy

Section 1: Definitions

A. *Administrator*—Administrator of the Bonneville Power Administration or the Administrator's designated representative.

B. *Alternative Code*—Codes implemented in the residential and commercial sectors which, in aggregate, achieve total electrical savings at least as large as would have been expected had the Council's illustrative MCS been implemented in the residential and commercial sectors. The Council's illustrative MCS are contained in the Council's Plan Amendment (52 FR 9738, March 26, 1987).

C. *Alternative Utility Plan*—Any plan which either partially or wholly relies on an approach to conservation savings discussed in Appendices 2, 4, 5, 6, or 7 of this Policy.

D. *Alternative Utility Program*—For the residential sector, a utility operated MCS support program designed to achieve at least the same level of total expected electrical savings, while complying with the Indoor Air Quality (IAQ) and ventilation goals, of Bonneville's Super GOOD CENTS program. For the commercial sector, a utility MCS support program designed to promote at least the same MCS measures as contained in the Council's commercial MCS of March 26, 1987, and providing comparable design assistance services as contained in the Bonneville/Utility MCS support program as of the effective date of this Policy.

E. *Customer*—For purposes of this policy, a utility existing in the Pacific Northwest region which purchases firm power from Bonneville under a utility Metered or Computed Requirements Contract, or a utility which purchases firm capacity under a pre-Act contract, or a utility which participates in the Residential Purchase and Sales Agreement/Exchange Transmission Credit Agreement, as an active exchanger or deemer.

F. *Equivalent Code*—In either the residential or commercial sectors, a code which is designed to achieve (within 5 percent) the level of total electrical savings that would have been achieved if that jurisdiction had adopted the Council's MCS for that sector.

G. *Jurisdiction*—For purposes of this Policy, any unit of government including Indian Tribes, State and local governments, and municipal corporations.

H. *Region*—The Pacific Northwest Region, region, or regional means the area consisting of Orgeon, Washington, and Idaho, the portion of the State of

Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and any contiguous areas, not in excess of 75 air miles from the area referred to above, which are part of the service area of a rural electric cooperative customer, served by the Administrator on the effective date of the Act, which has a distribution system from which it serves both within and without such region.

I. *Service Area*—The service area of a utility is that portion of its service territory which is both subject to the Surcharge Policy and to which the utility provides electric power service to the residential or commercial sectors.

J. *Total Retail Load*—The number of firm kilowatt hours (kWh's) sold at retail by a customer during the 12-month period prior to the implementation date contained in Appendix 8 or during consecutive billing cycles covering a comparable period of time.

K. *Total Residential Load*—The number of firm kWh's sold at retail by the customer during either the most recent 12-month period prior to implementation data contained in Appendix 8, or during consecutive billing cycles covering a comparable period of time.

L. *Total Commercial Load*—The total number of firm kWh's sold at retail by the customer during the 12-month period prior to the implementation date contained in Appendix 8, or during consecutive billing cycles covering a comparable period of time.

Section 2: Application of the Surcharge Policy

For the residential sector, by the plan submission date contained in Appendix 8, customers must submit either: (a) A letter indicating that the approach being used to comply with the Policy in 1988 will be used to comply with the Policy for the plan coverage period indicated in Appendix 8, (b) a plan to implement the Super GOOD CENTS Program, or (c) an alternative utility program, or utility service standard for Bonneville approval, or (d) a plan indicating that jurisdictions within its service area will implement and enforce the MCS via participation in the Northwest Energy Code Program (NEWCP) or adoption of a Bonneville-approved building code. A utility's residential sector plan may contain any combination of these approaches. Except as provided for in section 3(A) of this Policy, the utility's entire service area must be covered by some combination of the conservation strategies described in the appendices to this policy.

A utility's residential sector plan will be evaluated on the basis of the utility's proposed efforts for the residential sector during the plan coverage period indicated in Appendix 8 and its success with the approach(es) currently being used to comply with the Policy.

Customers who do not implement a Bonneville approved residential MCS plan by the plan implementation date indicated in Appendix 8, will be subject to a surcharge as calculated in sector 4 of this Policy. Customers who have been granted a grace period, as provided for either in section 3 or the appendix relevant to the utility's conservation strategy, will not face a surcharge until the end of any such period.

For the commercial sector, by the plan submission date indicated in Appendix 8, customers must submit either (a) a letter indicating that the approach currently being used to comply with the Policy will be used to comply with the Policy for the plan coverage period indicated in Appendix 8, (b) a plan to implement Bonneville's Commercial MCS Program, (c) an alternative utility commercial program or utility service standard in the commercial sector, or (d) a plan indicating that jurisdictions within its service area have met the Council's commercial MCS through codes. A utility's commercial sector plan may contain any combination of these approaches. Except as provided for in section 3(A), the utility's entire service area must be covered by some combination of the conservation strategies described in the appendices to this policy.

Customers who have not implemented a Bonneville-approved commercial MCS plan by the plan implementation date indicated in Appendix 8, are subject to a surcharge, as calculated in section 4 of this Policy. Customers who have been granted a grace period, as provided for in either section 3 or the appendix relevant to the utility's conservation strategy, will not face a surcharge until the end of any such period.

Customers of Bonneville without service areas as defined in this Policy, need only submit evidence of their lack of such a service area by the plan submission data indicated in Appendix 8. This provision exists for those customers who have voluntarily adopted a policy not to serve the residential or commercial sectors, or who are prohibited from serving the residential or commercial sector. If the customer serves one of these two sectors, then this provision will only apply to the one sector not served.

Customers who have neither submitted this information, nor a plan for achieving conservation in these sectors, will be subject to a surcharge after the plan implementation date indicated in Appendix 8 has passed.

Each of the appendices to this Policy represents a different approach to achieve electrical savings from improved construction practices. These appendices contain more specific submission and evaluation criteria for each of the MCS plan options and are part of this Policy. It is very important that customers carefully review this document including the appendices, to understand fully what actions utilities must take to achieve conservation savings in ways which also comply with this Policy.

Once any plan is approved and implemented, Bonneville will assume that the utility and/or jurisdiction(s) within its service areas will carry out that paln in good faith. During the period for which this Policy is in effect, Bonneville reserves the right to revisit any utility's approved plan if Bonneville has reason to believe that the utility has not implemented its plan in good faith. This same provision applies to utilities who rely on jurisdictional adoption and enforcement of codes to comply with this Policy.

With their proposed plan, customers are to submit the following load information to the extent available: (a) Total retail load, and (b) that portion of their total retail load in jurisdictions not covered by one or more of the conservation strategies contained in the appendices to this Policy. If a customer has retail loads in violation of the Policy for both sectors, the portion of their total load not in compliance with the Policy should be reported by sector for each noncomplying jurisdiction.

This Policy is in effect from the date it is signed by the Administrator until it is either amended or rescinded. In future years, Bonneville will announce the submission dates and timeframe which a submittal is to cover.

Section 3: Evaluation of Alternative Utility Plans

An alternative utility plan is any plan which relies wholly or in part on an approach to conservation savings presented in Appendix 2, 4, 5, 6, or 7 of this Policy. These plans will be evaluated using three criteria: (1) Expected electrical savings, (2) enforcement, and (3) indoor air quality (IAQ) and ventilation. This section applies to all residential sector alternative plans and those commercial sector alternative plans relying on the adoption of commercial codes or commercial service standards.

If Bonneville concludes that the utility's proposed alternative plan cannot be accepted because of its failure to comply with any of the evaluation criteria described below, Bonneville will allow a grace period lasting at least as long as Bonneville took to evaluate the utility's initial proposal. Any subsequent grace period(s) may be allowed on a case-by-case basis.

A. *Equivalent Electrical Savings.* For the residential sector, if a utility is proposing to achieve electrical savings by implementing an alternative residential utility program, Bonneville will use the prospective total electrical savings of its Super GOOD CENTS Program to determine whether the utility's proposed approach will at least meet the appropriate residential electrical savings level for the period of time covered by a utility's plan. Part of the equivalence determination procedure for an alterantive residential utility program will involve a comparison between the utility's proposed marketing program and the marketing program they would have pursued had they enrolled in the Super GOOD CENTS program for the period of time covered by the utility's plan.

Utilities which rely on jurisdictional adoption of residential building codes, or which impose a residential service standard, to achieve additional energy savings in the residential sector, will have to provide evidence supporting the claim that the code (or service standard) can be judged to be an equivalent code, as equivalence is defined in this Policy.

Utilities which rely on jurisdictional adoption of residential *and* commercial codes (or which impose residential and commercial service standards) to achieve additional savings beyond current practice, may "tradeoff" savings achieved in one sector towards a deficit in the other sector. The utility would have to present evidence supporting its claim that the residential and commercial codes, in aggregate, can be expected to achieve at least the same total level of electrical savings as would have been achieved had the jurisdiction adopted the Council's full illustrative commercial and residential MCS for that climate zone. Such sectoral trade-offs are only allowed using enhanced building codes or service standards.

In addition, a utility may obtain equivalent savings by allocating savings achieved by advanced building codes in a jurisdiction (or jurisdictions) within its service area to its entire service area. Such "jurisdictional trade-offs" are only allowed where the utility shows that the full Council MCS level of savings for both sectors are being attained, in aggregate, within the utility's service area.

Finally, those utilities relying on commercial code adoption by a jurisdiction within or covering their service area, or who will impose a commercial service standard, will have to provide evidence supporting their claim that the expected total electrical savings are at least equivalent to what would have been expected had the jurisdiction implemented the Council's illustrative commercial MCS. The only exception to these requirements is for utilities or jurisdictions who adopt a codified version of the Council's MCS, as discussed in Appendices 4 and 6, respectively.

Submittals in future years may be evaluated using different standards in the event that code advancement occurs and/or the MCS are changed. For the plan coverage period indicated in Appendix 8, Bonneville will analyze residential electrical savings from an alternative plan by assuming that, in the absence of MCS, a residence would have been built to one of the following: (a) In Oregon, 1983 energy code; (b) in Washington, 1983 energy code; or (c) in either Idaho or Montana, HUD Minimum Property Standards. Electrical savings in the commercial sector will be evaluated assuming: (a) 1986 code in Oregon and Washington, (b) National Energy code in Montana, and (c) individual jurisdiction codes in Idaho.

All thermal performance evaluations will rely on accepted engineering practices. Bonneville will be guided by the assumptions, process, and housing prototypes contained in Bonneville's Code Equivalency Determination Procedures.

B. *Enforcement.* A utility will have more discretion in proposing an approach which will meet the second evaluation criterion on enforcement. Bonneville is recommending that any customer contemplating submission of an alternative utility plan refer to Bonneville's Super GOOD CENTS, NWECP and Commercial MCS Program descriptions for guidance. Alternative utility plans, excluding an alternative utility commercial program, must contain a requirement for site inspection consistent with the effective date of the surcharge.

Referring to alternative utility programs, a utility will have to provide evidence adequate to assure Bonneville that the energy savings which are being claimed are attributable to the utility's program. Part of that evidence is some enforcement method to assure that the conservation savings the utility is claiming are attributable to the measures they are promoting and inspecting.

C. *Indoor Air Quality and Ventilation.* For residential construction all alternative plans will be examined to determine if the construction practices being promoted or required, when combined with the comparable monitoring, information, and mitigation strategies, are likely to assure that IAQ and ventilation rates are comparable to what is achieved in homes constructed to Super GOOD CENTS standards, which are designed to at least maintain 1983 levels of IAQ and ventilation.

For the commercial sector, IAQ measures designed to at least maintain 1983 levels of IAQ and ventilation are required. The IAQ requirements contained in the Council's Plan Amendment of March 1987 were designed to maintain those levels of IAQ and ventilation. These same standards are contained in Bonneville's Energy Smart Design Program and the codified versions of the Council's commercial MCS.

Section 4: Calculating a Surcharge

A. Not less than 30 days prior to a final decision on the imposition of a residential surcharge, the Administrator shall provide written notice to the customer including determination of the amount of a customer's total retail load in jurisdictions not covered by a Bonneville-approved MCS residential plan. The amount of the total retail load in jurisdictions not covered by a Bonneville-approved MCS residential plan shall be based on information submitted by the utility in accordance with the reporting requirements listed in section 2 of this policy. In the event that a utility has not provided that information, the Administrator may rely on the best information available to Bonneville.

B. Not less than 30 days prior to a final decision on the imposition of a commercial surcharge, the Administrator shall provide written notice to the customer including a determination of the amount of a customer's total retail load in jurisdictions not covered by a Bonneville-approved MCS commercial plan. The amount of the total retail load in jurisdictions not covered by a Bonneville-approved MCS commercial plan shall be based on information submitted by the utility in accordance with the reporting requirements listed in section 2 of this policy. In the event that a utility has not provided that information, the Administrator may rely on the best information available to Bonneville.

C. The fraction of a customer's total retail load in jurisdictions *not* covered by a Bonneville-approved MCS plan will be determined by dividing the customer's total retail load in jurisdictions not covered by a Bonneville-approved MCS plan, as determined in sections 4(A) and 4(B), by the customer's total retail load.

D. The level of the surcharge for failure to implement the necessary Bonneville-approved MCS plans is 10 percent multiplied by the fraction of a customer's total retail load in jurisdictions *not* covered by a Bonneville-approved MCS plan, as determined in section 4(C).

E. At no time will a customer simultaneously be assessed a surcharge for failure of a jurisdiction to comply with the requirements in the residential sector and a surcharge for failure of that same jurisdiction to comply with the requirements in the commercial sector.

F. The customer and other interested parties shall be afforded an opportunity to provide comments regarding the determinations made in sections 4(A) to 4(D). Such comments may be made in writing or orally at a public meeting convened by Bonneville at the request of the customer for this purpose. This public meeting will be held between the time of the written Notice of Intent to Surcharge and the final surcharge decision. Included in the Notice of Intent to Surcharge will be an initial determination of the fraction of a customer's retail load subject to the surcharge, based on sections 4(A) to 4(D). Following the receipt and evaluation of comments, the Administrator shall provide written notice to the customer of the final surcharge decision.

G. Beginning with the effective date of a surcharge, the Administrator shall review the findings made in sections 4(A) to 4(D) after the customer, or a jurisdiction served by the customer, has taken an action that affects those findings. Customers may request such review by providing evidence in accordance with this section that the customer or a jurisdiction served by that customer has taken actions subsequent to the effective date of the surcharge.

Section 5: Collecting a Surcharge

A. Those customers receiving a final written notice of a load subject to a surcharge shall be billed for the surcharge beginning with the first full billing period following issuance of such notice.

B. Any power purchases or exchanges made on or after the effective date of the surcharge, but before receipt of final notice finding the load subject to a surcharge, may be retroactively billed to the effective date of the surcharge. Such retroactive billing shall collect the retroactive surcharge over a like number of billing periods as elapsed from the effective date of the surcharge to the receipt of final written notice of a surcharge.

C. The level of surcharge is applied to all power purchases and/or exchanges made by the customer under the applicable rate schedules and/or exchanges pursuant to the residential Purchase and Sales Agreement/ Exchange Transmission Credit Agreement, using the Council's surcharge methodology, and is applied subsequent to any other rate adjustment.

1. For firm requirements customers purchasing firm power under the rate schedules subject to the surcharge, the surcharge shall be applied monthly to the billing charges for all power purchased under these rate schedules during the billing period.

2. For customers participating in the residential exchange program, the surcharge shall be applied to the charges for determining the cost to the purchaser of buying firm power from Bonneville under the terms and conditions of the Residential Purchase and Sale Agreement.

3. For those firm requirements customers that both purchase power from Bonneville and participate in the Residential Purchase and Sales Agreement or Exchange Transmission Credit Agreement, the surcharge shall be applied in the following manner to avoid surcharging the same load twice:

a. All power purchases under a utility's Power Sales Contract at rates subject to the surcharge shall include a surcharge, as calculated in the previous section, added to the billing charges for the billing period; and,

b. The surcharge applied to the utility's total exchange load shall be adjusted by multiplying the surcharge level by the percentage of a utility's exchange load served by a utility's own resources. The percentage of exchange load served by a utility's own resources shall be based on the difference between the utility's total retail load and firm power purchases from Bonneville divided by the total retail load and rounded to the nearest one-tenth of a percent. The adjustment surcharge level shall be applied to the charges for determining the cost to the purchaser of buying firm power from Bonneville under the terms and conditions of the Residential Purchase and Sales Agreement or in conformance with Exhibit E of the Exchange Transmission Credit Agreement.

D. If a customer participating in the Residential Exchange is currently in a deemer status, the surcharge shall be accumulated in the account established for this purpose as specified in the respective agreement and shall be included in the obligation a utility must repay prior to receiving a direct payment from Bonneville. If a customer is not in a deemer status, the surcharge shall be included in the determination of the net payment made by Bonneville.

E. The collection of the surcharge shall continue until the Administrator determines that the surcharge is no longer required under the terms of this Policy.

F. Surcharges collected on purchases for periods in which loads are subsequently found to be in compliance with this Policy shall be credited to the customer in the first full billing period following final written notice of such finding. Surcharges on loads which are subsequently found not to have been in compliance with terms of this Policy for specified periods shall be billed to the customer in the first full billing period following final written notice of such findings.

Appendix 1: Achieving Electrical Savings by Adopting the Bonneville/ Utility MCS Support Program

A. *Residential Sector.* Bonneville customers opting for this path are assured that enrollment in and subsequent good faith implementation of the Super GOOD CENTS Program throughout their service areas will result in avoidance of a residential surcharge under the current Surcharge Policy. A customer which is considered a Super GOOD CENTS Program participant, but is only operating that program in a portion of its service area subject to the Policy, will have to take actions to assure that those portions of its service territory not covered by Super GOOD CENTS are covered by some combination of the other conservation strategies presented in these appendices. Those customers which implement the MCS measures contained in the Super GOOD CENTS Program, implement incentives equal to Bonneville's Super GOOD CENTS incentive level, and implement an advertising strategy considered by Bonneville to be consistent with the Super GOOD CENTS licensing and grant requirements will be considered a full participant in the Super GOOD CENTS Program for purposes of Surcharge Policy compliance. A Bonneville-approved advertising strategy must include, but is not limited to, use of the Super GOOD CENTS logo

and participation in the regionwide Super GOOD CENTS advertising campaign, in a Bonneville-approved manner. Customers which choose to adopt an advertising strategy and/or incentives which Bonneville concludes are not consistent with Super GOOD CENTS requirements for Policy compliance will be treated as filing an alternative plan. Those customers should refer to Appendix 2 for a discussion of that option.

For customers which on average over the last 3 years have had no more than (a) five site-built housing starts, and (b) 2,000 residential accounts will be considered small utilities for purposes of this policy. These utilities will have the option of enrolling in Bonneville's Super GOOD CENTS Program for small utilities, referred to as the Small Utility Program. If a utility believes it qualifies for this option, the utility is encouraged to contact the nearest Bonneville Area or District Office to obtain more information on this program option.

If a customer is currently relying on Super GOOD CENTS participation to comply with the Policy, the utility's submittal for the plan coverage period indicated in Appendix 8 can consist of a letter indicating that the utility plans to continue participation in Super GOOD CENTS for that period of time.

Otherwise, those customers wishing to enroll in Super GOOD CENTS as a way of avoiding a surcharge must indicate this to Bonneville by the plan submission date indicated in Appendix 8. In addition, the utility shall have signed a Super GOOD CENTS grant agreement by the plan implementation date indicated in Appendix 8. Bonneville will consider Super GOOD CENTS Program implementation to have occurred when the utility is engaging in activities, particularly marketing and promotion activities, which can be considered consistent with the utility's agreement.

Bonneville will consider offering a grace period if Bonneville has not completed the customer's Super GOOD CENTS grant award by the plan implementation date indicated in Appendix 8. Any such grace period will be provided in the event that Bonneville has received a plan by the plan submission date indicated in Appendix 8, and the approval delay is due solely to Bonneville internal delay.

Finally, as is indicated in the Super GOOD CENTS Program, participants are to submit the following data:

1. Total number of new homes (all fuels) constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

2. Total number of new electrically heated homes constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

3. Total number of new electrically heated homes constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

To comply with the Policy, customers are to collect and provide that data to Bonneville by January 30 of the following year.

B. *Commercial Sector.* Bonneville customers opting for this path are assured that enrollment in, and subsequent good faith implementation of Bonneville's Smart Design Program throughout the utility's service area will result in avoidance of a commercial surcharge under the current Surcharge Policy. All customers wishing to avoid a surcharge under this path must agree to comply with the IAQ and data reporting requirements and other technical specifications of that program, applicable to the customer.

If a customer is currently relying on Smart Design participation to comply with the Policy, the utility's submittal can consist of a letter indicating that the utility plans to continue participation in Smart Design for the plan coverage period indicated in Appendix 8.

Those new customers electing to participate in Smart Design to comply with the Policy must agree by the plan submission date indicated in Appendix 8 to enroll in the commercial program and must have enrolled in the program no later than the plan implementation date indicated in Appendix 8. Bonneville will consider offering a grace period if Bonneville has not completed the customer's grant award, if applicable, by the plan implementation date indicated in Appendix 8. Any such grace period will be provided in the event that Bonneville had received a plan by the plan submission date indicated in Appendix 8 and the approval delay is due solely to Bonneville internal delay.

Appendix 2: Achieving Electrical Savings by Adopting an Alternative Utility Program

If a utility is currently relying on an approved alternative plan to comply with the Policy, for either or both the residential and commercial sectors, the utility can submit a letter indicating its intentions to continue to rely on that approach for the plan coverage period indicated in Appendix 8.

A. *Residential.* An Alternative Utility Residential Program is the customer's proposed approach to meeting the standards of Bonneville's Super GOOD CENTS Program. In order for Bonneville to verify that the proposed program will provide equivalent savings, the information listed below must be submitted.

1. The conservation measures that will be promoted.

2. Analysis of the thermal performance of the conservation measures using Bonneville's input assumptions and Bonneville prototypes. These results will be compared to the Super GOOD CENTS illustrative path for that climate zone, using a WATTSUN analysis. If alternative assumptions or prototypes are used, acceptance of those alternative assumptions or prototypes will depend on the general acceptability of the assumptions and whether the prototypes represent typical dwellings certified in the utility's service area.

3. A list of activities to be undertaken to achieve the targeted penetration, such as: promotion and sales, advertising, incentives (type and level), technical assistance, certification, and any other applicable information. In addition, customers will be required to submit quarterly reports listing the activities undertaken and resources utilized in the marketing effort.

4. A plan showing how the utility will collect and provide the following data to Bonneville by January 30 of the following year:

a. Total number of new homes (all fuels) constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

b. Total number of new electrically heated homes constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

c. Total number of new electrically heated homes constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

5. Information on how the utility and/or jurisdiction plans to achieve IAQ and ventilation rates at least comparable to those achieved in Super GOOD CENTS homes, which are designed to at least

maintain 1983 levels of IAQ and ventilation.

The Alternative Utility Program path is not generally recommended for utilities without prior experience in operating such programs. An established track record with a well-defined package of measures will be extremely helpful, if not essential, in obtaining Bonneville approval for Alternative Utility Programs. Nonetheless, Bonneville staff will work with customers interested in pursuing this path to help explain the data submission requirements and other complexities involved in this approach.

Because of these complexities, utilities intending to use this path for policy compliance should submit their proposals to Bonneville at the earliest possible data after the final adoption of the Surcharge Policy. An approved program shall be implemented by the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in section 3 of the Policy, has been granted.

B. *Commercial.* An alternative Utility Commercial Program is the customer's proposed approach to meeting the standards of the Bonneville/Utility Commercial MCS Program. A proposed alternative program will be evaluated relative to the: (1) Level and type of activities and services to be offered, (2) method of marketing and performing the services, (3) penetration levels expected for the proposed program activities, and (4) proposed inspection method. The types of design assistance offered in Bonneville's program will be used to evaluate the type of design assistance a utility is proposing to offer in its own commercial MCS design assistance progrram. The types of design assistance which Bonneville's Commercial MCS Program contains are:

—Promotion of services to commercial customers;
—Screening to determine design assistance needs;
—Depending on the size of the utility and the type of commercial construction, provision of building design handbooks, computer energy modeling, clearinghouse referral, or other building design analysis; and
—Designer recognition for specified levels of energy efficiency

To perform the necessary review, Bonneville will require the following information:

1. A list of activities and services the customer intends to offer (e.g., modeling, design assistance, design handbook, information services, and training opportunities) to achieve the targeted penetration;

2. Management and oversight consistent with Bonneville practices;

3. A proposed method to submit to Bonneville quarterly reports listing the activities undertaken and resources used in the marketing effort;

4. A plan showing how the utility will collect and provide the following data to Bonneville by January 30 of the following year:

a. Total number of new commercial buildings, major remodels, and retrofits (all fuels) constructed in the utility's service area during the past calendar year, listed by Bonneville prototype;

b. Total number of electrically heated newly constructed, major remodels, and retrofit commercial buildings in the utility's service area during the past calendar year, listed by Bonneville prototype; and

c. Total number of electrically heated newly constructed commercial buildings, major remodels, and retrofits, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan, listed by Bonneville prototype.

Those customers intending to use this path for Surcharge Policy compliance shall submit their proposed plan by the plan implementation date indicated in Appendix 8, and shall have implemented the approved program no later than the plan implementation date indicated in Appendix 8, unless a grace period, provided for in section 3 of the policy has been granted.

Appendix 3: Achieving Electrical Savings by Participating in the Northwest Energy Code Program (NWECP)

This is a pre-approved path for avoidance of the surcharge if all the jurisdictions within the customer's service area, subject to the Surcharge Policy, are NWECP (formerly Early Adopter Program) participants. Except for the one exception noted below, if there are jurisdictions within a customer's service area which are not NWECP participants, then the customer will be subject to a surcharge unless those jurisdictions have implemented a Bonneville-approved building code or the utility has implemented a Bonneville-approved utility program or a Bonneville-approved service standard.

Customers serving areas containing jurisdictions that have adopted advanced building codes may seek to allocate savings achieved by those jurisdictional codes to portions of their service areas not covered by another approved option. This will be permitted only if the utility shows that the full Council MCS level of savings for both sectors are being attained, in aggregate, within that utility's service areas. In other words, the utility must achieve at least the same level of total electrical savings as would be achieved had the Council's full commercial and residential MCS been implemented throughout the utility's service areas.

The essential feature of the NWECP is the adoption by a jurisdiction of the MCS contained in the NWECP description. Additional program features include specific activities to ensure that no degradation in IAQ results, some form of enforcement method to assure MCS construction, and some data reporting requirements.

A customer currently relying on jurisdictional participation in the NWECP as at least part of its Policy compliance approach, must submit a letter by the plan implementation date shown in Appendix 8 indicating that it wishes to continue to rely on that program participation to comply with the Policy for the plan coverage period indicated in Appendix 8.

A. *Residential.* 1. Customers with jurisdictions within their service area that are currently participating in the NWECP, must submit a letter indicating: (a) The jurisdictions that are NWECP participants, and (b) the award number for each jurisdiction. In addition, customers must indicate what fraction of its retail residential load lies within NWECP jurisdictions. This information shall be submitted to Bonneville by the plan submission date indicated in Appendix 8.

2. Any jurisdiction considering adoption shall adopt and enforce the code by the plan implementation date indicated in Appendix 8, for the utility to avoid a surcharge, if the utility will not be operating an approved utility MCS program or residential service standard at that time.

3. Bonneville will consider offering a grace period if Bonneville has not completed the NWECP grant award process by the plan implementation date indicated in Appendix 8. Any such grace period will be considered in the event that Bonneville has received a plan by the plan submission date indicated in Appendix 8, and the approval delay is due to Bonneville internal delay alone.

4. Finally, the utility shall collect and provide to Bonneville the following data by January 30 of the following year:

a. Total number of new homes (all fuels) constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

b. Total number of new electrically heated homes constructed in the utility's

service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

c. Total number of new electrically heated homes constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (single-family broken out by site built, modular, and HUD-code homes, and total multi-family units).

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

B. *Commercial.* 1. To avoid a surcharge, customers with jurisdictions within their service area considering enrolling in this program shall notify Bonneville by the plan implementation date indicated in Appendix 8, of the jurisdiction's intent to enroll in the program. The jurisdiction shall have officially adopted and be able to enforce the MCS by the plan implementation date indicated in Appendix 8, if the utility is not operating an approved Commercial MCS Program or commercial service standard.

2. Customers with jurisdictions within their service area that are currently participating in the NWECP, shall provide a copy of Bonneville's letter of approval or grant award number.

3. Finally, the utility shall collect and provide to Bonneville by January 30 of the following year:

a. Total number of new commercial buildings, major remodels, and retrofits (all fuels) constructed in the utility's service area during the past calendar year.

b. Total number of electrically heated newly constructed, major remodels, and retrofits commercial buildings constructed in the utility's service area during the past calendar year.

c. Total number of newly constructed, major remodels, and retrofit commercial buildings in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan, broken out by Bonneville prototype.

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

Those customers wishing to avoid a surcharge under this path shall agree by the plan submission date indicated in Appendix 8, to enroll in the commercial program and shall have enrolled in the program no later than the plan implementation date indicated in Appendix 8. Bonneville will consider offering a grace period if Bonneville has not completed its NWECP grant award process by the plan implementation date indicated in Appendix 8. Any such grace period will be considered in the event that Bonneville has received a plan by the plan submission date indicated in Appendix 8, and the approval delay is due to Bonneville internal delay alone.

NWECP application materials can be obtained by contacting your nearest Bonneville Area or District Office.

Appendix 4: Achieving Electrical Savings by Adopting a Codified Version of the MCS

A. *Residential.* Several codified versions of the MCS have been developed. These are pre-approved codified versions of the Council's illustrative MCS paths. The options discussed in this appendix pertain to jurisdictions considering adopting, or who have adopted a codified version of the MCS, but are not participating in the NWECP.

Under this alternative, the customer must submit the codified version of the MCS which any jurisdiction in its service area is proposing for adoption or which has been adopted. The enforcement methods should be specified.

The statute or ordinance shall have been adopted and enforced by the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in section 3 of the Policy, has been granted.

Finally, the utility shall collect and provide to Bonneville the following data by January 30 of the following year:

a. Total number of new homes (all fuels) constructed in the utility's service area during the past calendar year (broken out by site built, modular, and HUD-code homes, and total multifamily units).

b. Total number of new electrically heated homes constructed in the utility's service area during the past calendar year (broken out by site built, modular, and HUD-code homes, and total multifamily units).

c. Total number of new electrically heated buildings constructed in the utility's service area during the past calendar year to the standard(s) described in the customer's plan (broken out by site built, modular, and HUD-code homes, and total multifamily units).

Customers who are operating a utility program and/or utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

B. *Commercial.* Under this alternative, the customer must submit the codified version of the MCS which a jurisdiction in its service area is proposing for adoption or which has been adopted. The enforcement methods must be specified. In addition, the customer must indicate what steps the jurisdiction will will take to address IAQ and ventilation requirements of Bonneville's NWECP.

By the plan submission date indicated to Appendix 8, the customer must submit the above information to Bonneville. The statute or ordinance must be operative no later than the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in Section 3 of the policy, has been granted.

Finally, the utility shall collect and provide the following data to Bonneville by January 30 of the following year:

1. Total number of newly constructed, major remodels, and retrofitted (all fuels) commercial buildings in the utility's service area during the past calendar year.

2. Total number of electrically heated newly constructed, remodeled, and retrofitted commercial buildings in the utility's service area during the past calendar year.

3. Total number of electrically heated new, remodeled, and retrofitted commercial buildings in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan, broken out by Bonneville prototype.

Appendix 5: Achieving Electrical Savings by Adopting Alternative or Equivalent Building Codes

An alternative code is designed to achieve total electrical savings which, when both sector's savings are combined, are at least as large as the electrical savings expected had the Council's residential and commercial MCS been implemented. A jurisdiction proposing to adopt an alternative code, in which one sectors' total electrical savings is expected to exceed the target electrical savings level for that sector, can use those excess electrical savings to offset electrical savings below the target in the other sector. The alternative code path may be pursued by a jurisdiction only when the sum of each sectors' savings at least equals the aggregate electrical savings target, which itself is based on the sum of the level of savings for the two sectors calculated using the Council's MCS. Section 3 of this policy discusses how the utility should approach the electrical savings equivalency analysis.

As compared to alternative codes, equivalent codes examine each sector individually. They differ from the pre-approved codified versions mentioned

earlier, but provide equivalent savings. For a code to be judged equivalent to the MCS, it must meet the definition of equivalence as used in this Policy.

A customer must submit a copy of the alternative or equivalent code which a jurisdiction has proposed. In addition, the customer must indicate how the jurisdiction plans on maintaining IAQ and ventilation at 1983 levels. Bonneville staff will attempt to assist customers and jurisdictions wishing to formulate improved building codes.

If an alternative code path is pursued, customers are encouraged to submit their alternative codes at the earliest possible date, but no later than the plan submission date indicated in Appendix 8. Both codes would have to be implemented and enforced by the plan implementation date indicated in Appendix 8.

A customer currently relying on jurisdictional participation in the NWECP as at least part of its Policy compliance approach must submit a letter indicating that it intends to continue to rely on that program participation to comply with the Policy for the plan coverage period indicated in Appendix 8.

For either the equivalent or alternative code approaches, the customer must submit its residential and commercial plans by the plan submission date indicated in Appendix 8. The codes must be implemented and enforced by the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in section 3 of the Policy, has been granted. Finally, the utility shall collect and provide to Bonneville by January 30 of the following year:

A. Total new homes (broken out by site built, modular, HUD-code homes, and total multifamily units) and commercial buildings, (new, major remodels, and retrofits) (all fuels) constructed in the utility's service area during the past calendar year.

B. Total new electrically heated homes (broken out by single-family modular, HUD-code homes, site built, and multifamily) and commercial buildings (new construction, retrofits, and remodels) in the utility's service area during the past calendar year.

C. Total new electrically heated homes (broken out by single-family modular, HUD-code homes, site built, and total multifamily) and commercial buildings (broken out by new construction, major remodels, and retrofits by Bonneville prototye by square footage) in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan.

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

For a more complete discussion of the data required to evaluate an alternative or equivalent code, refer to the latest version of Bonneville's MCS Code Equivalency Determination Procedures. A copy of these procedures can be obtained by contacting your nearest Bonneville Area or District Office.

Appendix 8: Achieving Electrical Savings by Adopting a Codified Version of the MCS as a Utility Service Standard[1]

If a utility is currently relying on a utility service standard as at least part of its Policy compliance appraoch, all the utility need do is submit a letter indicating that it wishes to continue to rely on that approach to comply with the Policy for the plan coverage period indicated in Appendix 8.

A. *Residential.* This path essentially involves adoption of a legal enforceable electric utility hook-up standard for new electrically heated residential buildings. The customer would simply decline to serve new electrically heated buildings not built to the standard's specifications. A grace period would be allowed for buildings considered by Bonneville to be "under construction" at the time the standard was adopted. The adoption of a utility service standard may qualify the utility for participation in Bonneville's NWECP.

Customers wishing to avoid a surcharge with this approach shall submit a residential plan by the plan submission date indicated in Appendix 8, and the residential service standard shall be adopted and enforced by the plan implementation date indicated in Appendix 8. A plan must contain: (1) A copy of the standard to be imposed, (2) how the customer plans on monitoring compliance with the standard, and (3) what IAQ measures and activities will be pursued to at least achieve IAQ and ventilation levels of Super GOOD CENTS construction, which is designed to at least maintain 1983 levels of IAQ and ventilation.

No surcharge will be imposed on any customer relying on such a service requirement which is subsequently enjoined or invalidated by a court. In such an event, the customer will be given a reasonable period of time to chose and implement another option.

Finally, the customer shall submit to Bonneville the following data by January 30 of the following year:

1. Total new homes (all fuels) constructed in the utility's service area during the past calendar year (broken out by single-family modular, HUD-code homes, site built, and multifamily).

2. Total new electrically heated homes constructed in the utility's service area during the past calendar year (broken out by single-family modular, HUD-code homes, site built, and multifamily).

3. Total new electrically heated homes constructed in the utility's service area during the past calendar year to the standard(s) described in the customer's (broken out by single-family modular, HUD-code homes, site built, and multifamily).

B. *Commercial.* This path essentially involves adoption of a legally enforceable electric utility hook-up standard for new electrically heated commercial buildings at least equal to the Council's commercial MCS. The customer would simply decline to serve new electrically heated buildings not built to the standard's specifications. A grace period would be allowed for buildings considered by Bonneville to be "under construction" at the time the standard was adopted.

Customers wishing to avoid a surcharge with this approach shall submit a commercial plan by the plan submission date indicated in Appendix 8, and the commercial service standard shall be adopted and enforced by the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in section 3 of the policy, has been granted. A plan must: (1) Contain a copy of the standard to be imposed, and (2) indicate how the customer plans on monitoring compliance with the standard.

No surcharge will be imposed on any customer relying on such a service requirements which is subsequently enjoined or invalidated by a court. In such an event, the customer will be given a reasonable period of time to choose and implement another option.

Finally, the customer shall submit to Bonneville the following data by January 30 of the following year:

1. Total new commercial buildings, major remodels, and retrofits (all fuels)

[1] Many customers have questioned whether they have legal authority, under State laws to impose such a service requirement. Bonneville has examined this question under the State laws of Oregon, Washington, Idaho, and Montana and has reached the tenative conclusion that no clear legal impediments exists in these States to conservation-oriented utility service requirements. While Bonneville does not offer legal advice to customers, particularly on questions of State law, Bonneville legal staff are available to discuss these preliminary conclusions with customers and their legal counsel. Any utility considering such a path should obtain independent legal advice on this question.

constructed in the utility's service area during the past calendar year.

2. Total electrically heated new, remodeled, and retrofitted commercial buildings constructed in the utility's service area during the past calendar year (broken out by Bonneville prototype).

3. Total electrically heated new, remodeled, and retrofitted commercial buildings constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (broken out by Bonneville prototype).

Appendix 7: Achieving Electrical Savings by Adopting an Alternative or Equivalent Utility Service Standard

This path is actually two alternative paths. If an equivalent utility service standard approach is pursued, a customer may choose to adopt a utility service standard which is not one of the codified versions, but which is determined to be equivalent to the Council's MCS, as equivalence is defined in this Policy. Alternatively, the customer may choose to adopt utility service standards for the residential and commercial sectors which when taken together, achieves at least the same level of total electrical savings as would have been achieved had the customer adopted the Council's commercial and residential MCS. This latter option is referred to as an alternative utility service standard.

If a utility is currently relying on a utility service standard as at least part of its Policy compliance approach, all the utility need do is submit a letter indicating that it wishes to continue to rely on that approach to comply with the Policy for the plan coverage period indicated in Appendix 8.

If an alternative or equivalent utility service standard approach is pursued, a customer shall submit to Bonneville: (1) A copy of the proposed service standard(s); (2) a description of the enforcement method(s); (3) a description of the methods used to at least achieve IAQ and ventilation levels of Super GOOD CENTS construction, which is designed to at least maintain 1983 levels of IAQ and ventilation; and (4) a copy of the analysis used to verify that the proposed service standard(s) will achieve the required total electrical savings. This material shall be submitted by the plan submission date indicated in Appendix 8, and both service standards shall be adopted and enforced by the plan implentation date indicated in Appendix 8.

Finally, the customer shall submit to Bonneville the follwing data by January 30 of the following year:

A. Total new homes (broken out by site built, modular, HUD-code homes, and total multifamily units) and commercial buildings (all fuels broken out by new construction, major remodels, and retrofits) in the utility's service area during the past calendar year.

B. Total new electrically heated homes (for single-family, broken out by site built, modular, HUD-code homes, and total multifamily units) and commercial buildings (broken out by new construction, remodel, and retrofits) in the utility's service areas during the past calendar year.

C. Total new electrically heated homes (for single-family, broken out by site built, modular, HUD-code homes, and total multifamily units) and commercial buildings (new construction, remodels, and retrofits) constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan by Bonneville prototype).

For a detailed description of the data required to evaluate an alternative or equivalent code, and the evaluation criteria, the customer and/or jurisdiction is advised to consult the latest version of Bonneville's MCS Code Equivalency Determination Procedures. A copy of these procedures can be obtained by contacting your local Bonneville Area or District Office.

Appendix 8: Submittal and Implementation Schedule for MCS Surcharge Policy.

Plan Submission Date: December 16, 1988
Plan Implementation Date: January 16, 1989
Plan Coverage Period: Calendar Year 1989

Issued in Portland, Oregon, on February 28, 1989.

Steven G. Hickok,

Executive Assistant Administrator.

[FR Doc. 89-5746 Filed 3-8-89; 4:56 pm]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Project No. 10525-001; Washington]

White Chuck Water Co.; Surrender of Preliminary Permit

March 9, 1989.

Take notice that the White Chuck Water Company, permittee for the Clear Creek Hydroelectric Project No. 10525, to be located on Clear Creek in Snohomish County, Washington, has requested that its preliminary permit be terminated. The preliminary permit was issued on August 12, 1988, and would have expired on July 31, 1991.

The permittee filed the request on February 1, 1989, and the preliminary permit for Project No. 10525 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, or holiday as described in 18 CFR 385.2007, in which case the permit shall remain in effect through the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

Lois D. Cashell,

Secretary.

[FR Doc. 89-4743 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ89-2-1-000]

Alabama-Tennessee Natural Gas Co.; Proposed PGA Rate Adjustment

March 8, 1989.

Take notice that on March 1, 1989, Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), Post Office Box 918, Florence, Alabama, 35631, tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheet:

Twelfth Revised Sheet No. 4

Alabama-Tennessee states that this tariff sheet is to become effective April 1, 1989. Alabama-Tennessee states that the purpose of this filing is to adjust its rates to conform to the rates of its suppliers.

Alabama-Tennessee has requested any necessary waivers of the Commission's Regulations in order to permit the tariff sheets to become effective as proposed.

Alabama-Tennessee states that copies of the tariff filing have been mailed to all of its jurisdictional customers and affected State Regulatory 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 Rule 211 or Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR §§ 385.211 and 385.214). All such motions or protests should be filed on or before March 15, 1989. 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

to the proceeding 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. 89-5737 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA89-1-48-000]

ANR Pipeline Co.; Proposed Changes in FERC Gas Tariff

March 7, 1989.

Take notice that ANR Pipeline Company ("ANR"), on February 28, 1989, tendered for filing as part of its F.E.R.C. Gas Tariff, Original Volume No. 1, the following tariff sheet to be effective May 1, 1989.

Twentieth Revised Sheet No. 18

ANR states that the purpose of the instant filing is to implement its Annual PGA rate adjustment pursuant to Section 15 of the General Terms and Conditions of ANR's Tariff.

ANR states that Twentieth Rev. Sheet No. 18 reflects a 32.05¢ per dekatherm (dth) decrease in the gas cost component of the commodity rate of ANR's CD-1/MC-1 Rate Schedules, a decrease of $0.41 in the monthly D-1 demand rate and a reduction of 1.48¢ in the D-2 demand rate applicable to the CD-1/MC-1 Rate Schedules. The instant filing further reflects a decrease in ANR's one-part rate applicable to Rate Schedule SGS-1 of 36.61¢ per dth.

ANR states that copies of the filing were served upon all of its 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 Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with § 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before March 27, 1989. 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 in the Public Reference Room.

Lois D. Cashell,

Secretary

[FR Doc. 89-5711 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER89-17-000]

Cincinnati Gas & Electric Co.; Initiation of Proceeding and Refund Effective Date

March 8, 1989.

Take notice that on March 8, 1989, the Commission issued an order in this proceeding initiating a proceeding under section 206 of the Federal Power Act, as amended by the Regulatory Fairness Act of 1988.

Refund effective date: 60 days from publication of this notice in the **Federal Register.**

Lois D. Cashell,

Secretary.

[FR Doc. 89 5742 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA89-1-46-000]

Kentucky West Virginia Gas Co.; Proposed Changes in FERC Gas Tariff

March 8, 1989.

Take notice that Kentucky West Virginia Gas Company ("Kentucky West") on March 1, 1989, tendered for filing with the Federal Energy Regulation Commission ("Commission") its annual PGA filing, which includes Eleventh Revised Sheet No. 41 to its FERC Gas Tariff, Second Revised Volume No. 1, to become effective May 1, 1989.

Kentucky West states that Eleventh Revised Sheet No. 41 reflects a deferred gas cost adjustment of $0.0431 and a current adjustment decrease based on an average cost of purchased gas effective May 1, 1989, of $2.0526. This average cost of gas reflects Kentucky West's exercise of contractual provisions, pursuant to its obligations under various gas purchase agreements, so as to provide for a total price of $2.0724 per dth inclusive of all taxes and any other production-related cost add-ons that it would pay under these contracts.

Kentucky West states that, by its filing, or any request or statement made therein, it does not waive any rights to collect amounts, nor the right to collect carrying charges applicable thereto, to which it is entitled pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit issued on March 6, 1986, in *Kentucky West Virginia Gas Co.* v. *FERC*, 780 F.2d 1231 (5th Cir. 1986), or to which it is or becomes entitled pursuant to any other judicial and/or administrative decisions.

Kentucky West states that a copy of its filing has been served upon each of its 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 a accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure and 385.214). All such motions or protests should be filed on or before March 28, 1989. 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. 89-5738 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA89-1-47-000]

MIGC, Inc.; Proposed Purchased Gas Adjustment Rate Change

March 7, 1989.

Take notice that on February 28, 1989, MIGC, Inc. (MIGC) tendered for filing Fifty-Second Revised Sheet No. 32 to its FERC Gas Tariff Original Volume No. 1. MIGC states that the purpose of this proposed tariff change is to submit its first annual purchased gas cost adjustment (PGA) filing pursuant to the Commission's revised PGA regulations and the revised PGA provisions of MIGC's tariff, as approved in Docket No. RP88-143-000. The revised tariff sheet is proposed to become effective May 1, 1989.

MIGC states that Fifty-Second Revised Sheet No. 32 reflects a PGA increase of $.1141 per MMBtu. MIGC states that the proposed PGA increase of $.1141 reflects a current adjustment of $.0012 per MMBtu to be effective for the three months commencing May 1, 1989, and an annual surcharge adjustment of $.1153 per MMBtu also effective May 1, 1989.

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 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214 and 385.211). All such motions or protests should be filed on or before

March 27, 1989. 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 the public.

Lois D. Cashell,

Secretary.

[FR Doc. 89-5712 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. TM89-3-16-000 and TM89-3-16-001]

National Fuel Gas Supply Corp.; Proposed Changes in FERC Gas Tariff

March 7, 1989.

Take notice that on February 28, 1989, National Fuel Gas Supply Corporation ("National") tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, to be effective on March 1, 1989.

Fifth Revised Sheet No. 71, page 1 of 2
Third Revised Sheet No. 71-A, page 1 of 2
Third Revised Sheet No. 71-B, page 1 of 2
Second Revised Sheet No. 71-C
Fifth Revised Sheet No. 72, page 1 of 2
Fifth Revised Sheet No. 72, page 2 of 2
Third Revised Sheet No. 72-A, page 1 of 4
Third Revised Sheet No. 72-A, page 2 of 4
Third Revised Sheet No. 72-A, page 3 of 4
Third Revised Sheet No. 72-A, page 4 of 4
Third Revised Sheet No. 72-B, page 1 of 3
Third Revised Sheet No. 72-B, page 2 of 3
Third Revised Sheet No. 72-B, page 3 of 3
Second Revised Sheet No. 72-C

National states that the purpose of this filing is to update the amount of take-or-pay charges approved by the Federal Energy Regulatory Commission to be billed to National by its pipeline-suppliers and to be recovered by National by operation of section 20 of the General Terms and Conditions to National's FERC Gas Tariff, First Revised Volume No. 1. National further states that its pipeline-suppliers which have received approval to bill take-or-pay charges to National are: Columbia Gas Transmission Corporation, CNG Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipeline Company, and Tennessee Gas Pipeline Company.

In addition, on February 28, 1989, National filed Substitute Fifth Revised Sheet No. 71 to correct the amount of take-or-pay costs incurred by Texas Eastern from Southern and passed-through to National. National states that it also filed Substitute Fifth Revised Sheet No. 72 to reflect the correct computation of its customers' total monthly principal amounts.

Copies of National's filings were served on National's jurisdictional customers and on the 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 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214 and 385.211). All such motions or protests should be filed on or before March 14, 1989. 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.

Louis D. Cashell,

Secretary.

[FR Doc. 89-5713 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ89-2-16-000]

National Fuel Gas Supply Corp.; Proposed Changes in FERC Gas Tariff

March 8, 1989.

Take notice that on March 1, 1989, National Fuel Gas Supply Corporation ("National") tendered for filing as part of its FERC Gas Tariff First Revised Volume No. 1, Twenty-First Revised Sheet No. 4, proposed to become effective on April 1, 1989.

National states that the purpose of the proposed revised tariff sheet is to reflect the quarterly Purchased Gas Cost Adjustment ("PGA") required under the Commission's Regulations. National further states that the proposed tariff sheet results in a 28.68 cents per dekatherm (Dth) reduction in its commodity gas costs in comparison with its base tariff rates in Docket No. RP89-49-000, which went into effect on January 30, 1989. The proposed quarterly PGA is said to result in a commodity sales rate under National's Rate Schedules RQ and CD equal to $2.6447 per Dth.

National states that the alternative, it submitted Third Revised Seventeenth Revised Sheet No. 4 to reflect the rates filed by National in Docket No. RP86-136-000, which results in a 26.56 cent per Dth negative current adjustment based on the same projected purchased gas costs over the period April through June 1989. National states that this tariff sheet results in a comodity sales rate of $2.6619 per Dth.

National states that copies of this filing were posted in accordance with the Commission's Regulations and served upon the Company's jurisdictional customers and the Regulatory Commissions of the States of New York, Ohio, Pennsylvania, Delaware and New Jersey.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatary Commission, 825 North Capitol Street, NE. Washington, DC 20426, in accordance with Rules 214 or 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214 and 385.211). All such motions to intervene or protests should be filed on or before March 15, 1989. 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. 88-5739 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ89-2-59-000]

Northern Natural Gas Co., Division of Enron Corp., Proposed Changes in FERC Gas Tariff

March 8, 1989.

Take notice that Northern Natural Gas Company, Division of Enron Corp. (Northern), on March 1, 1989, tendered for filing changes in its F.E.R.C. Gas Tariff, Third Revised Volume No. 1 (Volume No. 1 Tariff) and Original Volume No. 2 (Volume No. 2 Tariff).

Northern states that the revised tariff sheets adjust its Base Average Gas Purchase Cost in accordance with the Quarterly PGA filing requirements codified by the Commission's Order Nos. 483 and 483-A. The instant filing reflects a Base Average Gas Purchase

Cost of $1.7698 per MMBtu to be effective April 1, 1989, through June 30, 1989. Northern further intends to use its flexible PGA, as necessary, to reflect actual market conditions throughout this time period.

Northern states that this filing establishes new D1 and D2 rates in compliance with the above referenced PGA Rulemaking. Such required Northern to adjust its PGA demand rate components on a quarterly versus annual basis. This filing will establish new D1 and D2 rate components of $.860 and $.0369 per MMBtu, respectively, to be effective April 1, 1989, through June 30, 1989.

Copies of the filing were served upon the company's jurisdictional sales 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 §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before March 15, 1989. 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 89-5740 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ89-3-29-000]

Transcontinental Gas Pipe Line Corp., Proposed Changes in FERC Gas Tariff

March 8, 1989.

Take notice that Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing on March 1, 1989 the following tariff sheets to its FERC Gas Tariff Second Revised Volume No. 1. Such sheets are proposed to be effective April 1, 1989.

Fifty-Sixth Revised Sheet No. 12
Fifth-Third Revised Sheet No. 15
Twelfth Revised Sheet No. 15-A

Transco states these tariff sheets reflect the elimination of the (0.9 cents) per dt surcharge rate under the CD, G, OG, PS, E, ACQ and S-2 Rate Schedules pursuant to the requirements of § 154.310 of the Commission's regulations.

Transco states that copies of the instant filing are being mailed to its jurisdictional customers and interested State Commissions. In accordance with the provisions of § 154.16 of the Commission's Regulations, copies of this filing are available for public inspection during regular business hours, in a convenient form and place at Transco's main office at 2800 Post Oak Boulevard in Houston, Texas.

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 §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before March 15, 1989. 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 89-5741 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-71-000]

Pacific Gas Transmission Co., Rate Change

March 7, 1989.

Take notice that on March 1, 1989, Pacific Gas Transmission Company (PGT) tendered for filing a "Notice of Rate Change to Reflect Increase in the Price of Canadian Gas in Cost of Service Charges and Request for Expedited Consideration."

PGT states that its filing is made in compliance with the Commission's orders in Docket No. RP73-111 which require PGT to make filings pursuant to section 4 of the Natural Gas Act before there is reflected in PGT's cost-of-service charges any increase in the price for gas purchased from Canadian suppliers.

PGT indicates that its filing will only affect increases in rates charged under its PL-1 Rate Schedule for gas sales made by PGT to its only sales customer, Pacific Gas and Electric Company (PG&E).

PGT states that the filed changes in rates will reflect in its cost-of-service charges an increase to $1.90 (U.S.) per MMBtu in the Commodity Rate for gas imported from Canada, commencing April 1, 1989. Under PGT's import arrangements, this new price will remain in effect for eighteen months, through September 30, 1990.

PGT states that the new price is based on competitive conditions in PG&E's market in northern and central California and that PG&E is willing to accept the increase in exchange for the stability of an eighteen-month price which is competitive under current market conditions. PGT presently obtains more than 99% of its gas supply from Canada at the International Boundary.

PGT advises that copies of its filing have been mailed to its customers and to interested state commissions and other interested parties. PGT requests that expedited consideration be given to the instant filing and that the rate change be allowed to become effective, without suspension, on April 1, 1989.

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 §§ 385.211 or 385.214 of 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 March 14, 1989. 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. 89-5714 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER89-256-000]

Palisades Generating Co.; Filing

March 6, 1989.

Take notice that Palisades Generating Company (PGC), on February 27, 1989, tendered for filing with the Federal Energy Regulatory Commission (Commission) as an initial rate schedule the Power Purchase Agreement between Consumers Power Company and PGC. The Power Purchase Agreement provides for long-term sales for resale of available energy from the Palisades Nuclear Generation Station. The Power Purchase Agreement, by its terms, is not

effective until it is accepted and approved by the Commission.

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 (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before March 29, 1989. 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. 89-5715 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ89-3-8-000]

South Georgia Natural Gas Co.; Proposed Changes to FERC Gas Tariff

March 7, 1989.

Take notice that on March 1, 1989, South Georgia Natural Gas Company ("South Georgia") tendered for filing Fifty-First Revised Sheet No. 4 to its FERC Gas Tariff, First Revised Volume No. 1. The tariff sheet and supporting information are being filed with a proposed effective date of April 1, 1989, pursuant to the Purchased Gas Cost Adjustments provision set out in section 14 of South Georgia's FERC Gas Tariff.

South Georgia states that Fifty-First Revised Sheet No. 4 reflects a revenue increase of approximately $666,000 in jurisdictional revenues resulting from an increase of $3.061 per MMBtu in the D-1 component of South Georgia's rates, an increase of $.196 per MMBtu in the D-2 component for the G-1/I-1 Rate Schedules, an increase of $.144 per MMBtu in the commodity component, and a decrease in the D-2 component of Rate Schedules G-2/I-2 of $.024 per MMBtu.

South Georgia states that its Current Adjustment reflects an increase in the rates of its primary pipeline supplier, Southern Natural Gas Company, which are proposed to become effective April 1, 1989 in Docket No. TA89-1-7-000.

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 (§§ 385.211, 385.214). All such motions or protests should be filed on or before March 14, 1989. 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. 89-5716 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-70-000]

Stingray Pipeline Co.; Change in Tariff

March 7, 1989.

Take notice that on March 1, 1989 Stingray Pipeline Company (Stingray) tendered for filing, pursuant to the provisions of Order Nos. 509 and 509-A and the applicable provisions of the Federal Energy Regulatory Commission's (Commission) Regulations, the following revised tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

Second Revised Sheet No. 1
Revised Sixteenth Revised Sheet No. 4
Original Tariff Sheet No. 72
through
Original Tariff Sheet No. 148

The proposed effective date of these revised tariff sheets is April 1, 1989.

In accordance with the provisions of the Commission's Regulations, Stingray states that these tariff sheets reflect establishment of Stingray's initial Rate Schedules for transportation service under 18 CFR Part 284, Subpart K of the Commission's Regulations.

Stingray also respectfully requests that the Commission grant such waivers of the applicable requirements of the Natural Gas Act and the Commission's Regulations thereunder, including Sections 154 and 284 as may be necessary, so that the enclosed tariff sheets may be accepted for filing and made effective on April 1, 1989. Grant of such waivers is reasonable given the nature of this filing, the limited scope of its applicability and the desirability of having the proposed tariff sheets become effective April 1, 1989 in response to Commission Orders 509 and 509-A.

Copies of this letter and enclosures are being served on affected jurisdictional customers.

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 §§ 385.214 and 385.211 of the Commission's Rules of Practice and Regulations. All such motions or protests should be filed on or before March 14, 1989. 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. 89-5717 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ89-2-9-000]

Tennessee Gas Pipeline Co.; Rate Change Under Tariff Rate Adjustment Provisions

March 7, 1989.

Take notice that on March 1, 1989, Tennessee Gas Pipeline Company (Tennessee) tendered for filing the following tariff sheets to its FERC Gas Tariff to be effective April 1, 1989:

Second Revised Volume No. 1

Item A:
Twelfth Revised Sheet No. 20
Ninth Revised Sheet No. 20A
First Revised Sheet No. 20B
Fourteenth Revised Sheet No. 21

Original Volume No. 2

Item B:
Thirteenth Revised Sheet No. 5
Twelfth Revised Sheet No. 6

Tennessee states that the revisions listed as Item A reflect PGA current rate adjustments pursuant to Section 2 of Article XXIII of the General Terms and Conditions of Tennessee's Tariff.

Tennessee states that the revisions listed as Item B adjust transportation rate schedules to reflect changes in the cost of gas used for fuel pursuant to section 5 of Article XXIII of the General Terms and Conditions.

Tennessee states that copies of the filing have been mailed to all of its customers and affected state regulatory commissions. Any persons 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, 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 March 14, 1989. 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; provided, however, that any person who had previously filed a motion to intervene in this proceeding is not required to file a further motion. Copies of this filing are on file with the Commisison and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-5718 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA89-1-43-000 and RP88-39-001]

Williams Natural Gas Co.; Proposed Changes in FERC Gas Tariff

March 7, 1989.

Take notice that Williams Natural Gas Company (WNG) on March 1, 1989, tendered for filing Eleventh Revised Sheet No. 6 and Tenth Revised Sheet No. 7 to its FERC Gas Tariff, Original Volume No. 1 WNG states that pursuant to the Purchased Gas Adjustment in Article 21 of its FERC Gas Tariff, it proposes to increase its rates effective May 1, 1989, to reflect:

(1) A $.0033 per Mcf increase in the Cumulative Adjustment due to an increase in WNG's projected gas purchase costs.

(2) A $.5855 per Mcf increase in the Surcharge Adjustment (to a positive $.4496 per Mcf from a negative $1.1359 Mcf) to amortize the Deferred Purchase Gas Cost Subaccount Balance.

WNG states that it is filing First Revised Sheet No. 6A to remove the Standby Charges from its tariff in compliance with Commission Order of Nov. 29, 1988 in Docket No. RP88-39-000.

WNG states that public copies of its filing were served on all 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 §§385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before Mar. 28, 1989. 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 proceedings. 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. 89-5719 Filed 3-10-89; 8:45 am]

BILLING CODE 6717-01-M

Southwestern Power Administration

Tentative Sponsor Selection and Request for Additional Proposals; Proposed Norfork Dam Unit Number 3

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of Tentative Selection of the City of Conway, Arkansas, as the Financial Sponsor and Preference Customer relating to the Proposed Norfork Dam Unit 3 Hydroelectric Power Project in Arkansas and Request for Additional Proposals.

SUMMARY: The Norfork Dam is located near Norfork, Arkansas, on the North Fork River, a major north bank tributary of the White River. The U.S. Army Corps of Engineers (Corps) constructed the project and is responsible for its operation. The project was authorized for flood control by the Flood Control Act approved June 28, 1938 (Pub. L. 761, 75th Congress, 3rd session) and modified to provide facilities for generation of power by the Flood Control Act of August 18, 1941 (Pub. L. 228, 77th Congress, 1st session). Norfork Lake is also a major center for recreation and releases from the project support a "put-and-take" trout fishery downstream on the North Fork and White Rivers.

Provisions were made during design and construction of the project for four hydroelectric power generating units. One unit began generation in June 1944 with a second unit placed in operation in February 1950. Units 3 and 4 have not been installed at the project. Each of the two existing units have an installed capacity of 40,275 kilowatts (kW) for a total installed capacity at the project of 80,550 kW. The units can produce an overload capacity of 92,600 kW. The two units generate an average of 184,000,000 kilowatt-hours (kWh) of energy annually. The hydroelectric power and energy generated at Norfork Dam is marketed by the Southwestern Power Administration (SWPA).

The proposed addition of one hydroelectric power generating unit (Unit 3) is generally described as Plan 1 in the Corps' Little Rock District document entitled "Norfork Lake Additional Hydroelectric Power Units 3 and 4" dated March 1983 and is authorized through the provisions of the original project authorizations. The proposed unit would have a capacity of approximately 42,500 kW and generate additional energy averaging about 5,900,000 kWh. The estimated cost of construction is $46,000,000 (based on October 1987 price levels).

The City of Conway, Arkansas (City), an incorporated city which owns a municipal electric utility system, has proposed to provide financing to the Federal government for the design and construction of Unit 3 at Norfork Dam during the period of design and construction. Upon completion of construction, the City proposes to pay its own debt service and a pro rata share of SWPA's hydroelectric power system's annual operation, maintenance, and replacement (OM&R) and marketing costs. The project would be designed, constructed, owned, and operated by the Corps. The power and energy would be marketed by SWPA.

The sponsor will have two years from the date the final sponsor selection notice is published in the **Federal Register** to enter into agreements with the Corps and SWPA for construction of the project. Additional time to enter into the agreements may be provided upon the sponsor's request and approval by the Corps and SWPA. If agreements cannot be negotiated within the specified time frame, the sponsorship will be cancelled automatically and new proposals for potential project sponsors will be considered.

In exchange for financing the design and construction of the project and making the required payments for OM&R and marketing costs, the City requests an allocation of approximately 36,000 kW of firm capacity with associated 1200 hours per year of firm energy from the SWPA's Interconnected System, which includes the Norfork Dam project. If the City is selected and successfully sponsors the project, it would receive the above requested allocation in accordance with section II, Part A, paragraph 2 of SWPA's Power Allocation Policy as published in the **Federal Register** (52 FR 29881) dated August 12, 1987. The proposed arrangement between the City and SWPA would extend for 50 years after Norfork Unit 3 is declared in commercial

operation. SWPA has determined that the City qualifies for preference, in accordance with section 5 of the Flood Control Act of 1944, as amended, to receive firm power and energy in accordance with the aforesaid terms, provided the City is the successful sponsor and can make satisfactory wheeling arrangements. Jointly, the Corps and SWPA have tentatively selected the City to be the non-Federal sponsor to provide financing for the proposed Unit 3 at Norfork Dam.

DATES: Questions, comments, and/or proposals received prior to (insert date April 12, 1989) will be considered in the final selection process.

For Further Information About the Proposed Project Financing, Contact: Colonel Anthony V. Nida, District Engineer, Little Rock District, Corps of Engineers, P.O. Box 867, Little Rock, AR 72203.

For Further Information About the Proposed Marketing of Power and Energy From the Project, Contact: Francis R. Gajan, Director, Power Marketing, Southwestern Power Administration, P.O. Box 1619, Tulsa, OK 74101.

Issued at Tulsa, Oklahoma, on January 27, 1989.

J. M. Shafer,

Administrator, Southwestern Power Administration, U.S. Department of Energy.

[FR Doc. 89-5747 Filed 3-10-89; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-3536-1]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared February 20, 1989 through February 24, 1989 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5074.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 22, 1988 (53 FR 13318).

Draft EISs

ERP No. D-FHW-K40165-CA, Rating EC2, Cloverdale Bypass Construction on US 101 from North of Hiatt Road to Preston Overhead, Funding and Possible 404 Permit, City of Cloverdale, Sonoma County, CA.

Summary: EPA expressed environmental concerns due to project impacts to wetland, riparian and instream habitats, and requested that the final EIS discuss alternative project designs to reduce these impacts. EPA also asked that the final EIS discuss conformity with State and local water quality management plans and water quality standards.

Final EISs

ERP No. F-COE-K35024-CA, Marathon Industrial/Commercial Business Park Development, Section 10 and 404 Permits, City of Hayward, Alameda County, CA.

Summary: EPA found that issuance of permits by the Corps for the proposed project would result in unacceptable environmental impacts. These impacts include the direct loss of 61.5 acres of seasonal wetlands and impacts to another 119 acres of other wetland habitats. Due to the direct and cumulative adverse impacts upon wetlands, EPA strongly recommended that the Corps deny the Section 404 permit for the project. EPA noted that it considers the project a possible candidate for referral to the Council on Environmental Quality and for possible administrative action under Sections 404(q) and/or 404(c) of the Clean Water Act. Specifically, concerns were raised about the alternatives analysis, mitigation, and several other aspects of EPA's 404(b)(1).

ERP No. F-COE-L32005-WA, Lummi Bay Navigation Channel Improvements and Marina Construction, Implementation, Lummi Indian Reservation, Whatcom County, WA.

Summary: EPA raised concerns in the draft EIS about the need for such a large fill given the non-water dependent nature of the associated marine facilities and about the adequacy of the proposed mitigation. After the review of the final EIS, EPA continues to have the same environmental concerns about this project.

ERP No. F-FHW-D40211-MD, Calvert Road Closure and Replacement Crossing Construction, Funding and 404 Permit, Prince Georges County, MD.

Summary: EPA's issues of concern in the draft supplemental EIS were addressed in this document. EPA also offers assistance in the formation of a wetland mitigation plan.

Dated: March 8, 1989.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 89-5756 Filed 3-10-89; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3534-4]

C.D. Buff Site; Proposed Settlement Agency

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement.

SUMMARY: Under section 122h of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), The Environmental protection Agency (EPA) has agreed to settle claims for response costs at the C.D. Buff Site, Una, South Carolina. EPA will consider public comments on the proposed settlement for thirty days. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from: Ms. Rosalind Brown, Life Scientist, U.S. EPA, Region IV, Investigations and Cost Recovery Unit, Investigation Support Section, Site Investigation Support Branch, Waste Management Division, 345 Courtland Street NE., Atlanta, Georgia 30365, 404/347-5059.

Written comments may be submitted to the person above by April 12, 1989.

Dated: February 15, 1989.

Lee A. DeHihns,

Acting Regional Administrator.

[FR Doc. 89-5700 Filed 3-10-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-821-DR]

Amendment to Notice of a Major Disaster Declaration; Kentucky

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the Commonwealth of Kentucky (FEMA-821-DR), dated February 24, 1989, and related determinations.

DATED: March 6, 1989.

FOR FURTHER INFORMATION CONTACT: Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646-3614.

Notice: Notice is hereby given that the incident period for this disaster is closed effective March 8, 1989.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Grant C. Peterson,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 89-5661 Filed 3-10-89; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-821-DR]

Amendment to Notice of a Major Disaster Declaration; Kentucky

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the Commonwealth of Kentucky (FEMA-821-DR), dated February 24, 1989, and related determinations.

DATE: March 6, 1989.

FOR FURTHER INFORMATION CONTACT: Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3614.

Notice: The notice of a major disaster for the Commonwealth of Kentucky, dated February 24, 1989, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of February 24, 1989: The counties of Edmonson, Elliott, Greenup, Hart, Jackson, Knox, McLean, Morgan, Nicholas, and Ohio for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Grant C. Peterson,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 89-5662 Filed 3-10-89; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-821-DR]

Amendment to Notice of a Major Disaster Declaration; Kentucky

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the Commonwealth of Kentucky (FEMA-821-DR), dated February 24, 1989, and related determinations.

DATED: March 3, 1989.

FOR FURTHER INFORMATION CONTACT: Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646-3614.

Notice: The notice of a major disaster for the Commonwealth of Kentucky, dated February 24, 1989, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of February 24, 1989: The counties of Bath, Carter, Fayette, Jefferson, Montgomery, Carroll, Clark, Fleming, Madison, and Powell for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Grant C. Peterson,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 89-5663 Filed 3-10-89; 8:45 am]

BILLING CODE 6718-02-M

Anti-Arson Program

AGENCY: Federal Emergency Management Agency.

ACTION: Notice of solicitation for award of cooperative agreement.

Notice of Solicitation is hereby given that the Federal Emergency Management Agency, under the Fire Prevention and Control Act of 1974, will issue a Request for Assistance (RFA) No. EMW-89-S-3052 on or about March 27, 1989, regarding the design and implementation of an anti-arson strategy program. This program is limited to Community-Based Organizations.

The purpose of this assistance is to focus on nationwide efforts to reduce the number of arson related fires that occur every year throughout this country.

Some broad objectives of this program are:

- To encourage neighborhood involvement in reducing arson fires through new and innovative broad spectrum programs.
- To expand the neighborhood involvement to a community-wide participation in fighting arson.
- To make information available to other neighborhoods and communities regarding successful programs.
- To increase the cooperation between neighborhood residents, community groups and public service organizations such as fire, police, building and code departments.
- To build a comprehensive community anti-arson program.

Application for assistance must be requested in writing and addressed as follows: Federal Emergency Management Agency, Office of Acquisition Management, 500 C Street, SW., Room 731, Washington, DC 20472, ATTN: Patricia A. English, Assistance Officer.

Request for Assistance No. EMW-89-S-3052. Please include a self-addressed mailing lable with the request.

Cooperative Agreements are anticipated to be awarded as a result of this request for assistance. It is anticipated that a minimum of five (5) and a maximum of thirty (30) assistance awards will be made. The anticipated funding levels of this program are between $10,000.00 to $15,000.00 based on the criteria that will be outlined in the solicitation package.

Kenneth J. Brzonkala,

Director, Office of Acquisition Management.

March 6, 1989.

[FR Doc. 89-5664 Filed 3-10-89; 8:45 am]

BILLING CODE 6718-01-M

FEDERAL HOME LOAN BANK BOARD

[No. 89-536]

Application for Permission To Establish a Branch Office or Change of Location of an Office

Date: March 6, 1989.

AGENCY: Federal Home Loan Bank Board.

ACTION: Notice.

SUMMARY: The public is advised that the Federal Home Loan Bank Board ("Board") has submitted, with revision, an information collection request, "Application for Permission to Establish a Branch Office of Change of Location of an Office," to the Office of Management and Budget for approval in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

This information is required from Federal Savings and Loan Associations and Federal Savings Banks to determine whether the application meets the Board's criteria for approval for permission to establish a Branch Office or for relocation of existing Branch Offices. We estimate it will take approximately 2 hours per respondent to complete the information collection.

DATE: Comments on the information collection request are welcome and should be received on or before March 28, 1989.

ADDRESS: Comments regarding the paperwork-burden aspects of the request should be directed to: Office of Management and Budget, Office of

Information and Regulatory Affairs, Washington, DC 20503. *Attention:* Desk Officer of the Federal Home Loan Bank Board.

The Board would appreciate commenters sending copies of their comments to the Board.

Request for copies of the proposed information collection requests and supporting documentation are obtainable at the Board address given below: Director, Information Services Division, Office of Secretariat, Federal Home Loan Bank Board, 801 17th Street, NW, Washington, DC 20552. Phone: 202–653–2751.

FOR FURTHER INFORMATION CONTACT: John Wilson, Financial Analyst Office of District Banks, 202–906–7217, Federal Home Loan Bank Board, 1700 G. Street, NW., Washington, DC 20552.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89–5688 Filed 3–10–89; 8:45 am]

BILLING CODE 6720–01–M

Freedom Savings and Loan Association, Tampa, FL; Appointment of Conservator

Notice is hereby given that pursuant to the authority contained in section 5(d)(6)(A)(i), of the Home Owner's Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(A)(i), and 12 U.S.C. 1701c (c)(2)(1982), as amended, the Federal Home Loan Bank Board was duly appointed by the Federal Savings and Loan Insurance Corporation as sole conservator for Freedom Savings and Loan Association, a Federal Savings and Loan Association, Tampa, Florida on February 7, 1989.

Dated: February 14, 1989.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89–5689 Filed 3–10–89; 8:45 am]

BILLING CODE 6720–01–M

Signal Savings and Loan Association Signal Hill, CA; Appointment of Receiver

Notice is hereby given that pursuant to the authority contained in section 406 (c)(1)(B) of the National Housing Act, as amended, 12 U.S.C. 1729(c)(1)(B)(1982), the Federal Savings and Loan Insurance Corporation as sole receiver for Signal Savings and Loan Association, Signal Hill, California, on February 10, 1989.

Dated: February 14, 1989.

By the Federal Home Loan Bank Board.

John F. Ghizzoni

Assistant Secretary.

[FR Doc. 89–5690 Filed 3–10–89; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control

National Institute for Occupational Safety and Health; Meetings; Endotoxin Detection in Cotton Dust et al.

The following meetings will be convened by the National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control (CDC), and will be open to the public for observation and participation, limited only by the space available:

Name: Endotoxin Detection in Cotton Dust.
Date: March 15, 1989.
Place: Appalachian Laboratory for Occupational Safety and Health, Room 203, 944 Chestnut Ridge Road, Morgantown, West Virginia 26505–2888.
Time: 8:30 a.m.–10:30 a.m.
Purpose: To review the project entitled "Endotoxin Detection in Cotton Dust."

Additional information and copies of the research protocol may be obtained from: Stephen A. Olenchock, Ph.D., Division of Respiratory Disease Studies, NIOSH, CDC, 944 Chestnut Ridge Road, Morgantown, West Virginia 26505, Telephone: Commercial: (304) 291–4256, FTS: 923–4256.

Name: Pulmonary Response to Cotton Dust: Relationship Between Animal Models and the Human Response
Date: March 15, 1989.
Place: Appalachian Laboratory for Occupational Safety and Health, Room 203, 944 Chestnut Ridge Road, Morgantown, West Virginia 26505–2888.
Time: 10:30 a.m.–12:30 p.m.
Purpose: To review the project entitled "Pulmonary Response to Cotton Dust: Relationship Between Animal Models and the Human Response."

Additional information and copies of the research protocol may be obtained from: Vincent Castranova, Ph.D., Division of Respiratory Disease Studies, NIOSH, CDC, 944 Chestnut Ridge Road, Morgantown, West Virginia 26505, Telephone: Commercial: (304) 291–4256, FTS: 923–4256.

Name: Where's the Endotoxin? — Environmental Sampling For Airborne Endotoxin.
Date: March 15, 1989.
Place: Appalachian Laboratory for Occupational Safety and Health, Room 203, 944 Chestnut Ridge Road, Morgantown, West Virginia 26505–2888.
Time: 2:00 p.m.–4:00 p.m.
Purpose: To review the project entitled "Where's the Endotoxin?— Environmental Sampling for Airborne Endotoxin."

Additional information and copies of the research protocol may be obtained from: William Jones, Ph.D., Division of Respiratory Disease Studies, NIOSH, CDC, 944 Chestnut Ridge Road, Morgantown, West Virginia 26505, Telephone: Commercial: (304) 291–4256, FTS: 923–4256.

Viewpoints and suggestions from industry, organized labor, academia, other governmental agencies, and the public are invited.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control.

[FR Doc. 89–5625 Filed 3–10–89; 8:45 am]

BILLING CODE 4160–19–M

[Program Announcement No. 913]

Grants for Injury Prevention Research Centers; Availability of Funds for Fiscal Year 1989

Introduction

The Centers for Disease Control (CDC) announces that grant applications are being accepted for Injury Prevention Research Centers (IPRCs).

Authority

This program is authorized under section 301 of the Public Health Service Act (42 U.S.C. 241). Program regulations are set forth in Title 42 of the Code of Federal Regulations, Part 52.

Eligible Applicants

Eligible applicants include all nonprofit and for-profit organizations. Thus, universities, colleges, research institutions, hospitals, and other public and private organizations, State and local health departments and small, minority and/or women-owned businesses are eligible for these grants.

Availability of Funds

Approximately $4.5 million is available in Fiscal Year 1989 to fund approximately 9 awards. It is expected that the awards will begin on or about August 1, 1989, and are usually made for a 12 month period within a project period of up to 5 years. Funding estimates may vary and are subject to

change. Continuation awards within the project period will be made on the basis of satisfactory progress and the availability of funds.

Background and Definitions

A. Background

By nearly every measure, injury ranks as one of the nation's most pressing health problems. Injuries are the country's leading cause of years of potential life lost before age 65. They are the leading cause of death and disability in children and young adults. Older Americans also suffer unduly from the severe consequences of injury. Much of the resources of the nation's health care system is devoted to attending to injury victims, who occupy one of every eight hospital beds.

However, opportunities to understand and prevent injuries and reduce their effects are available. Many of these opportunities are discussed in the National Research Council and Institute of Medicine report, *Injury In America* (National Academy Press—ISBN 0–309–03545–7).

B. Definitions

1. *Injury* is defined as physical damage to an individual resulting from acute exposure to physical or chemical agents. The major categories of injury are intentional, unintentional and occupational. Intentional injuries result from interpersonal or self-inflicted violence, and include homicide, assaults, suicide and suicide attempts, child abuse, and rape. Unintentional or unintended injuries include those that result from motor vehicle collisions, falls, fires, poisonings, and drownings. Occupational injuries occur at the worksite and include unintentional trauma (for example, work-related motor-vehicle injuries, drownings, and electrocutions) and intentional injuries in the workplace.

2. *An Injury Prevention Research Centers (IPRCs)* is defined as an organizational unit which would as a general rule be established within an academic institution that works toward the development of an interdisciplinary, comprehensive approach to the injury problem involving physicians, epidemiologists, engineers, behavioral scientists, public health workers, and others, and is organized in such a manner that multiple aspects of the injury problem can be addressed by this unit (for example, research in epidemiology, prevention, biomechanics, treatment, and rehabilitation; information gathering and dissemination); the ongoing provision of training opportunities to students, researchers, and public health agency personnel; and projects relating to the development and evaluation of injury prevention, injury surveillance or injury control programs).

Purpose

A. To support injury prevention and control research on priority issues as delineated in *Injury In America*, a 1985 report by the National Academy of Sciences.

B. To integrate aspects of the disciplines of engineering, medicine, public health, criminal justice, behavioral and social sciences, and others in order to prevent and control injuries more effectively.

C. To identify and rigorously evaluate current and new interventions for the prevention and control of injuries.

D. To support IPRCs which will develop an in-depth approach to injury control research and training.

E. To bring the knowledge and expertise of IPRCs to bear on the development of effective public and private sector programs for injury prevention and control.

F. To help make available the expertise of academic institutions for the evaluation and improvement of injury prevention, surveillance and control programs instituted and carried out by Federal, state or local government and private sector organizations.

Evaluation Criteria

Applications will be evaluated by a dual review process. The first review will be a peer evaluation of the application. The second review will be by senior Federal staff which will consider the results of the first review together with program need and relevance. Awards will be made based on merit and priority score ranking by the Injury Research Grants Review Committee (IRGRC) and program review by Senior Federal staff, availability of funds, and such other factors deemed necessary and appropriate by the Director, CDC.

A. Review by the Injury Research Grants Review Committee (IRGRC)

Peer review of center grant applications will be conducted by IRGRC. Site visits may be a part of this process. Factors to be considered by IRGRC include:

1. The degree to which the applicant possesses the following program requirements:

a. New applications to initially show expertise in at least one of the five areas of injury control (surveillance and epidemiology, prevention and health promotion, biomechanics, acute care, and rehabilitation) and specific, time-framed plans to incorporate all five areas into the center during the second year of the applicant's project period. In the case of currently funded centers seeking continuation, plans for the development and support of all five areas of injury control should have been formulated and progress made toward their incorporation at the time of application.

b. Demonstrated involvement in at least medicine, engineering, behavioral and social sciences and public health, with a specific, time-framed plan to expand to include, health policy development and health care administration.

c. Established curricula and graduate training programs in areas relevant to injury control.

d. Ongoing injury-related projects or activities currently supported by other sources of funding.

e. A director who has specific authority and responsibility to carry out the project.

f. Demonstrated experience in successfully conducting, evaluating, and publishing injury-related research and/or designing, implementing, and evaluating injury control programs.

g. Effective and well-defined working relationships with outside agencies and other entities which will ensure implementation of the proposed activities.

h. Mechanisms for linking the injury control research findings with public health and other intervention efforts to facilitate implementation of programs that take into consideration these research findings.

i. An established relationship, manifest by letters of agreement or periodic reports, with injury prevention and control programs or injury surveillance programs being carried out in the state or region wherein the IPRC is located. Such cooperation may be with governmental or private sector programs.

2. The overall match between the applicant's interdisciplinary, comprehensive approach to research and training objectives and the national program priorities as described in *Injury In America.*

3. The scientific and technical merit of the overall application.

4. The adequacy of the methods for coordinating the overall program and its component parts.

5. The extent to which the evaluation plan will allow for the quantitative measurement of progress toward the achievement of stated objectives.

6. Qualifications, adequacy, and appropriateness of personnel to accomplish the proposed activities.

7. The degree of commitment measured in terms of injury control personnel, facilities, and activities supported by other funding sources and the likelihood that this commitment will be sustained or expanded in future years.

8. The degree of commitment and cooperation of other interested parties as evidenced by letters detailing the nature and extent of this commitment and cooperation.

9. The reasonableness of the proposed budget to the proposed program.

10. Progress thus far made, if the applicant is submitting a competitive renewal application.

11. Plans to become self-sustaining.

B. Review by Senior Federal Staff

Further review will be conducted by Senior Federal staff. Factors to be considered will be:

1. The results of the peer review.

2. The significance of the proposed activities as they relate to the achievement of the objective in *Injury In America.*

3. National needs and geographic balance.

4. Overall distribution of the approaches of competing applications, keeping in mind the special emphasis areas of biomechanics, acute care, rehabilitation; and the overall balance of the program in addressing the control of injury among populations who are at increased risk, including minority groups, the elderly, children, and residents of farms and rural areas; and the major causes of intentional and unintentional injury.

5. Budgetary considerations.

6. Existing Center may be given priority consideration, if applicant has made satisfactory progress.

7. Plans to become self-sustaining.

C. Continued Funding

Continuation awards within the project period will be made on the basis of the availability of funds and the following criteria:

1. The accomplishments of the current budget period show that the applicant is meeting its objectives;

2. The objectives for the new budget period are realistic, specific, and measurable;

3. The methods described will clearly lead to achievement of these objectives;

4. The evaluation plan will allow management to monitor whether the methods are effective; and

5. The budget request is clearly explained, adequately justified, reasonable, and cosistent with the intended use of grant funds.

E. O. 12372 Review

Applications are not subject to the review requirements of Executive Order 12372, entitled Inter-Governmental Review of Federal Programs.

CFDA Number

The Catalog of Federal Domestic Assistance Number is 13.136.

Application Submission And Deadline

A. Applications

Applications should be submitted on Form PHS 5161–1 for State and local governments. Other applicants should use Form PHS–398 and adhere to the ERRATA Instruction Sheet for PHS–398 contained in the Grant Application Kit. The original and two copies of the application must be submitted to Henry S. Cassell, III, Grants Management Officer, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control, 255 East Paces Ferry Road NE., Room 300, Mailstop E–14, Atlanta, Georgia 30305 on or before June 9, 1989.

An applicant organization has the option of having specific salary and fringe benefit amounts for individuals omitted from the copies of the application that are made available to outside reviewing groups. If the applicant's organization elects to exercise this option, use asterisks on the original and two copies of the application to indicate those individuals for whom salaries and fringe benefits are being requested; the subtotals must still be shown. In addition, submit an additional copy of page four of Form PHS–398, completed in full with the asterisks requested by the amount of the salary and fringe benefits.

B. Deadline

Applications shall be considered as meeting the deadline above if they are either:

1. Received on or before the deadline date, or

2. Sent on or before the deadline date and received in time for submission to the peer review committee. Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.

C. Late Applications

Applications which do not meet the criteria in B.1. or B. 2. above are considered late applications and will be returned to the applicant.

Where to Obtain Additional Information

A complete program description, information on application procedures and application package may be obtained from Nealean K. Austin, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control, 255 East Paces Ferry Road NE., Room 300, Mailstop E–14, Atlanta, Georgia, 30305, (404) 842–6575 or FTS 236–6575.

Announcement Number 913 entitled "Grants for Injury Prevention Research Centers" must be referenced in all requests for information pertaining to this project.

Technical information may be obtained from James M. Monroe, Grants Manager, Division of Injury Epidemiology and Control, Center for Environmental Health and Injury Control, Centers for Disease Control, 1600 Clifton Road NE., Mailstop F–36, Altanta, Georgia 30333, (404) 488–4690 or FTS 236–4690

Dated: March 7, 1989.

Robert L. Foster,

Acting Director, Office of Program Support, Centers for Disease Control.

[FR Doc. 89–5621 Filed 3–10–89; 8:45 am]

BILLING CODE 4160–18–M

Advisory Committee for Elimination of Tuberculosis; Meeting

Action: Notice of meeting.

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), the Centers for Disease Control (CDC) announces the following committee meeting.

Name: Advisory Committee for Elimination of Tuberculosis (ACET).

Time and Date: 8:30 a.m.–5:00 p.m.–April 4, 1989; 8:00 a.m.–2:30 p.m.–April 5, 1989.

Place: Executive II & III Conference Rooms, Lanier Plaza Conference Center, 418 Armour Drive NE., Atlanta, Georgia 30324.

Status: Open.

Purpose: This Committee advises and makes recommendations to the Secretary, Department of Health and Human Services, the Assistant Secretary for Health, and the Director, CDC, regarding feasible goals for eliminating tuberculosis. Specifically, the Committee makes recommendations regarding policies, strategies, objectives, and priorities, addresses the development of new technologies and

their subsequent application, and reviews progress toward elimination.

Matters to be Discussed: Tuberculosis control among the foreign-born, tuberculosis and human immunodeficiency virus (HIV) infection, tuberculosis control in nursing homes, and statements on preventive therapy and screening. Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Dixie E. Snider, Jr., M.D., Director, Division of Tuberculosis Control, and Executive Secretary, ACET, Center for Prevention Services, CDC, 1600 Clifton Road NE., Mailstop E–10, Atlanta, Georgia 30333, Telephones: FTS: 236–2501; Commercial; 404/639–2501.

Dated: March 7, 1989.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control.

[FR Doc. 89–5624 Filed 3–10–89; 8:45 am]

BILLING CODE 4160–18–M

Food and Drug Administration

[Docket No. 89N–0030]

Public Meeting; Seafood Safety as Related to Cooked and Processed Seafood

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA), Southeast Region, is announcing a public meeting with the seafood industry and other interested persons to discuss a number of agency concerns relating to public health aspects of cooked and processed seafood.

DATES: The meeting will be held on Tuesday, April 18, 1989, from 8:30 a.m. to 5 p.m. Interested persons who will be unable to attend the meeting may submit written comments on the issues outlined in this notice by May 12, 1989.

ADDRESSES: The meeting will be held in a conference room at the Holiday Inn, Tampa International Airport, 4500 West Cypress St., Tampa, FL 33622. Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, referencing the docket number found in the heading of this notice.

FOR FURTHER INFORMATION CONTACT: Douglas D. Tolen, Food and Drug Administration (HFR–SE200), 7200 Lake Ellenor Dr., Suite 120, Orlando, FL 32809, 407–855–0900.

SUPPLEMENTARY INFORMATION: The meeting is being sponsored by FDA's Southeast Regional Office, in accordance with 21 CFR 10.65(b), to discuss with the seafood industry and other interested persons the agency's concerns, raised by its inspectional and analytical findings, relating to cooked and processed seafood.

Issues to be discussed will include:

1. Microbiological contamination of ready-to-eat or heat-and-serve seafood products.

2. Public health concerns relating to these products.

3. Improved processing practices for these products.

4. Strategies for protecting the consumer from associated health risks.

FDA is inviting all interested persons to participate in this meeting. Interested persons who will be unable to attend the meeting may submit to the Dockets Management Branch (address above) written comments that set forth their views on the issues outlined in this notice.

Dated: March 6, 1989.

Alan L. Hoeting,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89–5652 Filed 3–10–89; 8:45 am]

BILLING CODE 4160–01–M

[FDA 225–89–4001]

Memorandum of Understanding on Good Laboratory Practice; the Federal Republic of Germany Federal Minister of Food, Agriculture and Forestry et al.

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) among FDA, the U.S. Environmental Protection Agency, the Federal Minister of Food, Agriculture and Forestry, the Federal Minister for Youth, Family Affairs, Women and Health, and the Federal Minister for the Environment, Nature Conservation and Nuclear Safety of the Federal Republic of Germany. The MOU provides, under specified conditions, for (a) reciprocal recognition of each country's good laboratory practice program, (b) acceptance of test data collected in either country for evaluation of safety, and (c) implementation of procedures for continuing cooperation between parties.

DATE: The agreement became effective December 23, 1988.

FOR FURTHER INFORMATION CONTACT: Walter J. Kustka, Intergovernmental and Industry Affairs Staff (HFC-50), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1583.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all agreements and memoranda of understanding between FDA and others shall be published in the **Federal Register**, the agency is publishing this memorandum of understanding.

Dated: March 6, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

I. Purpose

This Memorandum reflects the concerns of the Food and Drug Administration and the Environmental Protection Agency of the United States of America and the Federal Ministry of Food, Agriculture and Forestry, the Federal Minister for Youth, Family Affairs, Women and Health, and the Federal Ministry of the Environment, Nature Conservation and Nuclear Safety of the Federal Republic of Germany (hereinafter called "the parties") for assuring the quality and integrity of safety evaluation data that support the approval of applications for research and/or marketing permits and licensing or registration or reregistration of all chemicals for agricultural, industrial, pharmaceutical, cosmetic, or food use to the extent encompassed by national law. The parties share the view that health and environmental safety studies which are required to be submitted to a national authority should be conducted in accordance with the principles of Good Laboratory Practice (GLP) that are internationally recognized, and that laboratories conducting such tests should be monitored by effective national inspection programs. Accordingly, this Memorandum provides, under specified conditions, for:

(a) Reciprocal recognition of each country's GLP program,

(b) Acceptance of test data collected in either country for evaluation of safety, and

(c) Implementation of procedures for continuing cooperation between parties.

II. Background

Safety evaluation data submited for consideration to one national authority are frequently based on studies conducted by laboratories located in the other country. Therefore, the standards observed by those laboratories that conduct health and environmental safety studies, the results of which are submitted to authorities of the other country, should be conducted in

accordance with principles of good laboratory practices.

When the safety evaluation data submitted to a national authority originate from a laboratory within the other country, the national authorities of the country of origin should be able to provide the parties in the other country with information that assures that the laboratory is operated in accordance with good laboratory practices.

National programs of inspection should verify the compliance of laboratories with the principles of GLP. These principles and the inspection programs should be in accord with the Decision of the Council of the Organization for Economic Cooperation and Development (OECD) on "The Mutual Acceptance of Data in the Assessment of Chemicals" (May 12, 1981) including Annex 2, "OECD Principles of Good Laboratory Practice." These standards and procedures should be consistent with the July 26, 1983 Recommendation of the OECD Council on "The Mutual Recognition of Compliance with Good Laboratory Practice."

A. Good Laboratory Practices

The parties have published comparable standards of good laboratory practice relating to health and environmental studies on safety evaluation experiments.

In evaluating the laboratories and auditing the data from the studies conducted in the United States of America, the inspectors of the Food and Drug Administration (FDA) rely on the regulations relating to Good Laboratory Practice for Nonclinical Laboratory Studies (21 CFR Part 58). The inspectors of the Environmental Protection Agency (EPA) rely on the regulations relating to Pesticide Programs, Good Laboratory Practice Standards (40 CFR Part 160), and Toxic Substances Control Act, Good Laboratory Practice Standards (40 CFR Part 792).

The inspectors of the *länder* of the Federal Republic of Germany rely on the "OCED-Grundsätze der Guten Laborpraxis (GLP)"; [OECD Principles of Good Laboratory Practice (GLP)] published in the *Bundesanzeiger* [Federal Journal] of March 2, 1983 and on the "Durchführung von GLP Inspektionen nach den Grundsätzen der OECD" [Conduct of GLP Inspections under the OECD Principles] adopted May 20, 1987 by the "Arbeitsgemeinschaft der Leitenden Medizinalbeamten des Bundes und der Länder" [Council of the Directors of the Medical Departments of the Federal Government and the *Länder*] in evaluating the laboratories and auditing the data from the studies conducted in the *länder*.

B. National Inspection Programs

Inspectional procedures will be mutually consistent among the parties. The parties will assess compliance of a laboratory with the standards of good laboratory practice by having trained government inspectors conduct an inspection approximately once every two years. The inspection programs will permit assessment of current laboratory operations as well as the audit of data from completed studies. Laboratories will generally be notifed in advance. A report of the results of the inspection will be prepared that describe and address laboratory operations and conformity with GLP.

C. Compliance

Each of the parties will establish satisfactory procedures to secure the compliance of laboratories with the standards of good laboratory practice. These procedures will include, for example, notifying a laboratory of deficiencies observed, the issuance of corrective and warning notices, and the removal of a laboratory from national GLP compliance programs. These and other actions may lead regulatory authorities to reject specific studies, or to cancel or refuse registration of specific chemicals. In some cases, depending upon the gravity and extent of the violation, more severe penalties may be applied.

III. Substance of the Understanding

A. General Principles

The parties agree that:

1. Adherence to adequate standards of good laboratory practice is essential to the conduct of high quality safety testing;

2. A national program of periodic inspections conducted by a trained inspectorate is required to monitor adherence to the standards of good laboratory practice;

3. Appropriate compliance procedures are necessary to assure adherence to the standards of good laboratory practice; and

4. Studies conducted in acordance with the respective standards of good laboratory practice promulgated by either country are to be acceptable to the parties in the other country for consideration in the evaluation of safety.

B. Inspections and Audits: Training and Evaluation

1. The parties agree that training in inspection and audit techniques shall be conducted for the purpose of promoting consistency of procedures among the parties.

2. The parties agree that such training will begin in the near future.

3. The parties will evaluate each others' inspection and audit procedures periodically.

4. It is expected that all parties will have comparable GLP programs in place by December 31, 1990, in which case the provisions of Article III.C of this Memorandum of Understanding will take full effect at that time.

5. Until the provisions of Article III.C take full effect as provided in Article III.B.4, a party or parties from one country may inspect laboratories or audit studies in the other country, and will duly inform the appropriate party or parties of their intent to inspect a laboratory or audit a study in that country.

C. Mutual Recognition of GLP Programs

1. As a routine matter, the parties will carry out inspections of health and environmental testing laboratories and auditing studies in their respective countries. In exceptional situations in which the requesting party of one country can justify a special concern, the requesting party may designate one or more of its scientists to participate in a laboratory inspection or the audit of a study conducted by the authorities in the other country.

2. Each party will inform the other parties of changes in their respective GLP programs.

3. Each party will provide the other parties, regularly, with the names and addresses of health and environmental testing laboratories operating within their country, the dates the laboratories were inspected, and their compliance status.

4. Each party will provide, upon request of one of the other parties, further information regarding whether or not a laboratory or study is in compliance with the GLP.

5. Each party will honor a request by one of the other parties to conduct a GLP inspection or data audit on behalf of the other party at a specified health or environmental laboratory whenever:

(a) There is serious concern about the quality or integrity of the data submitted to a party;

(b) Inspection has not been performed within the last 2 years; or

(c) An approval of an application for a research and/or marketing permit is pending based upon tests performed in a specified laboratory which are important to granting the approval.

6. On occasion, representatives of each party will participate as invited observers in an inspection of a laboratory conducted by another party to maintain a continuing understanding of each country's inspectional procedures. These inspections are to alternate between the two countries.

7. Each party will recognize the need to protect from public disclosure data and information that are exchanged among the parties and that fall within the definition of a trade secret or confidential commercial or financial information. If there is a request from the public for any information obtained from another party, that party will be notified of the request prior to the release of any information and given an opportunity for consultation.

IV. Participating Parties

A. Food and Drug Administration, 5600 Fishers Lane, Rockville, Maryland 20857.

B. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

C. Federal Ministry of Food, Agriculture and Forestry (BML), Rochusstr. 1, D–5300 Bonn 1.

D. Federal Ministry for Youth, Family Affairs, Women and Health (BMJFFG), Kennedyallee 105–107, D–5300 Bonn 2.

E. Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), Kennedyallee 5, D–5300 Bonn 2.

V. Liaison Officers

The parties respectively appoint the following officials to serve as liaison officers for all communications regarding matters relative to this Memorandum:

A. For the United States of America

Director, Division of Compliance Policy, Office of Regulatory Affairs (HFC–230) (currently: Mr. Ernest L. Brisson), Food and Drug Administration, 5600 Fishers Lane, Rockville, Maryland 20857.

Director, Laboratory Data Integrity Assurance Division, Office of Compliance Monitoring (EN–342) (currently: Mr. John J. Neylan, III), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

B. For the Federal Republic of Germany

The Federal Ministry for Food, Agriculture and Forestry, Referat 622 (currently: Regierungsdirektor R. Elsner), Postfach 140270, D–5300 Bonn 1.

The Federal Ministry for Youth, Family Affairs, Women and Health, Referat 355 (currently: Ministerialrat Dr. K. Feiden), Postfach 200220, D–5300 Bonne 2.

The Federal Ministry of Environment, Nature Conservation and Nuclear Safety, Referat IG II 4 (currently: Ministerialrat Dr. U. Schlottman), Postfach 120629, D–5300 Bonn 1.

VI. Amendment

This Memorandum may be amended at any time by mutual written agreement of all the parties.

VII. Duration

This Memorandum shall become effective on the date of the last signature and shall continue in effect unless terminated by mutual written agreement of all the parties.

VIII. Withdrawal

Any party to this Memorandum may withdraw at any time by written notice to the other parties, to take effect not less than ninety (90) days after the date of notification.

IX. Nature of the Memorandum

This Memorandum of Understanding states the intent of the parties to cooperate, and shall not be considered a binding international agreement.

Done and signed in Washington DC in the English and German language, both texts being equally authentic.

Approved and Accepted for the Food and Drug Administration.

By: Frank E. Young

Title: Commissioner of Food and Drugs

Date: December 25, 1988.

Approved and Accepted for the Environmental Protection Agency

By: Lee M. Thomas

Title: The Administrator

Date: December 23, 1988.

Approved and Accepted for the parties of the Federal Republic of Germany

By: Karl Th. Paschke

Title: Chargé d'Affaires a.i.

Date: December 23, 1988.

[FR Doc. 89–5651 Filed 3–10–89; 8:45 am]

BILLING CODE 4160–01–M

[FDA 225–89–4000]

Memorandum of Understanding on Good Laboratory Practice; the Pharmaceutical Service Ministry of Health, Republic of Italy

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA, U.S. Department of Health and Human Services and the Pharmaceutical Service, Ministry of Health Republic of Italy. This MOU describes the mutual goals of the United States of America and the Republic of Italy to conduct studies on assuring the quality and integrity of safety evaluation data that support the approval of applications for research and/or marketing permits for human and animal drugs. Accordingly, this MOU provides for reciprocal recognition of each country's good laboratory practice program, acceptance of test data in either country for evaluation of safety, and implementation of procedures for continuing cooperation between the countries.

DATE: The agreement became effective December 19, 1988.

FOR FURTHER INFORMATION CONTACT: Walter J. Kustka, Intergovernmental and Industry Affairs Staff (HFC–50), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–12583.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20. 108(c), which states that all agreements and memoranda of understanding between FDA and others shall be published in the **Federal Register**, the agency is publishing this memorandum of understanding.

Dated: March 6, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

I. Purposes

The participating parties of the Unites States of America and the Republic of Italy have a concern for assuring the quality and integrity of safety evaluation data that support the approval of applications for research and/or marketing permits for human and animal drugs. The parties recognize that nonclinical safety studies should be conducted in accordance with principles of good laboratory practice (GLP) that are internationally recognized, and that laboratories conducting such studies should be monitored by effective national inspection programs. Accordingly, this Memorandum of Understanding (MOU) provides for: (a) reciprocal recognition of each country's good laboratory practice program (b) acceptance of test data collected in either country for evaluation of safety, and (c) implementation of procedures for continuing cooperative between the countries. Inspections of nonclinical laboratories are to be carried out by the respective national authorities.

II. Background

Safety evaluation data submitted for consideration to one national authority are frequently based on studies conducted by laboratories located in another country. Therefore, the standards observed by those laboratories that conduct nonclinical safety studies which are submitted to the authority of the other country should be conducted in accordance with principles of good laboratory practice. When the safety evaluation data submitted to a national authority originate from a laboratory within another country, the national authority of the country of origin should be able to provide the other with information that assures that the laboratory is operated in accordance with good laboratory practices.

Representatives of the parties have met and have agreed to develop standards of good laboratory practice applicable to nonclinical laboratories and to establish national programs of inspection to implement those standards. Authorities in both the Unites States of America and the Republic of Italy have established national programs of inspection to verify the compliance of laboratories with the principles of GLP. These principles and the inspection programs are in accord with the Decision of the Council of the Organization for Economic Cooperation and Development (OECD) on "The Mutual Acceptance of Date in the Assessment of Chemicals" (May 12, 1981) including Annex 2, "OECD Principles of Good Laboratory Practice." These standards and procedures are consistent with the July 26, 1983, recommendation of the OECD Council on the "Mutual Recognition of Compliance with Good Laboratory Practice."

A. Good Laboratory Practice

The participating parties of the United States of America and the Republic of Italy have published comparable standards of good laboratory practice relating to nonclinical studies for safety evaluation experiments.

The inspectors of the Food and Drug Administration will rely on regulations relating to Good Laboratory Practice for Nonclinical Laboratory Studies (21 CFR Part 58) in evaluating the laboratories and auditing the data from the studies conducted in the United States of America.

The inspectors of the Ministry of Health will rely on the "Principi Di Buona Practica Di Laboratorio (BPL)" published at *Gazzetta Ufficiale Della Republica Italianato,* August 26, 1986, in evaluating the laboratories and auditing the data from the studies conducted in the Republic of Italy.

B. National Inspection Programs

Both of the parties assess compliance of a laboratory with the principles of GLP by having a trained government inspector conduct a laboratory inspection approximately once every two (2) years. The programs permit assessment of current laboratory operations as well as the audit of final reports of completed studies. Laboratories are generally notified in advance and inspection procedures are mutually consistent between the parties. A report of the results of the inspection is prepared that describes laboratory operations and addresses compliance with good laboratory operations and the addreses compliance with good laboratory practice standards.

C. Compliance

Both of the parties have established satisfactory procedures to secure the compliance of laboratories with the standards of good laboratory practice. These procedures include, for example, notifying a laboratory of deficiencies observed and requesting corrective action within a specified time frame. Failure to correct deficiencies is dealth with by the Food and Drug Administration in a variety of ways that include the rejection of specific studies or the disqualification of the laboratory. The Ministry of Health rejects specific studies of denies certification of compliance to laboratories that fail to take corrective action when informed of deficiencies.

III. Substance of Understanding

A. The parties agree that:

1. Adherence to adequate standards of good laboratory practice is essential to the conduct of high quality safety testing;

2. A national program of periodic inspections conducted by a trained inspectorate is required to monitor adherence to the standards of good laboratory practice;

3. Appropriate compliance procedures are necessary to assure adherence to the standards of good laboratory practice; and

4. Studies conducted in accordance with the respective standards of good laboratory practice promulgated by either country are to be acceptable to both parties for consideration in the evaluation of safety.

B. Each party will:

1. Inform the other party of changes in their good laboratory practice standards and their national inspection program;

2. Provide the other party quarterly, with the names and addresses of nonclinical laboratories operating within their country, the dates, the laboratories where inspected, and their compliance status;

3. Provide upon request of the other party, further information regarding whether or not a specific laboratory or study is in compliance with the GLP standards;

4. Agree to conduct a good laboratory practice inspection or data audit at a specified nonclinical laboratory at the request of the other party, whenever:

(a) There is serious concern about the quality or integrity of the data submitted to either country,

(b) An inspection has not been performed within the last two (2) years, or

(c) An approval of an application for research and/or marketing permit is pending based upon tests performed in a specified testing facility which are important to granting the approval.

In exceptional situations in which the requesting party can justify a special concern, the requesting party may designate one or more of its scientists to participate in the audit of a particular study;

5. Participate as an observer in an inspection of a laboratory conducted by the authorities in the other country each year in order to maintian a continuing understanding of each party's inspection procedures. These inspections are to alternate each year between the United States of America and the Republic of Italy; and

6. Recognize the need to protect from public disclosure, data and information that are exchanged between the parties that fall within the definition of a trade secret, or confidential commercial or financial information. If there is a request from the public for any information obtained from the other party, that party will be notified of the request prior to release of any information and given an opportunity for consultation.

IV. Participating Parties

A. Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

B. Ministry of Health, Viale della Civilta Romana, 7, 00144–I Rome, Italy.

V. Liaison Officers

The parties respectively appoint the following officials to serve as liaison officers for all communications regarding matters relative to this Memorandum of Understanding.

A. For the Food and Drug Administration: Director, Division of

Compliance Policy, Office of Regulatory Affairs, (Currently: Mr. Ernest L. Brisson), 5600 Fishers Lane, Rockville, MD 20857.

B. For the Ministry of Health: Director, Pharmaceutical Serivce, (Currently: Dr. Romano Capasso), Viale della Civilta Romana, 7, 00144–I Rome, Italy.

VI. Duration of the Memorandum of Understanding

This MOU shall become effective upon the date of the last signature. It may be terminated at any time by written notice to the other party.

Approved and accepted for the Food and Drug Administration.

By: Frank E. Young, Title: Commissioner of Food and Drugs. Date: December 8, 1988. Place: Rockville, MD, U.S.A.

Approved and accepted for the Ministry of Health.

By: Duilo Poggiolini, Title: General Director, Pharmaceutical Dept., MOH. Date: December 19, 1988. Place: Rome, Italy.

[FR Doc. 89–5650 Filed 3–10–89; 8:45 am]

BILLING CODE 4160–01–M

Health Resources and Services Administration

Special Project Grants; Maternal and Child Health Services, Federal Set-Aside Program

AGENCY: Health Resources and Services Administration, PHS, DHHS.

ACTION: Notice of extension of application due date.

SUMMARY: This notice extends the application due date for a separate sub-category of grants under category (5)(c) of the Special Projects Grants—Maternal and Child Health Services, Federal Set-Aside Program, published in the **Federal Register** December 20, 1988 (53 FR 51168). Category (5)(c) relates to child and adolescent health projects under special MCH improvement grants. The separate sub-category of grants has been established to provide funding for a special initiative in preventive health for children at the local community level. The initiative, called "Healthy Tomorrows," would encourage additional support from the private sector and from foundations to form a community based partnership that would coordinate resources to improve the health of pregnant women, infants, children and adults and increase their access to health services. The application due date for this special initiative under category (5)(c) is extended to June 29, 1989. All other aspects of the December 20, 1988 **Federal Register** Notice remain the same.

Dated: March 6, 1989.

John H. Kelso,

Acting Administrator.

[FR Doc. 89–5649 Filed 3–10–89; 8:45 am]

BILLING CODE 4160–15–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Administration

[Docket No. N–89–1953]

Submission of Proposed Information Collections to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notices.

SUMMARY: The proposed information collection requirements described below have been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposals.

ADDRESS: Interested persons are invited to submit comments regarding these proposals. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755–6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposals for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notices list the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: February 27, 1989.

John T. Murphy,

Director, Information Policy and Management Division.

Proposal: Energy Conservation Requirements Chapter 12 of Handbook H–4305.1, Appendix 1, Energy Conservation

Office: Housing

Description of the Need for the Information and Its Proposed Use: Information will be collected from multifamily housing owners in order for them to qualify for rent increases in compliance with Section 329c of the Housing and Community Development Amendments of 1981. It will assure that needed cost effective energy conservation improvements are identified and that a plan is in effect to make the improvements.

Form Number: Handbook H–4350.1, Chapter 12, Appendix 1

Respondents: Businesses or Other For-Profit and Non-Profit Institutions

Frequency of Submission: Annually

Reporting Burden:

	Number of Respondents	X	Frequency of Response	X	Hours per Response	=	Burden Hours
Survey	9,000		1		1		9,000
Recordkeeping	9,000		1		.05		450

Total Estimated Burden Hours: 9,450
Status: Annually
Contact: James T. Tahash, HUD, (202) 426–3944. John Allison, OMB, (202) 395–6880

Dated: February 27, 1989.

Proposal: Section 8 Moderate Rehabilitation—Single Room Occupancy Program
Office: Housing
Description of the Need for the Information and Its Proposed Use: This program will provide rental assistance for homeless individuals for rehabilitated Single-Room Occupancy (SRO) housing under Section 8 Housing Assistance Payment Program. The information requested will assist the Department in selecting applicants who meet the program requirements and demonstrate the greatest need.
Form Number: None
Respondents: State or Local Governments and Non-Profit Institutions
Frequency of Submission: On Occasion
Reporting Burden:

	Number of Respondents	X	Frequency of Response	X	Hours per Response	=	Burden Hours
Information Collection	100		1		25		2,500

Total Estimated Burden Hours: 2,500
Status: Extension
Contact: A.M. Bell, HUD, (202) 755–6650. John Allison, OMB, (202) 395–6880

Dated: February 27, 1989.

Proposal: Report on Applicants for Multifamily Rental Housing
Office: Fair Housing and Equal Opportunity
Description of the Need for the Information and Its Proposed Use: The information collected will be used by HUD to assess the results of the initial outreach and marketing activities described in the HUD-approved Affirmative Fair Housing Marketing Plan (HUD–935.2). The plans are prepared by sponsors or developers of subsidized and unsubsidized insured multifamily rental housing projects of five or more units (except low-income public housing).
Form Number: HUD–935.2
Respondents: Businesses or Other For-Profit
Frequency of Submission: On Occasion
Reporting Burden:

	Number of Respondents	X	Frequency of Response	X	Hours per Response	=	Burden Hours
HUD–935.2	1,000		1		0.25		250

Total Estimated Burden Hours: 250
Status: Extension
Contact: Joan Brackett, HUD, (202) 755–6540. John Allison, OMB, (202) 395–6880

Dated: February 27, 1989.

[FR Doc. 89–5668 Filed 3–10–89; 8:45 am]
BILLING CODE 4210–01–M

[Docket No. N–89–1954]

Submission of Proposed Information Collections to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notices.

SUMMARY: The proposed information collection requirements described below have been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposals.

ADDRESS: Interested persons are invited to submit comments regarding these proposals. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755–6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposals for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notices list the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: March 3, 1989.

John T. Murphy,

Director, Information Policy and Management Division.

Proposal: Certificate of Family Participation and Certificate of Family Participation (Spanish Version)
Office: Houseing
Description of the Need for the Information and Its Proposed Use: The Certificate of Family Participation will indicate the family's responsibilities under the Section 8 Existing Housing Program and authorize the family to seek an eligible rental unit.
Form Number: HUD–52578 and 52578S
Respondents: Individuals or Households and State or Local Governments

Frequency of Submission: On Occasion
Estimated Burden Hours:

	Number of Respondents	X	Frequency of Response	X	Hours per Response	=	Burden Hours
HUD-53578 and HUD-52578S	2,000		100		0.05		10,000
Recordkeeping	2,000		1		5		10,000

Total Estimated Burden Hours: 20,000
Status: Reinstatement
Contact: Louise Hunt, HUD, (202) 755–6887; John Allison, OMB, (202) 395–6880
Dated: March 3, 1989.

Proposal: Application for Indian Housing Authorities (IHAs) for Indian Housing Program
Office: Public and Indian Housing
Description of the Need for the Information and Its Proposed Use: This reporting is required pursuant to the U.S. Housing Act of 1937, as amended, in order for an entity to obtain HUD financial and technical assistance as well as obtain a preliminary loan to cover the cost of introductory surveys and planning for the proposed project.
Form Number: HUD–52730
Respondents: Non-Profit Institutions
Frequency of Submission: Other
Estimated Burden Hours:

	Number of Respondents	X	Frequency of Response	X	Hours per Response	=	Burden Hours
Annual Reporting	90		1		6		540

Total Estimated Burden Hours: 540
Status: Extension
Contact: Pat Arnaudo, HUD, (202) 755–1015; John Allison, OMB, (202) 395–6880
Date: March 3, 1989.

Proposal: Environment Procedures: Floodplains and Wetlands
Office: Community Planning and Development
Description of the Need for the Information and Its Proposed Use: An environmental review and decisionmaking procedure is described in proposed 25 CFR 55 regulations. Applicants and grantees must comply with this procedure, including disclosure of floodplain hazard, before HUD assistance can be used or application approved for projects that may affect floodplains and wetlands. Grant recipients must keep records to document the compliance of proposed projects.
Form Number: None
Respondents: State or Local Governments, Business or Other For-Profits, Non-Profit Institutions, and Small Businesses or Organizations.
Frequency of Submission: On Occasion
Estimated Burden Hours:

	Number of Respondents	X	Frequency of Response	X	Hours per Response	=	Burden Hours
Annual Reporting	9,100		6		0.2		10,920
Recordkeeping	3,200		1		.40		1,280

Total Estimated Burden Hours: 12,200
Status: New
Contact: Charles Thomsen, HUD, (202) 755–6610; John Allison, OMB, (202) 395–6880
Dated: March 3, 1989.

[FR Doc. 89–5669 Filed 3–10–89; 8:45 am]
BILLING CODE 4210–01–M

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N–89–1917; FR 2606]

Unutilized and Underutilized Federal Buildings and Real Property Determined by HUD to Be Suitable for Use for Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized and underutilized Federal property determined by HUD to be suitable for possible use for facilities to assist the homeless.

DATE: March 13, 1989.

ADDRESS: For further information, contact Morris Bourne, Director, Transitional Housing Development Staff, Room 9140, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 755–9075; TDD number for the hearing- and speech-impaired (202) 426–0015. (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988, court order in *National Coalition for the Homeless* v. *Veterans Administration*, D.C.D.C. No. 88–2503–CG, HUD publishes a Notice, on a weekly basis, identifying unutilized and underutilized Federal buildings and real property determined by HUD to be suitable for

use for facilities to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable this week.

Dated: March 7, 1989.

James E. Schoenberger,

General Deputy Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 89-5670 Filed 3-10-89; 8:45 am]

BILLING CODE 4210-27-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Preparation of Resource Management Plan Amendments and an Environmental Impact Statement; Northeast Resource Area, et al.

AGENCY: Bureau of Land Management (BLM), Department of the Interior.

ACTION: Notice of intent to prepare amendments to five Resource Management Plans (RMPs) and an Environmental Impact Statement (EIS) for the Northeast, Kremmling, Little Snake, Glenwood Springs, and San Juan Resource Areas.

SUMMARY: The Colorado State Office hereby gives notice of its intent to prepare an EIS and amendments to five RMPs. The five Resource Areas contain approximately five million acres of public lands and public minerals underlying private lands. The primary purpose of the amendments is to incorporate the latest BLM program guidance (BLM Manual section 1624.2) for fluid minerals. This guidance includes the use of a "Reasonably Foreseeable Development" scenario, identification of cumulative impacts, and evaluation of the effectiveness of stipulations.

The proposed planning action will result in a determination as to which public lands and minerals should be made available for oil and gas development through leasing, and what lease stipulations may be necessary to protect other resource values.

The issues anticipated include:

1. Determining if existing lease stipulations are proper and sufficient to protect other resource values.

2. Determining if there is additional federal mineral estate that should be considered for oil and gas leasing.

3. The cumulative impacts of oil and gas development.

4. Clarification of stipulations applied at lease issuance and conditions of approval applied to subsequent development activities.

5. Lease stipulations necessary to protect wildlife, fragile soils, water resources and other resource values.

6. The impact of lease stipulations on oil and gas development.

The proposed planning criteria used to address these issues are summarized below:

1. Consult with appropriate representatives of the oil and gas industry to identify mineral potential.

2. Apply applicable laws and regulations to identify land eligible for leasing.

3. Assess the suitability of the land to incur oil and gas development, and the availability of the resource for development.

4. Compare the public values of oil and gas development with the public values of other alternative uses which may be precluded or impacted.

Alternatives proposed for consideration include:

1. No action defined as a continuation of current management.

2. Standard lease terms only.

3. Preferred alternative—to be defined by management following consultations with staff and the public.

The plan amendments will be prepared using a variety of resource specialists including persons trained in geology, hydrology, soils, air, wildlife, range, recreation, realty, surface protection, and economics.

DATES: Public comment on the proposed issues, planning criteria, alternatives and resource disciplines will be accepted for 30 days following publication of this Notice. In addition, public scoping meetings will be scheduled for late March and early April. At least two weeks advance notice of the time and dates of these meetings will be provided. Additional public participation opportunities will be provided through formal public hearings on the draft EIS and requests for written comments.

ADDRESSES: Comments should be addressed to Greg Shoop, Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado 80215.

FOR FURTHER INFORMATION CONTACT: Greg Shoop, CO-922, telephone cml. (303) 236-1787 or FTS 776-1787.

Dated: March 7, 1989.

Neil F. Morck,

State Director, Colorado.

[FR Doc. 89-5622 Filed 3-10-89; 8:45 am]

BILLING CODE 4310-JB-M

[AZ-920-09-4212-13; A-22792-A]

Arizona; Exchange of Public and Private Lands in Maricopa and Mohave Counties and Order Providing for Opening of the Reconveyed Land

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Exchange of Land and Opening of Reconveyed Land.

SUMMARY: This action informs the public of the completion of an exchange between the United States and Westwing Associates, an Arizona General Partnership. The United States transferred 756.33 acres in Maricopa County and Westwing Associates conveyed 19,435.60 acres in Mohave County. In addition, the reconveyed land will be opened to the public land laws.

FOR FURTHER INFORMATION CONTACT: John Gaudio, BLM, Arizona State Office, P.O. Box 16563, Phoenix, Arizona 85011, (602) 241-5534.

SUPPLEMENTARY INFORMATION: The Bureau of Land Management transferred the following described 756.33 acres of land in Maricopa County by Patent No. 02-88-0037, pursuant to the Federal Land Policy and Management Act of October 21, 1976:

Gila and Salt River Meridian

T. 4N., R. 1E.,
Sec. 3, lots 1, 2, 3, 11, 12, 13, 14, 15, 19, and 20, S½NE¼, NE¼SE¼.
T. 5N., R. 1E.,
Sec. 27, NW¼NW¼NW¼, N½SW¼NW¼NW¼, SW¼SW¼NW¼NW¼, W½W½SW¼NW¼;
Sec. 34, S½N½NE¼NE¼, S½NE¼NE¼, NW¼NE¼, S½NE¼, E½SE¼SW¼, SE¼.

In exchange the following described 19,435.60 acres of land in Mohave County were conveyed to the United States:

Gila and Salt River Meridian

Parcel 1 (Surface Only):

T. 19N., R. 15W.,
Sec. 5, lots 1 to 4, incl., S½N½, S½.
T. 20N., R. 15 W.,
Sec. 5, lots 1 and 3, SE¼NW¼, SW¼;
Sec. 7, lots 1 to 4, incl., E½, E½W½, except Hualapai Mtn. Rd.;
Sec. 9, lot 1, E½NE¼, W½NW¼, SW¼, SW¼SE¼;
Sec. 17, all;
Sec. 19, lots 1 to 4, incl., E½, E½W½, except Hualapai Mtn. Rd.;
Sec. 21, N½, N½SW¼, SE¼, except metes and bounds parcel;
Sec. 31, lots 1 to 4, incl., E½, E½W½.
T. 20 N. R. 16 W.,
Sec. 1, lots 1 and 2, S½NE¼, N½SE¼SW¼, SW¼SE¼SW¼, SE¼, except Hualapai Mtn. Rd. and D.W. Ranch Rd.;

Sec. 12, NE¼NE¼.
T. 21 N., R. 15 W.,
Sec. 19, lots 1 to 4, incl., NE¼, NE¼NW¼, NE¼SE¼, except D.W. Ranch Rd. and Interstate Hwy. 40;
Sec. 20, N½NE¼, SE¼NE¼, NW¼, NE¼SW¼, except D.W. Ranch Rd.;
Sec. 21, all, except Interstate Hwy. 40;
Sec. 22, all, except Interstate Hwy. 40;
Sec. 23, all, except Interstate Hwy. 40;
Sec. 26, S½;
Sec. 27, N½NE¼, SW¼NE¼, NW¼, NW¼SW¼;
Sec. 28, E½E½NW¼, NW¼NE¼NW¼, N½NW¼NW¼, SW¼, SW¼SE¼;
Sec. 29, NE¼NE¼, S½NE¼, SE¼NW¼, NE¼SW¼, S½SW¼, SE¼;
Sec. 31, lots 1 to 4, incl., E½, E½W½;
Sec. 33, all;
Sec. 35, E½NE¼, SW¼NE¼, SW¼NW¼.
T. 21 N., R. 16 W.,
Sec. 13, E½, E½W½, except Interstate Hwy. 40;
Sec. 23, all, except metes and bounds parcel;
Sec. 24, E½SW¼, W½SE¼;
Sec. 25, all;
Sec. 27, E½E½E½;
Sec. 29, NE¼NE¼SW¼, E½NW¼ NE¼SW¼, S½N½SW¼, S½SW¼, SE¼;
Sec. 31, lots 1 to 16, incl., E½;
Sec. 33, NW¼NE¼, S½NE¼, NW¼, S½;
Sec. 34, S½;
Sec. 35, all, except Hualapai Mtn. Rd.

Parcel 2 (Surface and Minerals):

T. 20 N., R. 16 W.
Sec. 1, lots 3 and 4, S½NW¼, N½SW¼, SW¼SW¼;
Sec. 2, lots 1 and 2, S½NE¼, SE¼, except Hualapai Mtn. Rd.
T. 21 N., R. 15 W.
Sec. 19, SE¼NW¼, E½SW¼, W½SE¼, SE¼SE¼;
Sec. 20, W½SW¼, SE¼SW¼, SE¼, except D.W. Ranch Rd.;
Sec. 26, N½;
Sec. 27, SE¼NE¼, NE¼SW¼, S½SW¼ SE¼;
Sec. 28, NE¼, N½SE¼, SE¼SE¼;
Sec. 29, NW¼SW¼;
Sec. 30, lots 1 and 2, NE¼, E½NW¼;
Sec. 35, NW¼NE¼, N½NW¼, SE¼NW¼.
T. 21 N., R. 16 W.
Sec. 24, N½, W½SW¼, E½SE¼;
Sec. 26, all;
Sec. 30, lots 1, 2, and lots 5 to 16, incl., N½NE¼, SW¼NE¼, N½SE¼NE¼, N½S½SE¼NE¼, S½N½NE¼SE¼, S½NE¼SE¼, W½SE¼, SE¼SE¼;
Sec. 34, NE¼NE¼, S½N½, except Hualapai Mtn. Rd.

At 9:00 a.m. on March 13, 1989, the land described in Parcels 1 and 2 will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 9:00 a.m. on March 13, 1989, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

The purpose of this notice is to inform the public and interested State and local government officials of this exchange of public and private land, and of the opening of the reconveyed land.

The land conveyed to the United States in this exchange will be administered by the Bureau of Land Management.

Marsha L. Luke,

Acting Chief, Branch of Lands Operations.

[FR Doc. 89-5667 Filed 3-10-89; 8:45 am]

BILLING CODE 4310-32-M

[CA-940-08-4520-12; Group 1013]

Plat of Survey; California

February 24, 1989.

1. This plat of the following described land will be officially filed in the California State Office, Sacramento, California immediately:

Humboldt Meridian, Del Norte County

T. 17 N., R. 2 E.

2. This plat representing the metes-and-bounds survey of Tract 38, Township 17 North, Range 2 East, Humboldt Meridian, California, under Group No. 1013 California, was accepted January 6, 1989.

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 Six Rivers National Forest.

5. All inquiries 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.

Herman J. Lyttge,

Chief, Public Information Section.

[FR Doc. 89-5634 Filed 3-10-89; 8:45 am]

BILLING CODE 4310-40-M

[CA-940-08-4520-12; Group 961]

Plat of Survey; California

February 24, 1989.

1. This plat of the following described land will be officially filed in the California State Office, Sacramento, California immediately:

Mount Diablo Meridian, Kern County

T. 30 S., R. 37 E.

2. This plat representing the dependent resurvey of a portion of the subdivisional lines, the survey of the subdivision of section 28, and the survey of lot 5, in section 28, Township 30 South, Range 37 East, Mount Diablo Meridian, California under Group No. 961 California, was accepted January 6, 1989.

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 inquiries 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.

Herman J. Lyttge,

Chief, Public Information Section.

[FR Doc. 89-5635 Filed 3-10-89; 8:45 am]

BILLING CODE 4310-40-M

[CA-940-08-4520-12]; Group 1007]

Plat of Survey; California

February 24, 1989.

1. This plat of the following described land will be officially filed in the California State Office, Sacramento, California immediately:

Mount Diablo Meridian, San Bernardino County

T. 29 S., R. 44 E.
T. 30 S., R. 44 E.

2. This plat, (2 sheets) representing the dependent resurvey of the south and west boundaries, and a portion of the subdivisional lines, Township 29 South, Range 44 East, Mount Diablo Meridian, California and the survey of a portion of the subdivisional lines, Township 30 South, Range 44 East, Mount Diablo Meridian, California.

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 Department of the Navy.

5. All inquiries relating to this land should be sent to the the California State Office, Bureau of Land Management, Federal Office Building,

2800 Cottage Way, Room E–2841, Sacramento, California 95825.

Herman J. Lyttge,

Chief, Public Information Section.

[FR Doc. 89–5636 Filed 3–10–89; 8:45 am]

BILLING CODE 4310–40–M

[CA–940–08–4520–12; Group 735]

Plat of Survey; California

February 24, 1989.

1. This plat of the following described land will be officially filed in the California State Office, Sacramento, California immediately:

Mount Diablo Meridian, Siskiyou County

T. 43 N., R. 10 W.

2. This plat representing the dependent resurvey of a portion of the Hull Gulch Placer Mine (Lot 45), Mineral Survey No. 972, and a portion of the Quartz Valley Placer Mine (Lot 54), Mineral Survey No. 3228, in sec. 13, Township 43 North, Range 10 West, Mount Diablo Meridian, California, under Group No. 735 California, was accepted January 6, 1989.

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 inquiries 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.

Herman J. Lyttge,

Chief, Public Information Section.

[FR Doc. 89–5637 Filed 3–10–89; 8:45 am]

BILLING CODE 4310–40–M

[CA–940–08–4520–12; Group 967]

Plat of Survey; California

February 24, 1989.

1. This plat of the following described land will be officially filed in the California State Office, Sacramento, California immediately:

Mount Diablo Meridian, Trinity County

T. 32 N., R. 9 W.

2. This plat, (5 sheets) representing the dependent resurvey of a portion of the south and west boundaries and portions of the subdivisional lines, and the survey of the subdivision of sections 7, 23, 25, 26, 27, 30, 31, 32, 33, and 34, Township 32 North, Range 9 West, Mount Diablo Meridian, California under Group No. 967 California, was accepted January 6, 1989.

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 inquiries 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.

Herman J. Lyttge,

Chief, Public Information Section.

[FR Doc. 89–5638 Filed 3–10–89; 8:45 am]

BILLING CODE 4310–40–M

Minerals Management Service

Pacific Northwest Outer Continental Shelf (OCS) Task Force; Initial Meeting

This notice is issued in accordance with the provisions of the Federal Advisory Committee Act, Pub.L. No. 92–463, 5 U.S.C. Appendix 1, and the Office of Management and Budget's Circular No. A–63, Revised. The Pacific Northwest OCS Task Force will hold its initial meeting during the period 8:30 a.m. to 5 p.m., March 27, 1989, at the Inn at the Quay, 100 Columbia Street, Vancouver, Washington (206–694–8341). The meeting is open to the public.

The purpose of the Pacific Northwest OCS Task Force is to advise the Secretary of the Interior and other officers of the Department of the Interior on issues related to potential OCS oil and gas leasing, exploration and development in the Washington and Oregon OCS Planning Area.

Minutes of the meeting will be available for public inspection and copying at the Minerals Management Service, Pacific OCS Region, Suite 244, 1340 West Sixth Street, Los Angeles, California 90017. For more information contact John Smith at (213) 894–4154.

Dated: March 7, 1989.

Carolita Kallaur,

Deputy Associate Director for Offshore Leasing.

[FR Doc. 89–5744 Filed 3–10–89; 8:45 am]

BILLING CODE 4310–MR–M

Development Operations Coordination Document; Texas Producing Inc.

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the receipt of a proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that Texaco Producing Inc. has submitted a DOCD describing the activities it proposes to conduct on Lease OCS–G 1953, Block 144, West Cameron Area, offshore Louisiana. Proposed plans for the above area provide for the development and production of hydrocarbons with support activities to be conducted from existing onshore bases located at Cameron and Morgan City, Louisiana.

DATE: The subject DOCD was deemed submitted on February 27, 1989. Comments must be received within 15 days of the publication date of this Notice or 15 days after the Coastal Management Section receives a copy of the plan from the Minerals Management Service.

ADDRESSES: A copy of the subject DOCD is available for public review at the Public Information Office, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). A copy of the DOCD and the accompanying Consistency Certification are also available for public review at the Coastal Management Section Office located on the 10th Floor of the State Lands and Natural Resources Building, 625 North 4th Street, Baton Rouge, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). The public may submit comments to the Coastal Management Section, Attention OCS Plans, Post Office Box 44487, Baton Rouge, Louisiana 70805.

FOR FURTHER INFORMATION CONTACT: Michael J. Tolbert; Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section, Exploration/Development Plans Unit; Telephone (504) 736–2867.

SUPPLEMENTARY INFORMATION: The purpose of this Notice is to inform the public, pursuant to Sec. 25 of the OCS Lands Act Amendments of 1978, that the Minerals Management Service is considering approval of the DOCD and that it is available for public review. Additionally, this Notice is to inform the public, pursuant to Section 930.61 of Title 15 of the CFR, that the Coastal Management Section/Louisiana Department of Natural Resources is reviewing the DOCD for consistency with the Louisiana Coastal Resources Program.

Revised rules governing practices and procedures under which the Minerals Management Service makes information contained in DOCDs available to affected States, executives of affected local governments, and other interested parties became effective May 31, 1988 (53 FR 10595).

Those practices and procedures are set out in revised § 250.34 of Title 30 of the CFR.

Dated: February 28, 1989.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 89-5639 Filed 3-10-89; 8:45 am]

BILLING CODE 4310-MR-M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree; Flexcon Co.

In accordance with Department Policy, 28 CFR 50.7, 38 FR.19029, notice is hereby given that a proposed Consent Decree in United States v. Flexcon Co., Civil action No. 88-0016-xx (D. Mass.), was lodged with the United States District court for the district of Massachusetts on March 6, 1989. The proposed Decree, If entered, will resolve the liability of the defendant Flexcon in this action pursuant to the Clean Air Act, 42 U.S.C. 7413. The proposed Decree Requires Flexcon to pay $60,000 in penalties as well as to comply with specified emission limitation and reporting requirements under the Clean Air Act.

The Department of Justice will receive for a period of thirty (30) days from the date of publication of this notice, written comments relating to the proposed Decree. Comments should be addressed to the acting Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Flexcon Co.*, D.J. Ref. No. 90-5-2-1-11-49.

The proposed Decree may be examined at the office of the United States Attorney, 1107 J.W. McCormack Post Office and Courthouse, Boston, Massachusetts 02109; at the Region I office of the United States Environmental Protection Agency, John F. Kennedy Federal Building, Room 2203, Boston, Massachusetts 02203; and at the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, Room 1517, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed Decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, at the above address. In requesting a copy, please enclose a check in the amount of $2.10, payable to the Treasurer of the United States, to cover the costs of reproduction.

Donald A. Carr,

Acting Assistant Attorney General, Land & Natural Resources Division.

[FR Doc. 89-5683 Filed 3-10-89; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree; City of Ottumwa, IA

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on February 27, 1989 a proposed Partial Consent Decree in *United States* v. *City of Ottumwa, Iowa, et al.* (S.D. Iowa), Civil Action No. 88-164-E was lodged with the United States District Court for the Southern District of Iowa, Central Division. The Partial Consent Decree concerns violations of the Asbestos National Emission Standards for Hazardous Air Pollutants ("NESHAP"), 40 CFR Part 61.140, *et seq.*, and the Clean Air Act, 42 U.S.C. 7401, *et seq.* The proposed Partial Consent Decree requires defendants Allen Beachy and Daniel Beachy to give proper notification under the asbestos NESHAP, to comply with all aspects of the asbestos NESHAP, and to attend an EPA asbestos training program if they continue to handle asbestos.

The Department of Justice will receive comments relating to the proposed Partial 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, and should refer to *United States* v. *City of Ottumwa, Iowa, et al.*, D.J. No. 90-5-2-1-1143.

The proposed Partial Consent Decree may be examined at the office of the United States Attorney for the Southern District of Iowa, 115 U.S. Courthouse, Des Moines, Iowa 50309 and the U.S. Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101. The Decree may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1515, Ninth Street and Pennsylvania Avenue NW., Washington, DC 20530. A copy of the proposed Partial Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice.

Donald A. Carr,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-5643 Filed 3-10-89; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree; Township of Maple Shade, NJ

In accordance with departmental policy, 28 CFR 50.7, notice is hereby given that on February 14, 1989, a proposed consent decree in *United States of America v. Township of Maple Shade, New Jersey*, Civ. No. 89-689, was lodged with the United States District Court for the District of New Jersey. The proposed consent decree settles the United States' claims against Maple Shade under the Clean Water Act, set forth in a complaint filed on the same date, relating to discharges from two municipal sewage treatment plants in violation of effluent limitations and other applicable permit requirements.

The proposed consent decree requires Maple Shade to upgrade and expand one of its treatment plans to provide advanced wastewater treatment of all of the Township's sewage by December 31, 1991, to convert the second treatment plant into a pumping station, and to cease all discharges from the second treatment plant by December 31, 1991. The decree also requires: (1) Payment of a $75,000 civil penalty to the United States, (2) compliance with interim effluent limitations until the facilities improvements are completed, and (3) various interim operating improvements and repairs to the existing Maple Shade treatment facilities.

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, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Township of Maple Shade*, D.J. Ref. 90-5-1-1-3105.

The proposed consent decree may be examined at the offices of the United States Attorney, Federal Building, 970 Broad Street, Newark, New Jersey 07102, and at the Region II office of the Environmental Protection Agency, 26 Federal Plaza, New York, NY 10278. A copy of the consent decree may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Room 1517, Ninth Street and

Pennsylvania Avenue, NW., Washington, DC 20530. Copies of the proposed consent decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check in the amount of $2.10 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Donald A. Carr,

Acting Assistant Attorney General, Land & Natural Resources Division.

[FR Doc. 89-5644 Filed 3-10-89; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

[Civil No. C88-4253 (N.D. Ohio)]

Proposed Final Judgment; TRW Inc.,

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(a) and (b), the United States publishes below the comments it received on the Competitive Impact Statement and proposed Final Judgment in the captioned case, filed in the United States District Court for the Northern District of Ohio, together with the response of the United States to these comments.

Copies of the public comments and response are available on request for inspection and copying in Room 3229, Antitrust Division, Department of Justice, Washington, DC, and for inspection at the Office of the Clerk of the United States District Court for the Northern District of Ohio in Cleveland.

John W. Clark,

Deputy Director of Operations Antitrust Division.

In the matter of United States of America, Plaintiff, vs. TRW Inc., Defendant, filed in the United States District Court for the Northern District of Ohio Eastern Division.

Response of the United States to Public Comments and Motion of the United States for Entry of Final Judgment

Pursuant to section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. 16(b)-16(g)) (the "APPA"), the United States of America hereby files its Response to Public Comments and moves for entry of the proposed Final Judgment against TRW Inc. ("TRW") in this civil antitrust proceeding.

I. Introduction

This action began on November 17, 1988, when the United States filed a complaint alleging that the proposed acquisition of Chilton Corporation ("Chilton") by TRW would violate section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleged that the effect of the acquisition would be substantially to lessen competition in sales of consumer credit reports in sixteen (16) geographic markets. Both companies sell credit reports, either directly through credit bureau offices that they own ("owned offices") or indirectly through affiliated credit bureaus, in each of these markets. The Complaint seeks, among other relief, to enjoin the transaction to prevent its anticompetitive effects in the sixteen relevant markets.

On November 17, 1988, the United States and TRW filed a Stipulation in which they consented to the entry of a proposed Final Judgment designed to eliminate the anticompetitive effects of the acquisition. In accordance with the provisions of the APPA, the United States also filed a Competitive Impact Statement explaining the basis for the Complaint and for the United States' conclusion that entry of the proposed Final Judgment would be in the public interest. The proposed Final Judgment eliminated the anticompetitive effects alleged in the Complaint with respect to the sixteen markets by requiring TRW to consummate contracts to sell copies of the consumer credit files in some markets and to end affiliation agreements with independent credit bureaus in others.

The United States and TRW stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the government withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, and enforce the Final Judgment and to punish violations of the Judgment.

II. Compliance with the APPA

Upon publication of this Response in the Federal Register, the procedures required by the APPA will have been completed, and the Court may enter the proposed Final Judgment.

A. Stipulation, Proposed Final Judgment and Competitive Impact Statement

The United States has caused the Stipulation between the parties for entry of the proposed Final Judgment, and the Competitive Impact Statement, in the form prescribed by 15 U.S.C. 16(b), to be filed with the Court and to be published in the **Federal Register** (53 FR 48735, December 2, 1988 and 53 FR 49937, December 12, 1988).[1] It also has furnished copies of these documents to all persons who have requested them.

B. Newspaper Notices

The United States has caused newspaper notices of the proposed Final Judgment and the Competitive Impact Statement to be published in *The Washington Post* and the Cleveland *Plain Dealer* in accordance with the procedures set forth in 15 U.S.C. 16(c).[2]

C. Statements Regarding Communications

As required by 15 U.S.C. 16(g), on November 28, 1988, TRW filed with the Court a description of communications, by or on behalf of the defendant, with officers and employees of the United States concerning the proposed Final Judgment.

D. Waiting Period, Comments, and Publication of Comments and Response

The 60-day period provided by 15 U.S.C. 16(d) for submission of public comments expired on February 10, 1989. The United States received comments from Credit Bureau Services of New Hampshire, a credit bureau wholly-owned by CBC Companies ("CBC"), on January 18 and February 10, 1989; from Rochester Credit Center, Inc. ("Rochester") on January 26, 1989; from Credit Data of Hawaii, Inc. ("Hawaii") on February 9, 1989; from Credit Data of Central Massachusetts, Inc. and Credit Data of Rhode Island, Inc. (together "Central Massachusetts") on February 10, 1989; and from Centroplex Credit Reporting & Collections, Inc. ("CCRC") on February 8, 1989. In addition, on February 9, 1989, the Department received a letter from the Honorable Gordon J. Humphrey, United States Senator from the State of New Hampshire, indicating his concern about the impact of the proposed Final Judgment on CBC and asking us to give careful consideration to its comments.[3] In accordance with the APPA, the United States has evaluated the comments, and responds to them below. As required by 15 U.S.C. 16(b), the comments are being filed with this Response, and the comments and this Response will be published in the **Federal Register**. Counsel for the United States will inform the Court when publication has occurred.

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[1] Copies of the **Federal Register** Notices are attached to this Response as Exhibit A.

[2] Copies of the affidavits of publication are attached to this Response as Exhibit B.

[3] Copies of the comments are attached to the Response as Exhibits C through I.

E. Standards for Review of Consent Decrees

Under the APPA, the primary responsibility for enforcing the antitrust laws and protecting the public interest in competitive markets rests with the Department of Justice.[4] In carrying out its responsibilities, the Department has very broad discretion in prosecuting alleged antitrust violations and determining appropriate relief for the settlement of cases.[5] Before entering a proposed consent decree, the Court must determine that the decree is in the public interest, 15 U.S.C. 16(e),[6] but that test is limited to ensuring that the government has met its public interest responsibilities, that is, determining that the proposed Final Judgment falls within the range of the government's antitrust enforcement discretion. The Ninth Circuit Court of Appeals has explained these respective obligations as follows:

> The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General * * *. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interests." * * * More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[7]

Indeed, the courts repeatedly have held that the purpose of their review of proposed antitrust consent decrees is not to determine "whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder" [8] or whether this is the remedy "the Court might have imposed had the matter been litigated." [9] Rather:

> Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making the public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances. The Court must also give appropriate recognition * * * to the fact that every consent judgment normally embodies a compromise, and that the parties each give up something which they might have won had they proceeded to trial.[10]

In this case, the United States carefully considered the matters that are now being raised in the comments when it formulated its position with respect to this transaction. We concluded, for the reasons discussed below and in the Competitive Impact Statement, that the public would be best served by the remedial action set forth in the proposed Final Judgment. If the Court finds that the United States' action represented a reasonable exercise of its antitrust enforcement responsibility and prosecutorial discretion, it may enter the proposed Final Judgment as soon as compliance with APPA is completed by publication of the comments and Response in the **Federal Register.**[11]

F. The Competitive Analysis of the United States

The Department believes that if the proposed Final Judgment is entered, the transaction will no longer violate Section 7 of the Clayton Act. The proposed Final Judgment will ensure that a new vendor will enter each market in which, absent such relief, the transaction would substantially reduce competition. As a result, credit grantors will have as many potential sources of full file consumer credit reports to choose from as in the past and no credit report seller will be able to gain market power. Thus, the United States concludes that entry of the proposed Final Judgment is in the public interest.

1. *The Product Is "Full File" Consumer Credit Reports.* Consumer credit reports are purchased by grantors of credit such as banks, mortgage companies, department stores, and other businesses to determine whether to grant credit to individual consumers. Credit reports include information on a person's background,[12] debts owed,[13] and public record announcements.[14] Debt obligation information is obtained from computer tapes credit grantors prepare each month on the status of their consumer accounts. Public record information is collected manually from public records by local credit bureaus.[15] A data base of credit reports that contains all the types of information demanded by credit grantors, including five years of historical information, is considered a "full file."

Credit grantors purchase credit reports to reduce the risk of granting credit to consumers with whom they are unfamiliar. Obviously, the more information in a credit report, the lower the risk. Those who purchase credit reports generally believe that a four or five year credit history is necessary for prudent risk assessment. As a result, credit grantors do not consider credit reports that contain less than four or five years of debt obligation information and less than seven years of public record information to be adequate substitutes for reports that contain such information.[16]

2. *The Geographic Market for Consumer Credit Report is Local.* The geographic market for credit reports is local because credit grantors demand as much current credit information as they can get about an individual, and the only vendors likely to possess that information are those credit bureaus in the area in which the individual resides. A credit grantor would not consider a credit bureau that does not have full file information on most individuals in a particular geographic area to be an adequate substitute for a credit bureau that possessed such comprehensive

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[4] *United States* v. *Waste Management, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,651 at page 63,045 (D. D.C. 1985).

[5] *United States* v. *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 at page 71,980 (W.D. Mo. 1977), citing *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689, 81 S. Ct. 1309, 1312-13 (1961) and *Swift & Co.* v. *United States*, 276 U.S. 311, 331-332, 48 S. Ct. 311, 317 (1928).

[6] This determination can be properly made on the basis of the Competitive Impact Statement and this Response. The procedures of 15 U.S.C. 16(f) are discretionary, and a court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the Court in resolving those issues. *See* H.R. Rep. 93-1463, 93d Cong. 2d Sess. 8-9 *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6535, 6538.

[7] *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) (citations omitted).

[8] *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978), quoting *United States* v *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)

[9] *United States* v. Alcan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

[10] *United States* v. *Mid-America Dairymen, Inc.*, *supra*, ¶ 61,508 at page 71,980.

[11] United States respectfully requests that the Court enter the proposed Final Judgment promptly. Congress expected federal courts to adopt "the least complicated and least time-consuming means possible" to determine if entry of a proposed final judgment would be in the public interest. *United States* v. *ARA Services, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,861 at page 76,988 (E.D. Mo. 1979).

[12] This normally includes the consumer's name, any aliases, age, marital status, number of dependents, social security number, current and two most recent previous addresses, current and two most recent employers and current salary.

[13] Information about debts owed is gathered from individual, regional, and local credit grantors who are willing to give copies of their computerized records to credit bureaus. The data shows a consumer's outstanding credit accounts, credit balance, current balance, whether any amount is past due, and, if so, for how long.

[14] This includes judgments, liens, and bankruptcy information obtained from the records of federal, state, county or municipal authorities.

[15] In some states, public record information may be purchased from public record information collection firms.

[16] Bureaus sometimes sell credit reports while they are in the process of collecting information. Credit reports that are not full files usually sell for substantially less than full files.

local information. If distant credit bureaus were fully competitive substitutes for local credit bureaus, there would be no variations in local prices based upon the number of local bureaus. In fact, however, prices in particular geographic areas vary widely, depending on the number of credit bureaus offering full file credit reports in that area. That evidence strongly suggests the conclusion that credit bureaus doing business elsewhere are not in the market.

3. *The Structure of the Modern Consumer Credit Reporting Business.* The consumer credit reporting business has changed dramatically in the last twenty years as independent local merchant-owned credit bureaus have been transformed into parts of national computerized networks of consumer credit information. Most credit bureaus were founded by regional or municipal merchants associations. Originally, those bureaus collected information manually. The labor-intensive nature of the business, as well as the fact that most bureaus were owned by their customers, led to a situation where most local bureaus were monopolies. The business changed radically in the late 1960s and early 1970s when five companies (hereinafter referred to as "networks" or "network vendors") (TRW, Chilton, CBI, Trans Union, and ACS) began to store consumer credit files on computers.[17]

Computers greatly reduced the cost of maintaining consumer credit files and allowed firms to enter markets that had previously been monopolized by one firm. Computers also enabled credit bureaus to form regional networks that share information on individual consumers. These networks are of great benefit to credit grantors contemplating extending credit to consumers that reside in other parts of the country or that have recently moved.[18] The increased mobility of many Americans makes it very important that credit grantors be able to obtain information about an individual's credit history throughout the country.

Thus, while credit bureaus once operated as individual entities, they are now pieces of an interlocking network of independent bureaus, known as affiliates, and vendor-owned offices that collect, maintain, and distribute consumer credit information over a large geographic area. Affiliates and owned offices all store their information in a vendor maintained common data base and all of them have access to all the information in the data base. A vendor provides credit bureaus with data processing services and access to all the information in its data base. Affiliates provide vendors with all their data and sell that data to other affiliates and to the vendor (for use in its owned offices).

Affiliates in a network are more partners in the creation, maintenance, and sale of consumer credit data bases than mere customers of data processing services. Indeed, all affiliates and owned offices in a network are usually known to credit grantors by the vendor's tradename, rather than the affiliate's. As a result, affiliates have a big stake in the success or failure of their network vendors. Similarly, vendors rely heavily on the data collection and sales abilities of their affiliates.

In recent years, the importance to credit grantors of a credit bureau's ability to provide information on consumers in other parts of the country has led TRW, Trans Union, and CBI all to announce that they intend to have files on consumers all over the country. These vendors have opened new credit bureau offices or entered into contracts with independent affiliates in many towns previously served by a single, monopoly credit bureau. Indeed, TRW will substantially expand its geographic scope through the acquisition of Chilton. Thus, while the Department concluded that the transaction posed a danger to competition in sixteen local markets, it also recognized that the transaction created the potential for improved consumer credit data bases and thus could be of benefit to credit grantors in many local markets.

In spite of the great incentive for vendors to enter new local markets, development into a full fledged competitor from scratch is a lengthy process that cannot be accomplished in less than three to five years. The principle reason entry takes so long is that a full file must contain substantially the same information as an established firm, *i.e.*, four to five years of debt obligation and seven years of public record information, to be an adequate substitute for credit grantors. Since credit grantors usually save their debt obligation information for approximately one year, it takes several years to collect sufficient debt information data for a full file. Similarly, the collection of public record information is normally a slow process that takes at least two years.

4. *The Effect of the Transaction.* TRW and Chilton sell credit reports in many parts of the United States. There are, however, relatively few areas in which both firms sell full file consumer credit reports. The Department found that, in most of the United States, TRW and Chilton do not compete against one another.[19] Historically, TRW's strength has been on the east and west coasts while Chilton's strength has been in the midwest. The TRW and Chilton networks are direct competitors in sixteen markets where there are few alternative sources of credit reports. In all of those markets, the HHI,[20] measured by units sold, before the acquisition, exceeded 3200 and the acquisition would cause the HHI to increase by more than 700 points.[21] The high level of concentration in those makets, combined with the difficulty of entry into local markets, led the Department to conclude that the acquisition would enable TRW to gain market power, *i.e.*, the power to control

[17] There are now four networks. In the comments, the number of vendors is sometimes set at five and sometimes at four. This is a result of the fact that one of the companies that has been providing data processing services, Associated Credit Services, Inc. ("ACS"), is discontinuing its data processing and network activities. On August 1, 1988, ACS entered into an agreement to obtain computer services from The Credit Bureau, Incorporated of Georgia ("CBI"). After ACS discontinues its data processing activities, there will be four vendors of such services: TRW, Chilton, CBI, and Trans Union Credit Information Co. ("Trans Union").

[18] When an individual moves from one area to another, the information on that individual is transferred from the file of the credit bureau of his former residence to the file of the credit bureau at his new one within the data base.

[19] TRW has consumer information in all 32 states in which Chilton does business. However, both companies have full files in all of or portions of 11 of those states.

[20] "HHI" means the Herfindahl-Hirshman Index, a measure of market concentration calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 900 + 900 + 400 + 400 = 2{,}600$). The HHI takes into account the relative size and distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relative equal size and reaches its maximum of 10,000 when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

[21] Hawaii offers its own HHI calculation and concludes that the Department has understated the extent to which the concentration is likely to increase in its state, and presumably, the extent to which competition there will be reduced. The Department provided a range of HHI increases in the affected makets, rather than specific market shares and HHI calcualtions, in order to avoid revealing commerically sensitive information. We believe we adequately established the likelihood of competitive harm through less precise information on concentration. We agree with Hawaii that the threat to competition is substantial. However, the exact HHI is irrelevant to the question of whether the remedial action set out in the proposed Final Judgment will be effective.

price over a substantial period of time, in those markets. Each of these sixteen areas is now served by the TRW and Chilton networks and, at most, one other network.

5. *The Proposed Final Judgment.* Under the terms of the Proposed Final Judgment, TRW was required to take corrective action in each of the sixteen affected markets. TRW would be required either to end its relationship with an affiliate in a market, thereby making the former affiliate available for a network vendor not yet in the market with a full file, or to sell a copy of its data base to another vendor which would compete in the market. The Department concluded that either action would end any threat to competition posed by the acquisition. While we recognized that neither solution would leave any market unchanged, we concluded that either eventually would prevent TRW from maintaining market power in any market.

A firm cannot gain market power when there is either a sufficient number of competitors or it is likely that new firms would enter the market in response to a small, but significant, nontransitory price increase. The two forms of relief employed by the proposed Final Judgment will prevent TRW from exercising market power either by keeping the number of competitors unchanged (by enabling a network not in the market to team up with the former TRW (or Chilton) affiliate) or my making available to an outside vendor a full file of local credit information, the creation of which is the major barrier to entry into local markets. (See page 14, *supra.*) Indeed, the Department's predictions that the proposed relief would result in new entry into these markets has been borne out in fact; companies have already committed themselves to enter those markets through the purchase of copies of data files.

The proposed Final Judgment involves minimal governmental intrusion into the market and permits credit grantors, the consumers affected by this merger, to obtain the benefits of increased national coverge of the TRW data base. The increased coverage increases the likelihood that the data base will have information on an individual who has recently moved. Furthermore, local files will improve in areas where both TRW and Chilton have been developing files, but do not yet have fully mature data bases.[22]

[22] As we explain below, to enjoin the transaction completely would deny credit grantors the benefits they expect to gain from the transaction.

The Department also concluded that the proposed Final Judgment would be the least instrusive means of correcting the competiitive problems posed by the transaction. We were aware that the proposed Final Judgment would affect the interests of the affiliates with whom TRW had agreed not to reaffiliate. However, all consent decrees and, indeed, all mergers affect the interests of third parties. It is quite likely that, even in the absence of the proposed Final Judgment, some, or all, of those affiliates would have been unable to preserve their relationships with TRW. After many mergers, firms end relationships with duplicate suppliers or distributors. Similarly, after consummation of its acquisition of Chilton, TRW would have been likely to end its relationship with affiliates where there were overlapping territories. In any event, the courts repeatedly have recognized that the purpose of the antitrust laws is to protect competition rather than competitors. Preservation of the former, not the latter, was Congress' intent.[23]

G. Response to Comments

With the exception of Senator Humphrey, each of the commenters is an independent credit bureau that is currently affiliated with Chilton or TRW. While the various comments raise a number of concerns and objections to the proposed Final Judgment, they uniformly, with the exception of that of CCRC, reflect the desire of independent credit bureaus to be allowed to renew their contracts with their current vendor. However, each of the commenters appears to acknowledge that the proposed acquisition of Chilton by TRW would reduce competition in the sale of credit reports in its geographic areas. Most of the commenters argue that the United States should seek to prevent the acquisition of Chilton by TRW , *i.e.*, that the United States should not have negotiated any consent decree at all. Some commenters argue alternatively that the decree should require TRW to sell the information that it (or Chilton) owns, in lieu of refusing to extend its (Chilton's) affiliation agreement with the commenter.[24] Of singular import, however, is the fact that not a single credit grantor, the large sophisticated consumers of credit reports, has expressed any concern to the Court or the Department that the proposed Final Judgment would not adequately protect its interests.

Under these circumstances, the single issue presented here is whether the proposed Final Judgment represents a reasonable exercise of the Department of Justice's antitrust enforcement discretion. For the reasons discussed below, the United States has concluded that the proposed Final Judgment submitted to the Court is an appropriate resolution of this litigation. That proposed Final Judgment reflects a careful study of a complex business and is reasonably calculated to prevent the anticompetivie effects alleged in the Complaint. Therefore, the entry of that proposed Final Judgment is in the public interest.

1. *The Importance of Credit Inquiries.* CBC and Rochester argue that having a full file, as defined by the Complaint, is insufficient for a credit bureau to compete in a given market. They suggest that credit grantors always purchase the credit report with more credit inquiries,[25] regardless of price, service, or quality considerations.[26] CBC and Rochester assert that unless the transaction is enjoined, TRW will enhance its share of credit inquiries, thereby gaining the power to limit or exclude competition. These assertions are inaccurate; they are simply inconsistent with observable trends in the industry.

The commenters, current affiliates who will have to align themselves with a new network vendor, will not be disadvantaged in terms of credit inquiry quality by the proposed Final Judgment. That Judgment would not result in TRW increasing its share of credit inquiries in any of the commenters' markets. A credit bureau owns the data for its assigned zip codes in its vendor's computer, including the credit inquiries, and the credit bureau is free, when its contract expires, to transfer its data to another vendor. For example, since CBC owns the New Hampshire information, Chilton cannot duplicate and retain the information for TRW's use. If a credit bureau transfers its data to another vendor, its share of credit inquiries will be unaffected, and a purchaser of its

[23] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697 (1977).

[24] "[A]t a minimum the proposed Consent Decreee should be modified to allow [CBC] and similarly situated credit bureaus to continue to contract, on a fair and reasonsble basis with the successor to the Chilton/TRW operation." CBC Supplementary Comments at 2. "We object to the inclusion in the proposed final judgment of provisions that require the severance of relationships between our clients and TRW." Central Massachusetts Comments at 2.

[25] A credit inquiry is an indication that a credit grantor has purchased a credit report on an individual. Taken together, credit inquiries reveal the extent to which the person has recently sought credit.

[26] CBC Comment at 5 and Rochester Comments at 2–3.

credit reports the day after it changes affiliations will find all the inquiries it would have found the day before.[27]

The commenters' claims that the credit bureau with the most credit inquiries will always dominate a market is simply inconsistent with the existence of two or three competitors in virtually every metropolitan area in the United States. If credit grantors always chose the credit report with the greatest number of inquiries, there would only be one credit bureau in every geographic market.[28] That, of course, is not the case. Rather, most geographic markets have two or three credit bureaus.[29]

Furthermore, the evidence indicates that many geographic markets are becoming *less* concentrated as TRW, CBI, and Trans Union all enter markets throughout the United States. The opposite would be true if CBC and Rochester were correct. Entry would not be feasible because credit grantors would not purchase the report of the new entrant that would have no credit inquiries. Consequently, CBC's anecdote about its efforts to enter Cleveland actually undermines its position.[30] If credit inquiries were as important as CBC claims, entry in the face of a monopolist would be foolish and futile and CBC would not have attempted to enter the Cleveland market. Given the fact that the established firm held a monopoly position in credit inquiries, CBC must have believed that it could draw market share away from the incumbent firm (after it established a "full file") through price and service competition.[31] In the same vein, if CBC is correct, TRW acted irrationally by choosing to release the dominant firm in the New Hampshire market (CBC) rather than the credit bureau with the small market share or selling a copy of the file there.[32]

In fact, attempts by these firms to enter new markets to challenge the incumbents, who have more credit inquiries in their files, is not folly. While credit inquiries are a factor credit grantors use to assess credit report quality, they are not the *only* factor. We found that credit grantors' primary basis for selecting credit reports is whether the network has a "full file" (as defined in the Complaint) fo the area in which the consumer resides. (Complaint at 6.) Selection between full file alternatives is made on the basis of credit inquiry information, price, readability of reports, computer down time, brand loyalty, and other factors. And new entrants have been able to overcome the initial credit inquiry advantage of established credit bureaus by working hard and providing quality service.

2. *Alternate Vendors Have Incentives to Compete.* CBC, Rochester, and Hawaii also express concern that the other network vendors with whom they may contract are inadequate to meet their needs. CBC argues that it needs a partner that is well established in Boston because the New Hampshire and Boston markets are interrelated.[33]

In large measure, this argument is premised on CBC's view that the firm with the greatest number of credit inquiries automatically possesses sustained market power. For the reasons set forth above, this is not the case. This argument also is premised on the notion that CBI would not be an adequate replacement network vendor for CBC because CBI does not have the incentive or ability to compete in New England.[34] All the evidence we have gathered, however, suggests otherwise. In 1987 CBI entered the Boston market by opening an office in nearby Woburn. With its purchases of Chilton's Boston file pursuant to the proposed Final Judgment, CBI will have much the same New England coverage that Chilton had before the acquisition. CBI spent a substantial sum to purchase the files, a fact indicating its belief that the purchase of those files will greatly facilitate its entry into those areas and provide it with a competitive file offering. Nor is CBI a small company. It is significantly larger than Chilton, and has file coverage throughout most of the United States.[35] Moreover, CBI's interest in obtaining CBC's New Hampshire office as an affiliate does not appear in doubt. CBC's comments indicate that CBC's New Hampshire office will affiliate with CBI.[36] If, as CBC claims, success in one market is contingent on a presence in a neighboring market, a New Hampshire affiliate should greatly facilitate CBI's entry into the Boston market.[37]

Similarly, Hawaii's assertion that it would not be able to survive competitively with a new network vendor is contradicted by the facts. Hawaii asserts that it has only been able to compete with Chilton because of "TRW's west coast file."[38] If it affiliates with another vendor, it claims it will have only its Hawaii files, whereas TRW/Chilton will have both the more mature Chilton files and the strong Chilton/TRW mainland files. According to Hawaii, it will not be able to compete in these circumstances.[39]

Hawaii seems to be arguing that a strong West Coast file is a prerequisite to success in the state. But Chilton, the firm it asserts dominates Hawaii, has no file on the West Coast of any kind. In contrast, CBI and Trans Union have substantial files in California.[40] Consequently, if access to a good West Coast file is a prerequisite to competing in Hawaii, both CBI and Trans Union

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[27] However, TRW will have a larger share of credit inquiries in markets where it is selling a copy of its files. Consequently, the Department carefully considered the importance of credit inquiries in assessing whether such sales would be adequate to correct competitive problems. We concluded that they would for the reasons discussed, *infra*.

[28] All credit grantors would purchase credit reports from a single source because each purchase from another provider would serve to divide the credit inquiries for that area. Of course, if CBC is seriously suggesting credit reporting markets are natural monopolies, it would argue that there is *no* competitive problem at all, rather than that the proposed Final Judgment is insufficient.

[29] CBC, therefore, substantially undermines its position when it acknowledges that the number of firms competing in a particular geographic market is usually three. CBC Comments at 4. *See also*, Complaint ¶¶ 21 through 36, setting out the number of competitors in various other markets. Similarly, Rochester admits that, under its theory, its local market should be a monopoly. Yet, in the next paragraph it acknowledges that it essentially divides the Rochester market with its TRW competitor. Rochester Comments at 4–5.

[30] In its comments CBC indicates that it has only gained a 10% market share since it entered the Cleveland market in 1982. CBC Comments at 6.

[31] CBC's experience in the Cleveland market is entirely consistent with the Department's position that *de novo* entry is difficult.

[32] TRW owns the New Hampshire file but leases it to an independent credit bureau.

[33] CBC is concerned about what it describes as the "wholesale submarket." This relates to credit reports relating to individuals living in Boston which it will sell to credit grantors in New Hampshire. In its view, no New Hampshire credit grantor will purchase CBC's partner's reports relating to Boston when TRW has more credit inquiries there. In its supplemental comments CBC indicates that this market constitutes 18 percent of its business. CBC Supplemental Comments at 8.

[34] CBC cannot be arguing that CBI and Trans Union are inadequate networks generically, *i.e.*, wherever they do business. CBC owns offices in the states of Ohio, Indiana, Pennsylvania, New Hampshire, Vermont, Maryland, Michigan, West Virginia, and Florida. Through these various offices, it does business with each of the four networks.

[35] As a result of its agreement with ACS, CBI's file coverage will rival, if not surpass, the combined file coverage of TRW and Chilton. By CBC's calculations, CBI and TRW will be approximately the same size and Trans Union somewhat smaller. CBC Supplemental Comments at 4.

[36] CBC Comments at 8.

[37] CBC's comments indicate that its New Hampshire office will join the CBI system after the acquisition. CBC Comments at 8. It is not clear whether it already has signed a contract to this effect. In either event, CBC knows which network its New Hampshire office will join.

[38] Hawaii Comments at 6.

[39] Hawaii Comments at 10.

[40] Both CBI and Trans Union have mature files and significant market shares in Los Angeles. CBI is well established in San Francisco with a significant portion of the market and, we believe, Trans Union is developing a file there.

meet that requirement better than Chilton did for its owned office.[41]

Rochester's suggestion that no other network vendor would affiliate with it because of a lack of name recognition and file quality [42] is difficult to comprehend. With regard to the Rochester area (and the Buffalo metropolitan area sixty miles to the west), the Rochester Credit Center will bring its admittedly high quality files to any network that it joins. Based on their announced expansion plans and their past actions, either Trans Union or CBI would be interested in expanding their presence in upstate New York by affiliating with Rochester Credit Center. In Syracuse, the major metropolitan area to the east, Trans Union already has full files and CBI will gain full files as a result of its purchase of a copy of Chilton's files.

3. *The Importance of Tradenames.* Rochester and Hawaii also suggest that since they worked under the Chilton tradename in the past, credit grantors will fail to realize that it was they, rather than Chilton, who was responsible for their superior local credit information. Because of this alleged ignorance on the part of credit grantors, Rochester and Hawaii contend that they will not prosper even if they affiliate with a new network vendor.[43] This scenario of customer ignorance is highly improbable. On the local level, a credit bureau's success is primarily a function of its own sales efforts and those of the vendor with whom it affiliates. The credit bureaus deal continuously with local credit grantors who grow to know the people as well as their performance. Moreover, Rochester is a merchant-owned credit bureau. When a credit bureau is merchant-owned, it is owned and operated by its customers. In these circumstances, the idea that local credit grantors will be unaware of Rochester's change of affiliations is difficult to accept.

The assertion of customer ignorance is equally implausible on the national and regional credit grantor level. Rochester's and Hawaii's argument suggests that credit grantors purchase credit reports on the basis of the tradename attached rather than the quality of the information in the file. This is simply not the case. Credit grantors purchase credit reports to obtain timely, accurate information on an individual sufficient to evaluate the risks attendant to extending him or her credit. The tradename of the report is irrelevant. Credit grantors demand a report with current information of high quality to reduce their risk of loss from their credit granting activities.

Indeed, our investigation revealed that credit grantors, especially national and regional credit grantors, are very sophisticated in their ability to evaluate credit information quality on a local level. Such companies commonly do business with all four credit reporting networks. They are frequently visited by sales agents of the local credit bureau as well as those of the network vendor. Their purchasing decisions are based upon careful evaluations of file and other product quality considerations, as well as price and service factors. They often ask sales agents to provide file comparisons, comparing the number of trade lines, bits of public record information, credit inquiries, age of information and so forth, to determine which company has the best information in a given area.[44]

Hawaii raises still another concern with respect to the proposed Final Judgment's impact on electronic compilations of information.[45] It notes that most credit grantors now obtain credit reports electronically, via telecommunications lines, on either teletype machines or computer terminals. It claims that, at present, many of these devices can interact with both the Chilton and TRW data bases so that credit grantors can obtain credit reports from either company. Hawaii apparently beleives that successful affiliation with a different network vendor will be hampered by the latter's inability to join such an electronic system. However, each of the four networks has the ability to provide credit reports via teletype or computer terminals, and the computer equipment and/or software necessary to permit electronic transmission of credit reports is readily available. Nor should credit grantors experience significant additional costs. If a credit grantor has been willing to purchase or lease computer equipment that gave it access to TRW and Chilton in the past, then it should be willing to purchase or lease computer equipment that will permit it to access TRW's data base and that of the vendor with which Hawaii affiliates.

4. *The Transaction Should not be Enjoined.* As noted above, CBC, Hawaii, and Rochester all take the view, either explicitly or implicitly, that nothing less than a permanent injunction prohibiting TRW's acquisition of Chilton will provide an adequate remedy for the violation alleged in the Complaint. In effect, they argue that *no* settlement of this litigation should be permitted. Acceptance of that argument would represent an extraordinary restriction on the prosecutorial discretion of the United States. It would require this Court and the Department of Justice to undertake the substantial loss, risks, and delays of litigating to a final conclusion a case of substantial complexity, despite the Department's considered judgment that an adequate remedy can be obtained without imposing such costs on the taxpayers.

We are not aware of an instance in which a court has rejcted a proposed consent decree in its entirety in the course of a public interest review. Such a conclusion should not be reached absent a compelling demonstration of the inadequacy of other forms of relief.

The commenters have not made such a demonstration here.[46] Their

[41] Hawaii is concerned that it may not be able to affiliate with another vendor or sell a copy of its file to another vendor. Hawaii Comments at 2 and 5. Its explanation for this position seems to be that CBI and Trans Union might not have an interest. While this is possible, it seems unlikely. CBI and Trans Union have announced plans to have a national file and we can think of no reason why those companies would exclude Hawaii from their expansion plans. Indeed, affiliation with Hawaii should be attractive to them because it would enable them to avoid the substantial costs and extended period of information collection Hawaii acknowledges is necessary in order to sell credit reports there. Trans Union's and CBI's purchases of files pursuant to the proposed Final Judgment demonstrates their interest in expanding into new areas. It is also strong evidence that they have an interest in affiliating with credit bureaus whose contracts will not be renewed under the proposed Final Judgment.

[42] Rochester Comments at 4.

[43] Rochester Comments at 3–4 and Hawaii Comments at 6.

[44] The sophistication of credit grantors in evaluating local file quality is aptly demonstrated by their use of preference lists. Many large credit grantors, all the vendors, and some large credit bureaus (including CBC) have developed lists that identify which vendor has the best file, and which is the best alternative, in a given zip code or state.

[45] Hawaii Comments at 6.

[46] The fact that TRW has raised the price of its Boston credit reports to CBC's Pittsburgh credit bureau from $.75 to $4.00 provides no basis to conclude that TRW will gain market power if the proposed Final Judgment is entered. Rather, it suggests that the Boston office has taken an inopportune time to close a loophole that CBC has been using to its advantage. As noted above, a credit bureau can purchase credit reports from other bureaus or offices on the network at a reduced price, normally about $.75. Credit bureaus not on the network, however, generally pay the retail price, commonly $3 or $4.00. CBC's Pittsburgh bureau is affiliated with TRW and thus would normally be entitled to the wholesale price. It appears, however, that CBC has been purchasing credit reports from TRW's Boston files through Pittsburg for customers of CBC's New Hampshire credit bureau, a Chilton affiliate. The price change, then, is motivated by an effort to close the avenue by which a Chilton bureau obtains TRW credit reports at the wholesale price. The TRW really had market power in the Boston market, it would increase its wholesale prices to other TRW or Chilton bureaus, or retail price to credit grantors. We have no evidence of such price increases.

explanations of how competitive harm might occur cannot be reconciled with the fact that competition exists and is growing in local markets as the national networks seek to enter new markets. Their explanations are also premised upon their belief that credit grantors cannot be trusted to protect their interests. Since credit grantors tend to be relatively large and financially sophisticated firms, it can be presumed that they would express their concern to the Court of the United Sates if they felt that the proposed Final Judgment would reduce their competitive options in the future. The absence of any expression of concern by these customers of credit reporting services strongly confirms the correctness of the United States' competitive analysis in this case.

5. *Other Relief Options.* CBC and Hawaii argue that the Department did not give adequate consideration to other relief options.[47] They suggest that the options of forcing the outright sale of owned files and of forcing the sale of combined files are superior to that chosen by the Department. Their position, however, is predicated upon their belief that the firm that has the most credit inquiries in its file will, for that reason alone, have enduring market power. As we have shown, this position is contradicted by experience.

CBC changed its position in its supplemental comments. There it argues that the proposed Final Judgment should be modified to require divestiture of bureaus owned by TRW or Chilton rather than requiring the release of independent affiliates. CBC bases this argument on its belief that if it is forced to affiliate with another vendor, its ability to compete will be diminished, and that it is inequitable to place the burden of correcting the competitive problems of the acquisition on a non-party.[48] To avoid this hardship to itself, CBC asks that it be allowed to remain on the TRW-Chilton system and that the TRW affiliate be terminated instead. This request indicates that CBC's true concern is not preservation of competition, but avoiding the expense and inconvenience of changing affiliation. Indeed, CBC's goal might be to *reduce* competition in New Hampshire. If their argument that regional coverage and inquiries are so important is correct, CBC's dominant share of the New Hampshire market combined with TRW's position in Boston would create an even greater competitive problem in New Hampshire than the problem they see created by the relief in the Final Judgment.

In any event, there is no basis to believe that any independent credit bureau's ability to compete will be irreparably diminished. That is not to day that the proposed Final Judgment may not affect the commenters' businesses.[49] Market shares may change; there may be some costs associated with switching affiliations; and perhaps some disruption of day to day routines. However, we can conclude that any burden or cost to independent credit bureaus will not be significant[50] and that their ability to compete will not be threatened. The explanations that have been offered that suggest otherwise simply do not withstand close scrutiny.[51]

6. *The Market for Data Processing Services.* CBC and Hawaii argue that the proposed Final Judgment will not correct all the competitive problems raised by the acquisition. They note that TRW and Chilton are two of only four providers of data processing services to independent credit bureaus. In their view, the combination of TRW and Chilton will substantially lessen competition in the sale of such services to independent credit bureaus.[52] CBC also asserts that the Department's Competitive Impact Statement should have included a comprehensive discussion of concentration, entry barriers, and transaction efficiencies in a national network vendor market.[53]

CBC and Hawaii are asserting that the Court, in deciding whether the proposed Final Judgment is in the public interest, should consider alleged antitrust violations that were not the subject of the government's Complaint. They are mistaken as a matter of law. It is well established that a court's public interest inquiry is limited to an evaluation of the remedy proposed for violations alleged in the government's complaint[54] and that a court cannot base its public interest determination on antitrust concerns other than those alleged in the complaint.[55] The issue in a Tunney Act proceeding is "whether the relief provided for in the Proposed Judgment is adequate to remedy the allegations of antitrust violation as set out in the Complaint."[56] The APPA does not give a court the authority to order the United States to file a broader complaint than the Department of Justice, in the exercise of its prosecutorial discretion, has determined is appropriate.[57] In summary, there is no basis for CBC's assertion that the effects of the transaction on affiliates' access to alternative sources of data processing services is a basis for finding that the judgment is not in the public interest.[58]

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[47] CBC Comments at 7 and Hawaii Comments at 9.

[48] CBC Supplemental Comments at 9.

[49] It is not unusual for a consent decree to affect the interests of third parties. *See Texaco Inc., et al.* FTC Complaints and Orders 1983–1987, ¶22,168 (July 10, 1984) (Texaco ordered to divest 1900 associated gasoline stations) (The Complaint and Consent Order are set out *In the Matter of Texaco, Inc.*, 104 F.T.C. 241 (1984)); *United States* v. *Carrols Development Corp.*, 454 F. Supp. 1215 (N.D. N.Y. 1978) Lessee defendant required to assign or sublease movie theater over lessor's objections); *United States* v. *G. Heileman Brewing Co., Inc.*, 1973–1 Trade Cas. (CCH) ¶74,550 (E.D. Mich. 1973) (Brewer required to divest brands of beer and/or production agreements); and *United States* v. *Chicago Title and Trust Co.*, 1968 Trade Cas. (CCH) ¶71,745 (N.D. Ill. 1968) (In Section 7 proceeding, title insurance company required to cancel exclusive contracts with abstractors in Illinois).

[50] Such economic consequences would not be significantly different from those resulting from the termination of duplicate suppliers or the elimination of duplicate marketing systems, actions which are routine consequences of mergers throughout the economy.

It is not at all clear that CBC would escape conversion costs if the proposed Final Judgment was modified as it suggests. If TRW consolidates the Chilton data base into its own, as it is likely to do, CBC will bear the costs of changing from the Chilton network to the TRW network. There is no reason to believe that such costs would be substantially different than the costs of changing to, for example, CBI.

[51] Given the need to allocate exclusive territories to affiliates and offices in this industry, TRW may have intended to eliminate overlapping territories in any event. The primary benefit of the transaction to TRW is the creation of a single national credit information data base.

[52] CBC Comments at 4–5 and Hawaii Comments at 2. CBC states, and we agree, that the typical number of vendors in a given market is three.

[53] CBC Supplemental Comments at 3–6.

[54] *See United States* v. *Waste Management, Inc., supra*, ¶66,651 at page 63,046.

[55] *United States* v. *BNS, Inc.*, 858 F.2d 456, 462–63 (9th Cir. 1988). Hawaii asserts that this Court must determine whether the decree "is consistent with [the Department's] original prayer for relief" (that is, that the acquisition be enjoined). Hawaii comments at 9. The relief in a consent decree need not be identical to that prayed for in the complaint. Absent the divestiture in the overlapping markets, an injunction would have been appropriate. But the proposed Final Judgment calls for precisely that divestiture. Consequently, this Court need only determine whether the relief in the proposed Final Judgment is a reasonable enforcement means of correcting the competitive harm we have alleged.

[56] *United States* v. *Bechtel Corp.*, 1979–1 Trade Cas. (CCH) ¶62,430 at page 76,565 (N.D. Cal. 1979), *aff'd* 648 F.2d 660, 665, (9th Cir. 1981), *cert. denied*, 454 U.S. 1083, 102 S. Ct. 638 (1982). *See also, United States* v. *National Broadcasting Companies, supra*, 449 F. Supp. at 1144, citing *United States* v. *Automobile Manufacturers Ass'n*, 307 F. Supp. 617, 621 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York* v. *United States*, 397 U.S. 248, 90 S. Ct. 1105 (1970).

[57] *United States* v. *Mid-America Dairymen, Inc., supra*, ¶61,508 at page 71,979. If CBC is correct, we would also be obligated to explain our analysis of other markets. Other possible markets, in this case, where both companies are either actual or potential competitors include mortgage reporting, debt collection, check approval, and electronic credit equipment markets.

[58] The Department's conclusion that it should not allege a violation in another market does not

Continued

For the same reasons, CBC's argument that the proper relevant market in this transaction should be the New England region is outside the scope of the Complaint and should be summarily rejected.[59] In any event, such a market definition provides no basis for finding that the proposed Final Judgment is not in the public interest because the Final Judgment corrects the competitive problems that would exist in such a market.[60]

In fact, the Department carefully considered in the course of its investigation whether the merger would produce the anticompetitive effects alleged by CBC and Hawaii. Interviews with numerous independent credit bureaus failed to elicit any significant concern that the elimination of Chilton as a competing network vendor would reduce competition in the provision of network services to such independent bureaus. More importantly, the ultimate consumers of credit reports indicated that a reduction in the number of networks from four to three would be beneficial to them. These consumers felt that they would be able to obtain more comprehensive information as a result of the merger, and that three networks were sufficient to ensure continued vigorous competition in the collection and sale of credit information.

7. *Contractural Disputes.* The CCRC comments do not go to the competitive effects of the proposed Final Judgment, but to TRW's right to sell credit information relating to individuals residing in certain Texas zip codes.[61] CCRC argues that it purchased the files concerning these individuals in 1987, and in support of its claim, it has provided the Department with a copy of its contract with TRW. CCRC asks that the United States withdraw its consent to the judgment as currently written and require that it be modfied to eliminate the requirement that TRW sell these files.

TRW has written the Department reasserting its belief that it owns the files in question. It also has submitted evidence, in the form of contract amendments, to support its position.

The Department is not in a position to resolve the contract dispute between TRW and its affiliate. Nor is the Department willing to eliminate the requirement that TRW sell these files. The requirement was included in the decree because of representations by TRW that these "full files" in its network, a representation that, if true, would result in competitive harm in the affected market.

In the Department's view, the contractural dispute between TRW and CCRC does not provide a basis to withdraw our consent to the proposed Final Judgment, to modify its scope, or for the Court to find that it is not in the public interest. In our view, reliance on TRW's representations was appropriate and TRW should bear the consequences if those representations prove to be inaccurate. Consequently, CCRC's objections should be addressed and resolved by TRW, consistent with the provisions of the proposed Final Judgment as currently drafted, or by the courts in any separate proceeding that CCRC may choose to initiate to resolve its contractural dispute with TRW.[62] If subsequent events should demonstrate that TRW cannot sell the disputed files, the proposed Final Judgment permits the parties to apply to this Court to obtain such other relief as is necessary or appropriate.[63]

III. Conclusion

Consequently, for the reasons set forth in the Competitive Impact Statement and this Response, the Court should find, after publication of this Response in the **Federal Register**, that the proposed Final Judgment represents a reasonable exercise of the Department of Justice's antitrust enforcement discretion, is in the public interest and should be entered.

Respectfully submitted,

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Dated: March 6, 1989.

Exhibits A and B

Exhibits A and B have been omitted.

Exhibit C

January 18, 1989.

Barry Grossman, Esq., Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, Judiciary Center Building, 555 4th Street NW., Room 8104, Washington, DC 20001

RE: *United States v. TRW, Inc.* Consent Decree

Dear Mr. Grossman: These comments are submitted in response to the Notice published in the **Federal Register** by the Justice Department on December 2, 1988, amended December 12, 1988. Put simply, it is the Credit Bureau Services of New Hampshire's position that the proposed Consent Decree in *United States v. TRW,* Case No. C88–4253, now pending in the Northern District of Ohio, is and will be substantially ineffective in preventing the anti-competitive effects which will result from the acquisition of Chilton by TRW. Specifically, it is our assertion that the Competitive Impact Statement filed in this matter is defective in several very serious respects:

(1) it misdefines and misconstrues the relevant product markets and the interactive relationship between various geographic markets;

(2) it misunderstands the mechanics of the credit reporting industry, and as a consequence, errs in its analysis of, *inter alia,* entry barriers and the adverse consequences of concentration of market power; and

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prevent CBC from seeking more stringent relief in private litigation. *United States* v. *Associated Milk Producers,* Inc., 394 F. Supp. 29, 45 (W.D. Mo. 1975). Indeed, CBC's interests would be more appropriately presented in separate litigation than in the determination of the public interest in the matter presently before this Court. *See United States* v. *ARA Services, Inc., supra,* ¶62,861 at page 78,989.

[59] CBC Supplemental Comments at 8. Defining the relevant geographic market is a far more complex process than CBC has undertaken. "The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357, 83 S. Ct. 1715, 1738 (1963).

[60] Under the proposed Final Judgment, TRW will neither release an affiliate or sell a copy of its files in every part of the region where it has full file, *i.e.,* everwhere but Vermont and Maine. The one case CBC cites in its supplemental comments actually undermines its argument for a regional market definition. In that case, an administrative law judge for the Federal Trade Commission found that the appropriate geographic markets for assessing the impact of acquisitions of credit bureaus were specific metropolitan areas. *In the Matter of Retail Credit Company,* 92 F.T.C. 1, 99–102 (1978). His decision was affirmed by the Commission, *Id.* at 131 *et seq.* On appeal, the decision of the Commission was reversed and remanded on the grounds that the Commission's conclusion that credit reports and mortgage reports constituted a single product was unsupported by the evidence. *Equifax, Inc.* v. *F.T.C.,* 168 F.2d 63 (9th Cir. 1980).

[61] CCRC claims its own approximately one-tenth of the zip codes the propsed Final Judgment requires TRW sell to Trans Union. We believe the contract dispute involves a much smaller fraction of the files that must be sold.

[62] In this regard, a contract dispute on the date of termination may exist between Chilton and Rochester. Rochester Comments at 6. Rochester has brought the matter to our attention, but indicates its belief that the matter should not be resolved in the context of this public interest determination. If this dispute should make TRW unable to comply with its obligations under the proposed Final Judgment, the parties will come before this Court for further orders and directions as may be necessary or appropriate. Proposed Final Judgment at ¶X.

[63] Proposed Final Judgment ¶¶VIII and X.

(3) as a result of the foregoing errors in analysis, its conclusions as to the efficacy of the proposed Consent Decree, and its evaluations of other possible remedies to prevent competitive harm as a result of the merger, are simply wrong.

Accordingly, we urge that the Justice Department withdraw its proposed Consent Decree, and act to prevent consummation of the proposed acquisition until a solution which genuinely addresses the serious anti-competitive effects of the acquisition can be found.

A. The Competitive Impact Statement Misconstrues the Relevant Markets

It is plain from a careful reading of the Competitive Impact Statement, and the conclusions reached therein, that the Justice Department has based its analysis on the premise that only one market—"provision of full file consumer credit reports"—will be affected by the acquisition of Chilton by TRW. Unfortunately, this analysis ignores the actual functioning of the credit reporting industry, and consequently provides a faulty foundation for the Department's competitive analysis model.

Initially, it must be understood that the credit reporting industry operates at two inter-dependent, yet highly distinct levels. At the level proximate to credit report customers (i.e., credit grantors) are the credit bureaus. These credit bureaus own all credit information for individuals residing within a particular geographic locale—other credit bureaus own the credit information for individuals residing within other geographic areas. As a consequence, credit bureaus engage in three different sales functions:

(1) *Local Sales.* In these sales of credit reports, a report concerning a resident of the bureau's geographic territory is sold to a customer within that territory. In this situation, the bureau is selling information which it owns.

(2) *Sales of Reports Concerning Non-Resident Individuals.* In this situation, a bureau receives a request for a credit report from a local customer concerning a resident of another bureau's geographic territory. Because the other bureau owns the credit information concerning this individual, the local credit bureau must purchase the credit report from the bureau in whose territory the subject individual resides. The sale of such reports between credit bureaus, generally at a price lower than such reports are sold directly to customers, is known in the industry as "wholesaling." The local credit bureau profits on these sales by adding a surcharge to the "wholesale" price.

(3) *Sales of Reports Concerning Resident Individuals to Other Credit Bureaus.* The flip-side of credit report sales to customers respecting non-resident individuals is the sale of credit reports concerning resident individuals to credit bureaus in other locales. The local credit bureaus profit on these sales by receipt of the "wholesale" price for each report.

Within the credit bureau level there are essentially two types of operations: wholly-owned subsidiary bureaus of corporations such as TRW and Chilton; and independent bureaus, such as the Credit Bureau Services of New Hampshire, which are affiliated by contract with vendors such as TRW and Chilton.

The second tier of the credit bureau industries—i.e., vendors such as TRW and Chilton—perform a variety of functions which are an outgrowth of the types of credit report sales engaged in by credit bureaus. In the context of local sales by credit bureaus, these vendors' role is limited to providing data processing services for the credit bureau. In other words, the vendor, for a fee, is simply storing credit information owned by the credit bureau and printing that information (or transmitting it to a computer terminal) when requested by the bureau.

In a "wholesale" credit report transaction, in which one credit bureau is buying the credit report for resale from another credit agency, the vendor has a broader function. In these transactions, in addition to providing data processing services, the vendor serves as a network for information between various credit bureaus.

The two-tiered structure of the credit report industry is confused by the fact that vendors such as TRW and Chilton also own a number of credit bureaus throughout the country. Thus, at the vendor level, TRW and Chilton compete nationwide (along with several other vendors) for contracts to provide data processing and networking services to independent credit bureaus. On the other hand, at the credit bureau level, Chilton and TRW compete through their wholly-owned bureaus with the bureaus of other vendors and with independent credit agencies, such as Credit Bureau Services of New Hampshire. At the vendor level, the product market is for data processing and networking services, and the customers in this market are independent and wholly-owned credit bureaus. At the credit bureau level, the product market is for credit reports, and the customers in this market are credit grantors.

The Competitive Impact Statement fails in any manner to address this distinction. Rather, the Competitive Impact Statement addresses the market as if there were only one product (the credit reports) and Chilton and TRW competed only in that market. In other words, this analysis, while briefly alluding to the existence of independent credit bureaus such as Credit Bureau of New Hampshire, ignores their existence in evaluating the acquisition solely in terms of competitive harm to credit grantors.

Once the over-simplification of the credit reporting industry contained in the Competitive Impact Statement is understood, the anti-competitive damages of the Chilton acquisition to customers in the upstream market (in particular, to independent credit bureaus) becomes obvious. At the beginnming of 1988, five vendors competed in this upstream market: Chilton, TRW, CBI/Equifax, Transunion and ACS. During 1988, CBI/Equifax entered into a contractual arrangement whereby ACS ceased to provide data processing and networking services. Thus, if the proposed Chilton acquisition is approved, the number of vendors will be reduced to three.

The number of credit bureaus competing in a particular geographic territory is generally three. If the number of vendors is reduced to three, competition in the vendor/credit bureau market, at least in many geographic territories, will be significantly reduced or eliminated. It is the nature of this industry that vendors deal exclusively with one bureau in a given market. Thus, if the proposed acquisition is consummated, and a credit bureau in a particular geographic market, as a result of poor service or price increases, seeks to change vendors, it will have only the potential to affiliate with one of the two vendors not now affiliated with that bureau. At present, such a bureau has a third alternative, the vendor not currently presently in the market, with whom to seek a deal. When a bureau can choose between only the two vendors already in the market, its existing market share will limit such discussions (if any) to vendors who have a relationship with a smaller independent competitor in the market—no vendor is going to discontinue its relationship with a given bureau to enter into one which will offer it a smaller volume of business.

Thus, in effect, in a market with three independent credit bureaus, the smallest bureau (in terms of market share) will have no option but continuation of its existing vendor relationship (or going out of business), the middle bureau will have but one possible alternate vendor,

and only the largest bureau will have, in the best possible scenario, two alternatives to its existing vendor rather than three or four (which would have included vendors anxious to enter the market). These options will likely be even further limited by the difficulty of inducing vendors to abandon the security (or requirements) of their existing contractual relationships.

Of course, the foregoing analysis ignores an even more serious limitation upon the ability of an independent credit bureau to effectively switch vendors—the vendor-owned bureau. In the vast majority of geographic territories in which an independent credit bureau competes, one or both of the other credit bureaus are vendor-owned. Obviously, a vendor is not going to abandon its wholly-owned bureau (and the profits earned therefrom) to enter into an affiliation contract with a competing independent credit bureau, unless that independent bureau would offer a substantial increase in market share over what the vendor's wholly-owned bureau has.

The existence of a fourth and fifth vendor in the vendor-bureau market has always served to prevent any particular vendor from using its market power to control the price of services to an independent bureau. Without this protection, these vendors will dramatically increase their power over price and even, by the threat of refusing to do business, be able to seek to force such independent bureaus to sell out to the vendor.

B. The Competitive Impact Statement Misunderstands The Mechanics Of The Credit Reporting Industry

The Competitive Impact Statement further errs in its analysis of the entry barriers in the credit reporting industry and in its reliance solely upon the Herfindahl-Hirshman Index in measuring the anti-competitive effects of market concentration in this industry. Specifically, the Competitive Impact Statement ignores the fact that because the number of credit inquiries regarding an individual is an important factor to many credit grantors in determining whether to extend credit, and accordingly, a crucial factor in the value of a credit report, the bureau which receives the largest number of inquiries (and thereby reports those inquiries on its report) is the one perceived as the bureau selling the most useful report.

As the Competitive Impact Statement recognizes, the number of credit inquiries made respecting a particular individual is important information to credit grantors—it is established that the number of inquiries, and therefore credit activity, is an important indicator of the credit worthiness of the particular applicant. Perhaps just as importantly, the number of inquiries is perceived to impact upon the reliability of the credit report. The more frequently inquiries are made, the more often a bureau has had the opportunity to cross-check an individual credit history and thereby identify as relevant information contained in files listing a different address, marital status, or other identifying information. The credit grantors' preference for a bureau receiving the largest volume of inquiries (i.e., the bureau with the largest market share) significantly protects the market share of the dominant bureau. The Herfindahl-Hirshman Index simply does not measure this aspect of market concentration found rather uniquely in the credit reporting industry.

An example of the entrenchment a dominant firm enjoys at the credit bureau level is the experience of our own affiliated bureau in Cleveland, OH. We entered that market in 1982. In that market, our competitor enjoys an approximate 85% market share. We, on the other hand, despite having all tape and public record information (i.e., the type of information the Competitive Impact Statement deems crucial to its entry barrier analysis), have approximately 10% of the market. Our competitor charges $1.56 per report. We have charged as low as $.75, with no charge for inquiries in which no information is found, and yet have made no appreciable penetration into that market.

The Competitive Impact Statement fails to address this entrenchment of market shares in the credit bureau market. The effect of this entrenchment is to make it extremely difficult for any new entrant in a market to hope for market penetration even over the long term of more than 10%–15%. This barrier is obviously a significant disincentive to many potential entrants in this industry. Combined with the limited number of vendors available, if the acquisition is approved, it makes new bureau entries practically an impossibility. Moreover, as discussed below, such entrenchment profoundly limits the usefulness of requiring the sale of copies of bureau files as a vehicle to protect competition.

C. Of The Possible Remedies To The Anti-Competitive Effects Of The Chilton Acquisition Outlined In The Competitive Impact Statement, The One Chosen Is The Least Efficacious

The sum of the foregoing discussion is to point out that the Justice Department's proposed remedy to the anti-competitive effects of the Chilton acquisition simply will not prevent serious anti-competitive effects from resulting. The mere selling of copies of files and termination of affiliation agreements will have little impact in diminishing the anti-competitive effect of the acquisition. In our view, only enjoining the acquisition can completely prevent serious and irreparable harm to the vendor/bureau market in the credit reporting industry. At a minimum, the Justice Department should require divestiture of wholly-owned bureaus in those markets in which merger of bureaus will create significant market power in the remaining bureau.

That the Justice Department's current proposal will not remedy the anti-competitive injury which the Chilton acquisition will create is an inevitable conclusion from an informed understanding that the credit reporting industry is not a single market, but rather two distinct markets. The remedy of contract terminations and file sales does *nothing* to protect the more vulnerable market, the vendor-bureau relationship. In fact, in some instances this remedy reenforces the harm to this market that is inherent in the Chilton acquisition. For example, the requirement that TRW terminate its existing contracts with various independent credit bureaus primarily injures each independent bureau by forcing it to seek another, less established vendor. The bias against independent bureaus is plain—while requiring termination of numerous contracts with independent bureaus, the proposed Order does not require TRW to divest itself of a single wholly-owned bureau. Even in circumstances in which the Order requires TRW to sell off a copy of a particular file, it is not required to include the Chilton portion of the file, or to cease using information from either file in credit reports sold by its merged wholly-owned bureau. All TRW is required to do is sell off what will be perceived as a lower quality file of information to buyers who as yet have absolutely no foothold in the relevant markets and no assurance of continuing updated information.

The Competitive Impact Statement's discussion of the Department's rejection of other alternative remedies further reveals the misunderstanding of the workings of this industry. In rejecting the possibilities of requiring TRW to sell even some of its (or Chilton's) wholly-owned bureaus or of prohibiting TRW from keeping the whole merged TRW-Chilton files, the Department has failed to consider the overwhelming entrenching effect a large market share creates in this industry. Likewise, in

refusing to require TRW to sell new market entrants the combined TRW-Chilton file, the Department ignored the fact that credit grantors will inevitably perceive TRW to have more complete information, and thereby shun any purchaser of the "Chilton information only" file.

The articulated reasons for rejection of injunctive relief to prohibit the proposed acquisition even more blindly ignore the realities of the credit reporting industry. In concluding that the mere termination of vendor contracts and sale of file copies will create viable competition to TRW, the Department ignores the real barriers to entry this acquisition creates. Specifically, in markets in which affiliates are terminated, competition will decrease rather than increase, since existing independent bureaus will be forced into vendor contracts with a vendor new to an area, and likely having a smaller nationwide market share. The sale of file copies to a newcomer in a market in which the merger of Chilton and TRW bureaus has created a single bureau with overwhelming market power cannot be said, in this industry, to guarantee active competition. Rather, it guarantees an entrenched TRW bureau.

The effects of the proposed acquisition on the vendor-bureau market and upon independent bureaus is well illustrated by the acquisition's impact upon Credit Bureau Services of New Hampshire and the New Hampshire and Eastern Massachusetts markets. Credit Bureau Services of New Hampshire now uses Chilton as its vendor. Once the acquisition takes place, CBI/Equifax will take over as vendor. In the interrelated territory of Eastern Massachusetts CBI will have no immediate market (as opposed to Chilton's 40% share). Thus, in the market in which Credit Bureau Services of New Hampshiare does the vast majority of its wholesale business, it will be cut-off because of the elimination of Chilton as a possible vendor to it. Moreover, because the combination of TRW and Chilton will change the Eastern Massachusetts market from one in which their wholly-owned bureaus competed while holding roughly equal (i.e., 45–50%) market shares each into a market with one entrenched dominate (80–85% market share) bureau, Credit Bureau Services of New Hampshire, despite the Department's claims, will permanently lose a significant portion of the wholesale sub-market it now enjoys.

Similarly, other independent bureaus will be permanently harmed by this acquisition. Indeed, in any areas in which an independent bureau is presently affiliated with Chilton, and in which TRW and either Transunion or CBI/Equity do business, the independent bureau will always be confined to the new vendor it finds to contract with—no alternative will remain available. Only blocking the acquisition can prevent this permanent damage to competition.

In closing, we would note that the anti-competitive effects of the proposed acquisition have already reared their head. Credit Bureau Services of New Hampshire has for some years sought to provide its New Hampshire customers with the product they desire. Thus, when our customers have indicated they wish to obtain TRW credit reports for residents of Eastern Massachusetts, we have accommodated our customers. We have done so by obtaining the report through our affiliated bureau in Pittsburgh, Pennsylvania, which has contracted with TRW as a vendor. This practice is entirely permissible within our vendor agreement. Recently, however, and plainly in anticipation of its domination of the Eastern Massachusetts market, the TRW controlled Boston bureau has informed us that the wholesale price of its reports will increase from $.75 to $4.00 (i.e., by 533%). (Please see the attached letter of Pamela J. Lawlor to James McGinnis.) Plainly, this price increase is nothing more than an attempt to use TRW's new-found market power in Boston to leverage an increased market share throughout New England. We believe such abusive conduct is merely the beginning.

In order to supplement and clarify these concerns, we are in the process of obtaining expert economic advice and analysis. With such information, we will be supplementing these comments in the very near future. In the meantime, please do not hesitate to contact us for any clarification of these comments in the very near future. In the meantime, please do not hesitate to contact us for any clarification of these comments you would find helpful.

Very truly yours,

William H. Price,
President.

cc: Donald J. Russell, Esq.
George S. Baranko, Esq.
Richard L. Irvine, Esq.
Jonathan M. Rich, Esq.
Katherine M. Jones, Esq.
William E. Swope, Esq.

Exhibit D

February 10, 1989.

Via Certified Mail

Barry Grossman, Esq., Chief,
Communications and Finance Section, Antitrust Division, U.S. Department of Justice, Judiciary Center Building, 555 4th Street NW., Room 8104, Washington, D.C., 20001

Re: *United States v. TRW, Inc.*
Consent Decree

Dear Mr. Grossman: This letter contains the additional comments of CBC Companies regarding the Notice published in the **Federal Register** on December 2, 1988, as amended December 12, 1988, respecting the proposed Consent Decree in *United States v. TRW,* Case No. C88–4253 now pending in the United States District Court for the Northern District of Ohio. We transmitted CBC Companies' initial written comments to you on January 18, 1989, in the form of a letter from William H. Price, the President of CBC Companies.

We are offering these additional written comments to supplement and expand upon our client's concerns regarding the anticompetitive effects of the TRW acquisition and the proposed Consent Decree. As a concerned citizen and a customer of both TRW and Chilton, our client believes that the Consent Decree does not address the actual anti-competitive effects of the Chilton acquisition.

Our client has asked us to reiterate its grave concern with the harm it and other independent credit bureaus will suffer from the anticompetitive effects of the TRW acquisition of Chilton and the further anticompetitive effects of the proposed Consent Decree. Our client's position is that, at a minimum, the proposed Consent Decree should be modified to allow it and similarly situated credit bureaus to continue to contract, on a fair and reasonable basis with the successor to the Chilton/TRW operation, such as in the New England area. In addition, our client believes that unless the Consent Decree is modified to require the complete divestiture of either the Chilton or TRW credit bureau in Boston and like cities, the acquisition will not only impose severe economic harm on independent credit bureaus, but create an entrenched and dominant credit bureaus in various areas including Boston and large parts of New England.

In general, it is our view that the Consent Decree will not protect competition in at least the following respects:

(1) Although it attempts to deal with real competitive concerns, the

Department's proposed Consent Decree is competitively and economically harmful relative to available alternatives and unduly disruptive and burdensome to CBC Companies and others in the industry.

(2) Under the Department's chosen "remedy" for the competitive problems caused by this acquisition, retail level concentration will in some cases rise dramatically and immediately. For example in Boston, the HHI will rise by about 4500 points and a near dominant firm is likely to be created at the credit bureau level.

(3) By reducing the number of vendors of data processing and networking services from four to three, the acquisition greatly increases concentration at the vendor/data processing level of the industry and thereby imposes a substantial risk of harm to competition, consumers, and to CBC Companies, a major purchaser of services from this level of the industry. As shown in our earlier comments, there are already indications of anticompetitive price increases.

(4) The proposed Consent Decree results in a market structure which imposes substantial additional costs on independent credit bureaus. For example, the New Hampshire operation of CBC Companies will be forced under the Consent Decree to obtain credit reports, an essential input, from a lower quality and less efficient supplier while allowing TRW to realize increased product quality and efficiency. Such a venture into "industrial policy making" is inconsistent with the Department's long held view that the free market should be permitted to determine an industry's structure.

(5) Imposing unnecessary cost increases on independent credit bureaus such as Credit Bureau Services of New Hampshire is itself harmful to competition, because it weakens the competitive constraints on the merged firm, which is likely to enjoy a near dominant position in various geographic regions of the United States, such as in parts of New England, including Boston.

Our client urges that the Department withdraw its proposed Consent Decree, and act to prevent consummation of the proposed acquisition until a reasonably equitable and genuine solution to the anticompetitive effects of the acquisition can be found. Our reasons for these concerns are set forth in the January 18th letter of William H. Price and in the following paragraphs.

I. The Competitive Impact Statement Does Not Fully Reflect the Potential for Competitive Harm.

As we have indicated in our earlier comments, we disagree with the Department's analysis of relevant markets and of the mechanics of the credit reporting industry. In our view, the Department's conclusions in these areas have apparently led it to underestimate the potential for competitive harm from the acquisition and choose, from legally and practically available remedies, the remedy that is least efficacious.

A. The Department's Nearly Exclusive Focus on the Credit Bureau or "Retail" Level of the Industry, as Reflected in the Competitive Impact Statement and other Documents in this Matter, Leads to Understatement of the Competitive Dangers from the Acquisition.

As our earlier comments indicate, the Competitive Impact Statement as well as other papers submitted by the Department in this matter do not reflect the very high (and increasing) market concentration at the vendor level in the credit reporting industry, or the impact to consumers and indepedent credit bureaus, such as those owned by the CBC Companies, of the loss of an independent source of supply and competition.

This vendor level, now occupied by only four firms will become a highly concentrated triopoly if this acquisition is consummated. According to the limited market data available to the CBC Companies, which our client believes provide reasonable approximations to national shares at the vendor level, on a national basis TRW now has about a 30 percent market share, CBI/Equifax has approximately 40 percent, Transunion has 20 percent, and Chilton 10 percent. Based on these figures, the present HHI at the vending level is 3000, far above any of the Department's enforcement thresholds, and TRW's acquisition of Chilton substantially increases this already extremely high concentration by 600 points, to 3600.

As the Department and its economists know, voluminous economic literature clearly indicates the importance of having a significant number of effective competitors in a market, and in general, three is considered to be too few. There is no generally accepted economic literature or legal authority indicating that, absent an acquisition of a failing competitor or creation of substantial efficiencies attainable only by the acquisition in question, such a concentration-increasing merger is likely to be pro-competitive.

An extensive economic analysis considering competitive risks, including the very real danger of collusion and market division at the vendor level in this industry, would be required to establish that such a concentration-increasing merger is not likely to substantially harm competition and consumers. As the Department's own *Merger Guidelines* clearly recognize, an even more extensive analysis would be required to show that purported *vendor-level* efficiencies from the acquisition could justify the real competitive risks. We believe the Department needs to further examine this concentration-swelling deal, the potential efficiencies (if any) due to combination of files and the potential competitive risks versus conceivable economic benefits at the vendor level.

Moreover, as the Department is aware, in 1988 CBI/Equifax contracted with ACS, another vendor, to take over all of its vendor functions, thereby reducing the number of independent vendors from five to four. The effect of this transaction needs to be considered.

The Department may feel that the geographic market-extension effects of both the CBI/Equifax-ACS transaction and TRW's proposed acquisition of Chilton entail significant competitive benefits and efficiencies. If so, we respectfully suggest that the Department has an obligation to discuss this rationale and the evidence on which it is based in the Competitive Impact Statement.

B. The Competitive Impact Statement Discusses Entry Conditions Only at the Credit Bureau Level, and Should Also Consider Barriers to Entry at the Vendor Level.

We also believe consideration needs to be given to possible entry barriers or other impediments to competition at the vendor level. We do not believe that the solutions to competitive problems identified in local markets for retail credit reports solved those problems at the vendor level.

It is clear that there are numerous barriers to entry and competition at both levels of the credit reporting industry. Particularly relevant barriers at the vendor level include the time, expertise, and capital involved in setting up computer operations, and credibility and reputation for reliability both with local merchants and financial institutions and national grantors of credit. Although such credit grantors spend substantial amounts on credit reports, the costs of credit information are quite small in

relation to the risks of, among other things, inaccurate information or inaccessibility due to computer crashes or problems in data transmission. Given these considerations, entry conditions at the vendor level need to be separately analyzed and considered to make any Consent Decree in this matter effective.

The Federal Trade Commission case ordering CBI/Equifax's predecessor firm to divest certain acquired credit bureaus provides support for the proposition that there are substantial entry barriers at both levels of the credit reporting industry *In the Matter of Retail Credit Company*, 92 F.T.C. 1 (1978). After hearing substantial testimony from industry officials, the administrative law judge reached the following finding:

There are substantial barriers to entry into credit reporting. They include the need for support and cooperation of merchants and credit grantors, adequate file information, experience in the credit reporting industry, sufficient capital, ability to offer competitive prices and services and, in certain markets, computer technology.

Vorys, Saler, Seymour and Pease

In the Matter of Retail Credit Company, Initial Decision, Findings of Fact, par. 119, (February 10, 1976) 92 F.T.C. 1, (1978) (Citations to testimony omitted).

Today, with computerization much more extensive, particularly at the vending level, the entry barriers at that level are undoubtedly higher than they were at the time the FTC considered the *Retail Credit Co.* case.

The only entry barrier the Department identifies in this entire industry is one at the credit bureau level—specifically, the time and cost involved in acquiring files of credit information. Apparently because of this view, the Department believes that requiring the sale of copies of files will alleviate any potential constraint on supply of services to users. The Department also apparently believes that severing certain contracts (such as CBC Companies' contract with Chilton in New Hampshire) and requiring that independent bureaus not deal with the merged firm will provide both demand pressures that will rapidly generate efficient and competitive entry and expansion. However, if access of file copies such as made available under the proposed Consent Decree is not the only barrier, this remedy will not be effective.

C. The Analytical Focus and Proposed Remedy Are Apparently Based on a Faulty View of the Potential Barriers to Entry into the Retail Level of the Industry.

The Department has identified one of the key requisites for effective competition at the credit bureau level of the industry: access on competitive terms to files of local credit information. Certainly, the time and cost of assembling a file of such information is a hurdle that any competitor must overcome. However, it is our client's belief, based on long experience in the industry, that such time and cost requirements impose much less of a restraint than they did in the past. As a result, while access to and cost of local files are important determinants of competitive success, such file access is far from the only barrier. The relevant competitive and economic question is not access to the "physical" requisites for producing a report (such as files and computers). Rather, the relevant inquiry is what are the real market requirements for gaining market acceptance.

The computerization of both the credit reporting industry and of many credit grantors has substantially reduced the time and cost investments involved in getting substantial amounts of local credit information. For example, when CBC Companies entered Cleveland in 1982, they were able rapidly to get substantial computerized files of local credit information on tape from banks and others. However, despite heavily discounted pricing, the Cleveland operation has yet to achieve a major market penetration. The reasons relate to the types of barriers cited above and noted in the FTC's *Retail Credit Co.* case. 92 F.T.C. 1 (1978).

Despite having substantial credit information, because the Cleveland operation was new, and CBC's office was small, the files had relatively little recent or current "activity" measured in terms of the number of credit grantor inquiries to the bureau. It is such very recent and ongoing inquiries which provide the cross-checks on file information which give a bureau the best credibility with local credit grantors. The importance of this file inquiry activity, in turn, explains why leading local credit bureaus maintain substantial shares in many areas.

Because credit grantors find file inquiry activity as well as the bureau's scale of local coverage so important, the proposed Consent Decree's requirement for the sale of file copies is unlikely to be of substantial or lasting competitive benefit. Our client's experience, reflecting broader marketplace realities, is that mere access to files as such does not give a firm the ability to compete effectively.

D. The Department Uses Improper Definitions of Relevant Geographic Markets and Fails To Consider Interrelationships Among Geographic Areas.

As discussed in our earlier comments, the Department assessed market concentration and the potential for competitive harm as well as the desirable parameters of relief based on analyses of local geographic markets. To be sure, under the standards enunciated in the *Merger Guidelines*, there are numerous localized markets for credit reporting services. However, this does not imply that *only* these localized markets are relevant for assessing the competitive impact of this transaction or of the proposed Consent Decree. Instead, numerous broader areas are highly relevant to the assessments which the Competitive Impact Statement is supposed to provide.

Although local credit bureaus and local information remain essential for many transactions and for many credit grantors, increased population mobility, ever-increasing use of nationwide mail and telephone ordering, and the widening geographic scope of many retail operations have increased the geographic scope of the information that a credit bureau must be able to provide. This both broadens the scope of certain relevant geographic markets and increases the potential importance of vendors covering appropriate geographic areas.

CBC Companies' situation in New Hampshire provides an illuminating example of the competitive importance of this broadening geographic scope of the industry. For many retailing operations, such as Filene's, New Hampshire might be considered, in effect, a "suburb" of Boston. A very substantial proportion of New Hampshire credit transactions are with residents of Boston and other parts of Massachusetts, as well as other states in the area. As a result, Credit Bureau Services of New Hampshire, is very dependent on credit information obtained through its contract with Chilton, through which it obtains all or most of its "Boston" reports from the Chilton bureau in that area.

CBC Companies estimates that about 35 percent of the reports its New Hampshire operations sell are "local reports" or inquiries about New Hampshire residents from credit grantors in that state. Since 15 percent of its reports are "inbound regional" or

inquiries about New Hampshire residents from credit grantors in New England but primarily with offices in Boston, only about half of CBC Companies' New Hampshire reports concern local residents, and a substantial proportion of these reports come from outside the area and from grantors served in their own areas by other local bureaus.

A full 18 percent of our client's sales to New Hampshire credit grantors are "outbound regional" reports—inquiries from New Hampshire grantors about residents of other parts of New England, many from Boston. Thus, a substantial portion of CBC Companies' New Hampshire sales are dependent on Boston, and a major portion of the reports provided are based on information now purchased from Chilton. Given this relationship it makes little or no sense to assess competition in New Hampshire, Boston, or New England solely in terms of local concentration.

Such geographic interrelationships show that relevant credit reporting markets are not all local. The market relevant for assessing competition to provide credit reports to many New Hampshire merchants must include the Chilton Bureau serving the Boston area. The same logic shows that the relevant credit report market for many New Hampshire credit transactions must include the TRW Boston area bureau and other bureaus in various parts of New England and the Northeast.

II. Harm to CBC and Other Independent Credit Bureaus From the Proposed Consent Decree.

As the Department knows, the Credit Bureau Services of New Hampshire will be deprived of a supplier with whom it has had a long-term and successful relationship by the terms of the Consent Decree. It is our belief that the net effect of this contract termination is to make CBC a less effective competitor, and thereby reduce competition in New Hampshire. By being forced to deal with a new entrant in the Massachusetts credit bureau market, CBC will be able only to offer a less saleable product to its customers. The effect of the Consent Decree in New Hampshire thus will be not to create a more competitive market, but rather to decrease competition, by decreasing Credit Bureau Services of New Hampshire's ability to compete. It is our belief, therefore, that the termination of the Credit Bureau of New Hampshire's contract with Chilton Corporation after the acquisition will lessen the competition by weakening an effective competitor in the market.

Nor is the termination of contract approach, it would appear, consistent with the Department's determination that the sale of a file in a particular market will allow a new entrant sufficient entry into the market to compete effectively. Application of this concept to New Hampshire, it would appear to CBC, would dictate that TRW be required to sell its New Hampshire file, but Credit Bureau of New Hampshire be permitted to continue its contract with Chilton, or, in other words, negotiate with TRW for continuation of the Chilton contract in New Hampshire. After all, CBC is not a participant in the acquisition, and it would seem logical therefore to place the burden of remedying the anticompetitive effects in New Hampshire of the acquisition in New Hampshire by requiring a participant (TRW) to sell off its file. In our view, it is CBC, and not TRW, that is being required to subsidize the entry and expansion of vendors, such as CBI/Equifax, into the New England market. CBC and its customers will have to pay the price for the anticompetitive effect of TRW's acquisition of Chilton, rather than that cost being borne by TRW. Two solutions can correct this problem—requiring TRW to divest itself of the Chilton Bureau in Boston, or requiring TRW to sell a copy of its file in New Hampshire. In CBC's view, either alternative is preferable to making it pay the cost of correcting the anticompetitive effects of this acquisition.

In conclusion, we believe that the historical evidence does not support the effectiveness of selling a file as a remedy to the anticompetitive effects of this acquisition. Even if the Department is convinced, however, that such a sale will remedy the anticompetitive effects of this merger, CBC respectfully suggests that such a remedy could be applied in New Hampshire as well as in Massachusetts. We very much appreciate your attention to these comments.

Very truly yours,

James P. Kennedy.

cc: Donald J. Russell, Esq.
George S. Baranko, Esq.
Richard L. Irvine, Esq.
Jonathan M. Rich, Esq.
Catherine M. Jones, Esq.

Exhibit E

January 26, 1989.

Barry Grossman, Esq., Chief,
Communications & Finance Section,
Antitrust Division, U.S. Department of Justice, Judiciary Center Building,
555 4th Street NW., Room 8104,
Washington, DC 20001

RE: Proposed Consent Decree in *United States* v. *TRW, Inc.*, Northern District of Ohio (C88–4253)

Dear Mr. Grossman: I am submitting these comments on behalf of Rochester Credit Center, Inc. in response to the Notice published in the **Federal Register** by the Justice Department on December 2, 1988, which Notice was amended December 12, 1988. Rochester Credit Center is owned by a not-for-profit trade association, which in turn is owned by the entire credit-granting community, who share equally, through Board representation, their concerns for price, product, services and credit education within the community. The trade association, comprised of over 1,200 area businesses, owns the stock of Rochester Credit Center.

It is the position of Rochester Credit Center that the proposed consent decree in the above action will not prevent the anti-competitive effects that will result from the acquisition of Chilton by TRW. I speak specifically to the situation in Rochester, but I believe that the situation is the same in many other areas of the country referred to by the Justice Department in its complaint. In Rochester, it is clear to me that competition will reduced substantially if the terms of the consent decree are followed.

The Justice Department has concluded in the Competitive Impact Statement that the fact that credit vendors other than TRW and Chilton have "full files" will ensure that the number of competitors in the market will remain the same and that the market shares of various competitors will remain approximately as they were before the merger. For the reasons explained below, the presence of a "full file" is not a sufficient remedy to the ills engendered by this merger.

Rochester Credit Center also believes that with respect to its own situation, the proposed consent decree is inaccurate in one significant respect. It assumes that the termination date of the affiliation agreement between Rochester Credit Center and Chilton is June 1, 1990. As is explained later in this letter, this is not the case.

Anti-Competitive Effect of Merger

The Competitive Impact Statement correctly has recognized that the credit-reporting business is a highly concentrated market in which entry is very difficult. Further, in both its complaint and in its Competitive Impact Statement, the Justice Department recognizes that purchasers of consumer credit reports make their decision on which reports to buy primarily on the

basis of the quality and quantity of information in the reports.

Having recognized that the quality nd quantity of credit report information is critical, the Competitive Impact Statement concludes that so long as a credit vendor has a "full file", this is enough to satisfy the desire of purchasers of credit reports for files containing sufficient quality and quantity of information. In fact, the presence of a "full file", standing alone, does not mean that the credit grantor buying the report will deem that the file has the quality and quantity of information that it wants.

Essentially, the Competitive Impact Statement ignores the fact that while a file may be full, some files will be fuller than others. Moreover, the Competitive Impact Statement ignores the fact that for credit grantors, some names have much greater market recognition than others, and the Competitive Impact Statement also ignores how difficult entry is in the face of this name recognition.

Quality and Quantity of File, and Name Recognition

Paragraph "16" of the complaint filed in this action defines the information that constitutes a "full file". Rochester Credit Center does not disagree with this definition, but does disagree with the concept that one "full file" is the same as another. By way of hyperbole, an 11-man football team composed of staff personnel from Rochester Credit Center is a "full football team", but nobody would think that such a football team could compete with the San Francisco 49ers. Obviously, I do not mean to suggest that a vendor that has the "Full File" information referred to in Paragraph "16" of the complaint stands in the same relation to a vendor with a much better "Full File" as an office football team stands in relation to the Superbowl champions. However, I do mean to suggest that to credit grantors, some files are much fuller, and therefore much better, than others.

The competitive impact statement ignores an important element of market concentration, namely that the number of credit inquiries regarding an individual is a vital factor to most credit grantors when they are deciding whether to extend credit. Therefore, the credit bureau that receives the largest number of inquiries, and reports these inquiries on its report, is the bureau selling the most useful report. Its file is better than that of a competitor with a "Full File".

Not only is the number of inquiries, and therefore the credit activity, of a particular applicant an important indicator of the credit worthiness of the applicant, but it is also an important indicator of the reliability of the credit report. Under most circumstances, a credit grantor will prefer a credit bureau receiving the largest number of inquiries, which simply means the credit bureau with the largest market share. This preference among credit grantors will tend to protect the market share of the dominant bureau. In essence, a snowball effect is at work. A credit bureau with a large market share has that share because it has information desirable to credit grantors. They will turn to this bureau, thereby further enhancing the market share of that bureau.

The confidence that the credit grantor has in the name under which the local bureau does business is also an important factor that these credit grantors consider when deciding what bureau or credit vendor will be contacted for credit information. Since 1971, when Rochester Credit Center became an affiliated bureau of Chilton, each and every credit report has carried the name of Chilton within the context of the report. Rochester Credit Center has marketed its reports under the auspices of the Chilton Credimatic system, and substantial good will has been engendered for this name in the Rochester area, as I am sure it has in the other areas of the country. TRW and Chilton have recognized the value of the Chilton name in a letter they have sent to common TRW and Rochester Credit subscribers, advising them that Chilton will not become part of the TRW network in Rochester.

All credit grantors in the Rochester area are familiar with both the TRW and the Chilton reports. This familiarity will be a major advantage to the proposed TRW/Chilton entity in maintaining and attracting a greater market share. This same situation exists in the other areas referred to in the complaint and the Competitive Impact Statement.

Because credit grantors are familiar with the Chilton name, they will perceive it, and in most cases properly so, as being better. In trumpeting the fact that TRW will now have access to the best of both worlds—information from TRW and information from Chilton—TRW is marketing the Chilton name, a name developed in Rochester at great expense by Rochester Credit Center. We have no doubt that customers of Rochester Credit Center identify consumer credit reports by the Chilton name, much as a consumer using a moving van company recognizes it by the national name rather than by the name of a local carrier.

Reduced Competition as a Result of Merger

As a result of this proposed merger, markets in which affiliates are terminated, such as Rochester, will suffer a decrease in competition. Independent bureaus like Rochester Credit Center will have to enter into contracts with vendors new to an area, who totally lack the name recognition and the local file that leads credit grantors to certain vendors.

If the merger occurs, Rochester Credit Center's share of the market will drop dramatically. Given the way in which a company becomes entrenched in this market, it will be extremely difficult for Rochester Credit Center, whichever other national vendor it affiliates with, to develop any significant market share.

The Competitive Impact Statement recognizes that consumer credit reporting is subject to considerable economies of scale. Once a company has created a file that has the quantity and quality of information that credit grantors desire *and* the company has gained the confidence of consumers, it has a great cost advantage over a new entrant to the market. Any company considering entry into a market like Rochester must have the quality and quantity of information that goes beyond having a "full file," and must develop consumer acceptance. Consequently, a prior entrant can easily underprice it, and yet charge monopoly prices.

Indeed, the market for consumer credit reporting may be described as a natural monopoly. There are only three ways that another firm can hope to enter this market successfully. One is by use of a new, superior technology that allows it to offer the product demanded at a lower price. We know of no such technology in existence or on the horizon. The second possibility occurs when the market is expanding, the present monopolist is lazy and does not go after new business, and the new entrant can sign up new customers at a sufficiently rapid rate to overcome the costs of entry. This is unlikely to occur as Rochester is a stable community that has not grown much in the past nor is expected to expand much in the future. The third possibility results from the present monopolist giving such poor service that customers are willing to shift their business to a new entrant. We see no reason for this to occur, as we believe that TRW and Chilton provide good service to their customers.

As it happens, the Rochester area has been served primarily by a duopoly—two, roughly equal-sized firms, Chilton

and its associated company, Rochester Credit Center, and TRW. They have been in a stable competitive equilibrium, from which users of their services have benefited. The proposed merger of Chilton and TRW will change this situation. TRW, combined with Chilton, will be in a position to drive Rochester Credit Center out of business. The newly-merged firm will have very deep pockets. It can afford to cut its prices and spend considerable sums on sales persuasion to take customers away from Rochester Credit Center. Ironically, Rochester Credit Center made this possibility more likely as a result of its significant and successful efforts over the years to develop market recognition for the Chilton name in this area.

Indeed, as I already mentioned, we have seen information deisseminated by TRW heralding the fact that TRW will now have access to the best of both worlds—information from TRW and information from Chilton. As I explained, we have no doubt that customers of Rochester Credit Center identify consumer credit reports by the Chilton name, much as a customer using a moving van company recognizes it by the national name, rather than by the name of the local carrier.

Because of the Chilton name recognition, we expect that a significant number of customers will leave Rochester Credit Center and follow Chilton when it becomes part of TRW. It is reasonable to anticipate that this change will result in a significant shift in the current market concentration, and that TRW then will have a dominant share of the Rochester market.

TRW can take advantage of this dominant position by lowering its prices. Because of TRW's financial reserves, this decrease in prices will not likely cause it any harm. Ultimately, TRW will drive Rochester Credit Center out of business.

Of course, once Rochester Credit Center is out of the market, Rochester-area users of consumer credit reports will be left with a single supplier, TRW—a monopolist. Once it achieves this monopoly position, TRW will be able to raise its prices. At this point, entry by another firm will be very unlikely, unless one of the three REMOTE possibilities outlined above occurs. Credit grantors in the Rochester area then will have no alternative to TRW and will be forced to pay monopoly prices.

Contractual Rights of Rochester Credit Center

The Competitive Impact Statement assumes that Rochester Credit Center's contract with Chilton expires June 1, 1990. In fact, there is no such provision in the contract between these companies.

After receiving notice from Chilton that it intended to terminate Rochester Credit Center, I wrote to Van Smith, the President of Chilton, on November 30, 1988, asking him to specify for me the contractual language that gave Chilton the right to terminate Rochester Credit Center. He responded without specifying the contract in issue, and I wrote him again on December 15. At a later meeting with him, he acknowledged that a clarifying sentence had been left out of the Rochester Credit Center agreement, and that the agreement was ambiguous as to when it could be terminated. In fact, the agreement does not contain a specific date for termination, and Rochester Credit Center plans to litigate vigorously the position taken by Chilton and TRW that the Chilton contract with Rochester Credit Center expires on June 1, 1990.

While we recognize that this may not be a significant factor to the Justice Department, and that the Justice Department is far more interested in the competitive impact of the proposed merger, we did want to bring it to your attention.

CONCLUSION

We believe that an analysis of the market and a true understanding of the credit-reporting business demonstrates that the proposed merger will have significant anti-competitive effects in the Rochester area, and, we believe, in many other areas similar to Rochester. The alternative proposed in the consent decree does not, for the reasons explained, resolve the difficulty. Therefore, unless the Justice Department can develop some alternative that will permit the merger to go forward, while ensuring that competition will remain in areas such as Rochester, it is the position of Rochester Credit Center that the Justice Department should seek an injunction halting the merger.

We have set up a meeting for February 2, 1989 with officials at the Justice Department to discuss this matter further. At that time, we will be glad to answer any questions that representatives of the Justice Department have and discuss our comments in detail.

Very truly yours,

R. Gregg Helfer.

pc: Donald J. Russell, Esq.
George S. Baranko, Esq.
Richard L. Irvine, Esq.
Jonathan M. Rich, Esq.
Katherine M. Jones, Esq.
William Swope, Esq.
James Sutton, Esq.

Exhibit F

February 9, 1989.

Barry Grossman, Esq., Chief, Communications & Finance Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, NW., Washington, DC 20001

Re: *United States v. TRW, Inc.*, Civ. No. C88-4253 U.S. District Court for the Northern District of Ohio, Eastern Division

Dear Mr. Grossman: We are writing on behalf of Credit Data of Hawaii, Inc., a Hawaii corporation ("CDH"). We have been provided with the proposed Final Judgment and Competitive Impact Statement filed in the above-referenced matter.

On November 17, 1988, the United States Department of Justice ("Department") filed a civil antitrust complaint under Section 15 of the Clayton Act (15 U.S.C. § 25) alleging that the proposed acquisition of Chilton Corporation ("Chilton") by TRW, Inc. ("TRW") would violate Section 7 of the Clayton Act (15 U.S.C. § 18).

Simultaneously, the Department and TRW filed a stipulation by which they consented to the entry of a proposed Final Judgment ("Consent Decree"). On that same day, the Department filed its Competitive Impact Statement as required by the Antitrust Procedures and Penalties Act. The proposed Consent Decree approved the acquisition and required TRW to sell a copy of its consumer credit files in certain geographic areas, to sell a copy of Chilton's consumer credit files in other areas and to terminate contracts relating to the sale of network services for certain specified marketing areas, including Hawaii.

In accordance with the antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), CDH submits these comments on the Consent Decree.

As stated in the Complaint, the consumer credit reporting industry is already highly concentrated. There are currently four vendors of network services in the United States, including TRW and Chilton. (Complaint ¶ 15.) The merger of the two largest vendors of network services in the United States, leaving a total of three, raises serious questions of the continued viability of competition in the credit reporting industry. CDH, however, will focus these comments on the competitive situation in Hawaii.

The following portion of the proposed Consent Decree is the subject of this comment:

Unless such notice has already been provided, TRW is ordered and directed

to provide written notice to [Credit Data of Hawaii, Inc., Honolulu, Hawaii] of its intent to terminate contracts relating to the sale of network services for the marketing areas. . . .

It is CDH's position that the proposed final judgment should not be entered as it is not in the public interest. CDH believes it will either be unable to affiliate with or sell its files to another competitor, or if successful will not be able to compete with TRW/Chilton. Either result would be to the severe detriment of CDH. In CDH's view, the aspects of the proposed Consent Decree relating to Hawaii are likely to result in the near elimination of competition in this state. Much has been said about the dangers to competition posed by the increasing dominance of the two major forces in the credit reporting industry. However, the proposed consent judgment does not, at least in Hawaii, adequately deal with those problems.

2. The Nature of the Credit Reporting Market

Credit bureaus collect consumer credit information, store it in computers and sell it to credit grantors. Credit grantors use these consumer credit reports to determine whether to grant credit, or how much to grant, to individuals. Credit grantors usually receive consumer credit reports electronically through computer terminals. Vendors operate computer facilities that supply network services to credit bureaus. (Complaint ¶ 15.)

Currently, there are four vendors of network services in the United States, including TRW and Chilton. In 1986, the total United States credit reporting revenues of all vendors from the sale of network services and credit reports was about $410 million. (Complaint ¶ 15.) In 1987, TRW's sales totaled about $140 million and Chilton's totaled about $93 million. (Complaint ¶¶ 13, 14.)

Buyers purchase consumer credit reports primarily on the basis of the quality and quantity of information in the reports. (Complaint ¶ 18.) The Department claims that there is no substitute for consumer credit reports that a significant number of credit grantors would purchase in response to a small, but significant increase in the price of the reports. (Complaint ¶ 18.)

Entry into the business of providing consumer credit reports is difficult, time consuming and expensive. Generally, it takes three to five years to collect sufficient information to provide full file credit reports in a given market. Consequently, new entry by another party could not be accomplished rapidly enough in any relevant geographic area to prevent the anti-competitive results in this transaction.

Only credit bureaus that have comprehensive coverage in the local geographic area in which the consumer about whom a credit report is sought resides are considered sources of credit reports. Thus, the relevant geographic markets for purposes of an antitrust inquiry are local and bounded by the overlapping geographic areas covered by particular competing credit bureaus. (Complaint ¶ 19.) The relevant geographic market for purposes of CDH's concerns is the state of Hawaii.

1. Background of Credit Reporting in Hawaii

Prior to 1981, when CDH first entered into a credit-reporting contract with TRW, Chilton was the only national credit-reporting agency in Hawaii. In 1981, Chilton had been in business in Hawaii for a considerable period of time. It had developed a mature credit file. In large part, Chilton's file development and market position were possible because of Chilton's acquisition of the former Credit Bureau of Hawaii in the 1970's.

When CDH began operations, it was able to compete with Chilton only because of its relationship with TRW. Potential customers had no reason to tap the meager Hawaii file of CDH unless they sought the large mainland file of TRW. Most important, TRW had and has significant files in the west coast. Because so many Californians relocate to Hawaii, credit customers sought access to the CDH/TW files.

After nearly eight years of developing its Hawaii credit information, CDH now has a mature file. Nonetheless, Chilton still maintains a more comprehensive local file.

When customers seek *only* local credit information, Chilton still maintains a competitive edge over CDH. CDH remains able to compete largely because of the strength of the TRW file behind it. The continued affiliation between TRW and CDH has enabled CDH to obtain roughly 30% to 35% of the market.

4. Effect of the Final Judgment

The Complaint alleges: "There are *two* credit bureaus that collect information for and sell full file consumer credit reports on individuals who reside in Hawaii. Based on the number of consumer credit reports sold, Chilton's owned office is the largest credit bureau and TRW's affiliate is the second largest." (Complaint, ¶ 24.)

The proposed consent judgment requires TRW to terminate its contract with CDH. According to the economic impact statement:

Termination of the affiliation agreements will ensure that the acquisition will have no effect on competition in the relevant geographic markets where the affiliates operate because affiliates will be free to enter into affiliation agreements with vendors other than TRW or Chilton. The terminated affiliates will have strong financial incentives to enter into new contractual relationships with a credit information data base service not fully represented in the local market. As a result, the number of competitors and their local market positions will remain substantially unchanged.

We respectfully submit that this view is misguided at the least and disingenuous at worst. It displays fundamental misunderstandings as to the nature of the credit reporting system in Hawaii.

First, the competitive impact statement concludes that there will be *no effect on competition* because the affiliates will be free to enter into affiliation agreements with other vendors. The conclusion that there will be no effect on competition presupposes two things: 1) not only will CDH be able to sell its file to or contract with another potential competitor, but also 2) that CDH acting along or with one of the remaining potential competitors will be able to maintain the same market share that CDH/TRW now enjoys. Neither of these suppostions is well-founded.

While the two remaining potential competitors in Hawaii might be willing to purchase CDH's file, there is no assurance it can be sold. Right now, absent a TRW/Chilton merger, CDH has the right to enter affiliation agreements with any of the four competitors or potential competitors in Hawai. If the consent judgment becomes effective, TRW will have to terminate its agreement with CDH and will be prohibited from entering into an agreement with CDH for a period of 5 years. Chilton will no longer exist. Thus, instead of four competitors or potential competitors in Hawaii with whom CDH could contract, there remain at most two. At least one of the last competitors has a fledgling Hawaii file. It might not be advantageous to affiliate with CDH. Moreover, the remaining potential competitors might not have the interest in purchasing a file unless they are certain that the file can compete with the new TRW/Chilton file.

Even a cursory review of the market forces in Hawaii demonstrate the fallacy in the assumption that CDH will be able to successfully compete with the joint

TRW/Chilton. As set forth above, the success CDH has enjoyed in the recent past is a direct result of its relationship with TRW. CDH's less mature and less complete Hawaii file has been able to complete with Chilton because of TRW's west coast file. Certain customers now choose CDH/TRW because of its mainland files.

If CDH no longer has the TRW files to support it, it will be faced with attempting to compete head-to-head with the more established, more complete Chilton local file. If the TRW/Chilton merger goes through, the result for CDH will be even more devastating. A customer will now have the choice between a more mature Hawaii file (Chilton) coupled with a vast mainland file (TRW) or a young Hawaii file (CDH) possibly coupled with a weaker mainland file. To suggest that CDH once it is cut adrift, will retain the same market share as CDH/TRW, is naive.

To make matters worse, CDH/TRW now markets its services under the name of "TRW." Customers and potential customers are currently faced with the choice between Chilton or TRW. As stated above, credit grantors (or CDH customers) usually receive consumer credit reports electronically through computer terminals. In Hawaii, most credit grantors have been provided with terminals through which they may gain access to the credit bureaus. All new terminals are currently equipped with a number of buttons including one for Chilton and one for TRW. The name "CDH" does not appear on the computer terminals. Nor does it appear on the consumer credit report or the invoice. As far as most customers are concerned, TRW works alone. After the TRW/Chilton merger, many customers will not even know that the entity that was supplying the information under the TRW name is now independent or associated with another company.[1]

The inevitable result is that whatever market share CDH/TRW had will *not* simply shift to CDH with its new affiliate. It is far more likely that TRW will retain its share and add that to the Chilton market share.

5. HHI

In its Complaint, the Department stated that in 16 relevant markets (including Hawaii) the proposed acquisition would substantially increase concentration. The HHI, it reports, is currently greater than 3,200 and the acquisition of Chilton would increase the HHI by more than 700 points. (Complaint ¶ 20.)

In fact, based on the allegations in the Complaint, the HHI in Hawaii would be closer to 5,200.[2] CDH takes the position that the HHI is really somewhere in excess of 4,300.[3] Whatever figure is used, the market is considered highly concentrated based on the 1984 Department of Justice Merger Guidelines.

The increase in the HHI could be almost 4,000 if TRW and Chilton merge in Hawaii without limitation. Even with the ordered termination of the affiliation agreement between TRW and CDH, the HHI would undoubtedly rise.

Assuming that TRW/CDH has a market share of 35 percent, Chilton has a 55 percent share and a third competitor has a 10 percent share, the HHI is 4,350. If CDH affiliated with the third competitor and kept its entire market share the HHI would rise by 700 points. What is more likely, CDH might retain only a portion of its market share (*e.g.*, 20 percent) and TRW retain part (*e.g.*, 15 percent). That would leave TRW/Chilton with a 70 percent share and CDH with a 30 percent share. The resulting HHI would be 5,800 or an increase of 1,450. (As set forth above, it is unlikely that CDH would be able to retain a large market share without its TRW affiliation. The smaller CDH's share, the larger the HHI.)

According to the 1984 Merger Guidelines,

> The Department is likely to challenge mergers in this region [above 1,800] that produce an increase in the HHI of more than 50 points, unless the Department concludes . . . that the merger is not likely substantially to lessen competition. However, if the increase in the HHI exceeds 100 and the post-merger HHI substantially exceeds 1,800, *only in extraordinary cases will such factors establish that the merger is not likely substantially to lessen competition.*

The merger of TRW and Chilton in Hawaii would result in a post-merger HHI *substantially* in excess of 1,800. The increase in the HHI would in all likelihood far exceed 100.[4] The Department cannot establish that the merger is not likely substantially to lessen competition.

The factors affecting the significance of market shares and concentration do not change the result. For example, this is not a market in which there are changing market conditions, nor is there ease of entry. Accordingly, the Department should have to show what extraordinary circumstances exist in Hawaii to allow competition to remain.

6. The Consent Decree Should Not Be Approved Until The Department And TRW Demonstrate That CDH Can Remain a Viable Competitor

To fulfill its obligations under the Antitrust Penalties and Procedures Act, 15 U.S.C. §16(e), the court must consider whether the public interest will be served by sanctioning a merger of the only two competitors in the consumer credit market in Hawaii. In support of the Consent Decree, the Department concluded that by ordering TRW to discontinue its affiliation with CDH, the competitive environment would remain unaltered. As set forth above, that is not the case.

In *United States v. National Broadcasting Co., Inc.*, 449 F. Supp. 1127 (C.D. Cal. 1978), the court, in approving a proposed consent judgment stated, "in evaluating a proposed consent decree, one highly significant factor is the degree to which the proposed decree advances and is consistent with the government's original prayer for relief." *Id.* at 1144. The court concluded that the "relief provided by the judgment is consistent with the government's general theory of liability as manifested in its complaint." *Id* at 1145. As a result, the court held "that the consent judgment, on balance, advances and is in the public interest." *Id.*

In this case, the government's original prayer for relief sought to enjoin the merger in order to protect competition. Thus, the court must determine whether the Consent Decree is consistent with that original prayer for relief. Since the effect of the Consent Decree is likely to substantially lessen competition, it should not be approved.

The Competitive Impact Statement fails to explain why other options were not considered with respect to the Hawaii market. Since CDH, without access to the TRW, files will have difficulty competing with TRW/Chilton, merely requiring TRW to terminate its contract with CDH will not result in continued competition in this state. In certain areas, the Consent Decree requires that TRW sell a copy of either the file it now owns or a copy of the file

[1] CDH will even be prevented from using the name "CDH" once the affiliation contract is terminated.

[2] This assumes that there are only two competitors in Hawaii with the following market shares: TRW—40 percent; Chilton—60 percent.

[3] Assuming TRW/CDH has a 35 percent share; Chilton has 55 percent and one or two others have 10 percent.

[4] Only if there are only two competitors in Hawaii and CDH retains its entire market share would the HHI remain the same.

it will acquire from Chilton to one of the other companies providing network services. The Competitive Impact Statement states that the Department considered but rejected the option of refusing to allow TRW to retain a copy of the consumer credit files that it must sell. It rejected this option claiming that if TRW can retain a copy of both the Chilton and TRW consumer credit files it can provide consumers with a higher quality product. However, that is basically the reason that competitors such as CDH will be unable to compete in the market.

The Department also considered and rejected requiring TRW to sell copies of the combined TRW/Chilton consumer credit files. The Department rejected this alternative because it believed that a copy of either firm's full file would be sufficient to enable the new firm to compete effectively in the relevant market. The reasons for rejecting this option were not well thought out. The Competitive Impact Statement stated, "The new firm will have all the credit information previously owned by one of the leading competitors in the market." As stated above, in Hawaii, that is not the case. If CDH is coupled with another competitor, CDH will have only the local component of its TRW/CDH files, whereas TRW/Chilton will have both the more mature Chilton files and the strong Chilton/TRW mainland files. CDH or others will remain unable to compete against these joint files.

There were other alternatives which the Department failed to accept. Since the Consent Decree as proposed by TRW and the Department will likely reduce competition in the state of Hawaii, the Consent Decree should not be approved.

If you have any questions about the foregoing or would like to discuss it with CDH, please do not hesitate to contact this office.

Very truly yours,

Margery S. Bronster.

Exhibit G

February 10, 1989.

Deliver

Barry Grossman, Esq., Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, 555 4th Street NW., Washington, D.C. 20001

Re: Proposed Final Judgment in *United States* v. *TRW, Inc.*

Dear Mr. Grossman: The comments in this letter are being submitted on behalf of Credit Data of Central Massachusetts, Inc. and Credit Data of Rhode Island, Inc. Neither of these firms is a party to the action which you have brought against TRW and neither of these firms has committed any offense under the laws of the United States. Yet, remarkably, they bear the burden of the relief sought by the proposed final judgment. I suggest that there is no precedent in case law or in the practice of the Antitrust Division for this result and it is manifestly unjust.

This matter arises out of the proposed acquisition of Chilton Corporation by TRW. The United States has filed a complaint under section 7 of the Clayton Act contending that the acquisition is unlawful in that it would lessen competition in the sale of consumer credit reports. The Antitrust Division has apparently negotiated a decree with TRW under which the Division would agree that the acquisition may be consummated. Although the decree or proposed final judgment drastically affects our clients, they have never been consulted by representatives of the Government. Indeed, so far as I know, they have never even been contacted.

The proposed final judgment reflects an assumption that there is particular concentration in certain defined geographic markets and that in these markets, TRW must agree to terminate existing affiliates. Credit Data of Central Massachusetts and Credit Data of Rhode Island are two such affiliates and they have been informed by TRW that their agreements will not be extended and will terminate on their respective anniversary dates in May and July of this year. I quote from a letter dated November 14, 1988 from TRW to Credit Data of Central Massachusetts (a copy of the full letter is attached):

"As I am sure you know, TRW is in the process of acquiring Chilton Corporation. Because of the size of the transaction, approval of the Department of Justice was required. As part of that approval process, we will be required to terminate our Computerized Credit Reporting Services Agreement made and entered into as of July 12, 1983 ("Agreement)."

It is just not right for such harm to be visited on an innocent party. We object to the inclusion in the proposed final judgment of provisions that require the severance of relationships between our clients and TRW. These provisions call for the destruction of our clients' existing business relationships and the harm is real and immediate.

Our clients have limited resources. Therefore, we request that you make our comments available to the Court before which this action is pending. We do not believe that a Court would find the proposed final judgment in its present form to be in the public interest.

Very truly yours,

William L. Patton.

Exhibit G

November 14, 1988.

Mr. Richard Downing, Sr., Credit Data of Central Massachusetts, Inc., 15 Howard Street, Framingham, Massachusetts 01701

Dear Mr. Downing: As I am sure you know, TRW is in the process of acquiring Chilton Corporation. Because of the size of the transaction, approval of the Department of Justice was required. As part of that approval process, we will be required to terminate our Computerized Credit Reporting Services Agreement made and entered into as of July 12, 1983 ("Agreement").

This letter is to notify you that if the acquisition of Chilton is completed, notice will be given pursuant to Section 11(b) of the Agreement that the Renewal Term will not automatically extend, and the Agreement will terminate on July 10, 1989, unless extended by mutual agreement with approval of the Department of Justice. If, for some reason the acquisition is not completed, we will notify you promptly.

If the Agreement terminates, TRW will use its best efforts to assist in a conversion of your data base to another credit reporting system, and we will work with you to make the transition as smooth as possible under the circumstances. Until that time, we will continue to provide you with the best support and service on the TRW System.

If you have any questions, please contract me directly.

Sincerely,

Edward A. Babierl, Ph.D.

Vice President & General Manager TRW Credit Data.

Exhibit H

February 8, 1989.

Mr. Barry Grossman Chief, Communications & Finance Section, Antitrust Division, U.S. Department of Justice, 555 4th Street NW., Washington, DC 20001

Dear Mr. Grossman: This firm has been retained by Centroplex Credit Reporting & Collections, Inc. (hereinafter referred to as "CCRC") which has offices in the Central Texas area and its principal place of business being 807 North 2nd Street, Killeen, Texas. This letter is being sent pursuant to the provisions of 15 U.S.C. Sec. 16(d) and is intended to be a comment on the proposed consent judgment submitted in cause no. C88–4253, styled United States of America vs. TRW, Inc. filed in the

District Court for the Northern District of Ohio, Eastern Division.

The substance of this letter is to notify the Justice Department and all parties concerned in the TRW acquisition of Chilton that the consent judgment as presently written contains errors in that it authorizes TRW to sell or transfer to Trans Union Credit Information Co. credit file information contained in the affected zip code areas which TRW does not have authority to sell or transfer. Therefore, CCRC is seeking to have the United States withdraw its consent to the judgment as presently written or in the alternative CCRC is seeking a modification of the consent judgment as presently written to eliminate the problems with the zip code regions affected by the agreement between TRW and CCRC.

Background Regarding Relationship Between TRW & CCRC

On July 7, 1987, CCRC and TRW entered into a computerized credit reporting service agreement for an initial term of five years. Pursuant to the terms of the agreement, there were a series of zip codes which were designated to be CCRC's data base. This data base included all of the credit information and records stored in the TRW system, no matter how or by whom collected which had a current address within the CCRC designated zip code area. A copy of those zip codes are attached as Exhibit One. Thiere also may be other zip codes affected by subsequent amendments to the agreement between CCRC and TRW.

By virture of the agreement entered into by CCRC and TRW, the credit information contained in the designated zip code areas became the property of CCRC. The agreement specifically provides that "CCRC's data base shall be the property of CCRC . . .". CCRC essentially bought TRW's corporate files for the affected regions. Since the date of the agreement, CCRC has continually updated and enhanced the credit information contained in the files for those zip code areas. This process has resulted in the expenditure of a great deal of manpower hours and expense on the part of CCRC.

The agreement further provides that TRW may purchase on an inquiry by inquiry basis the credit information contained in CCRC's data base. Likewise, CCRC may purchase on an inquiry by inquiry basis the credit information contained in the TRW data base. By virtue of this provision in the agreement, the parties recognize that each party owns the information contained in the respective data bases as separate and independent property.

The agreement also provides that the relationship between CCRC and TRW created by the agreement is not to be interpreted as a joint venture, partnership, or principal/agent relationship. Neither party has the right or authority to act for, or to assume, create or incur any obligation, liability, or responsibility of any kind, whether expressed or implied, against, in the name of or on behalf of, the other party.

Effect of Consent Judgment on CCRC

Paragraph V (A)(1) of the consent judgment provides that TRW has entered into an agreement to sell a copy of the consumer credit files for the geographic areas identified in attachment II of the consent judgment. More specifically, TRW has entered into a credit file sale agreement with Trans Union Credit Information Co. to sell zip code areas which are the subject of this comment letter. Those areas include some of the zip code areas which are designated CCRC data base information in the agreement between CCRC and TRW. A comparison of the zip codes designated as CCRC's data base in the agreement between TRW and CCRC and the zip code areas listed in attachment II of the consent decree reveals that at least the following zip codes are affected:

78626, 76500, 76529, 76531 through 76532, 76555 through 76556, 76575, 76581 through 76620, 76629, 76688, 76700.

There may also be other zip codes which could be affected by virtue of amendments to the agreement entered into between CCRC and TRW.

The competitive impact statement notes that TRW has entered into agreements to sell a copy of the file it *owns* to one of the other companies providing network services. Simply put, TRW has agreed to sell zip codes/data base information to a competitor of CCRC which it has no authority to sell. It has not asked for nor received CCRC's permission to sell such information.

Obviously, the sale of such information to a competitor of CCRC could have a direct and devastating effect on CCRC's operations. As noted throughout the competitive impact statement and consent judgment, the credit information contained in the credit files is extremely important in the day to day business of companies in the credit retrieval information business.

It is CCRC's position that the purpose of the proposed final judgment is to do what is in the public's best interest. Certainly it cannot be said that it is in the public's best interest to permit TRW to transfer property which rightfully belongs to CCRC and sell it to a competitor of CCRC. Once this credit data has been transferred and assimilated into a competitor's file, it may be virtually irretrievable and the damage sustained by CCRC could be devastating.

Therefore, CCRC would request that the United States withdraw its consent to the consent judgment in cause no. C88-4253, United States of America vs. TRW, Inc. or in the alternative, that the United States recommend a modification of the consent decree to eliminate the problems expressed in this comment letter.

CCRC is willing to provide any further information which United States Justice Department feels is necessary to adequately review this consent judgment including, but not limited to, the agreement entered into with TRW. Please feel free to contact me if you have any questions or comments.

Sincerely,

Robert T. Swanton, Jr.

Exhibit 1—CCRC Area of Coverage

CCRC's Zip Code Area for consumer credit reports will include the following zip codes:

Texas: 76500-76799, 76853, 76877, 78613, 78615, 78617, 78619-21, 78626, 78634, 78640-42, 78666, 78676, 78700-99.

Exhibit I

February 9, 1989

Barry Grossman, Esq., U.S. Department of Justice, Washington, DC 20001

Re: *United States v. TRW, Inc.*, Consent Decree

Dear Mr. Grossman: It has been called to my attention that the arrangements called for by the proposed consent decree in the referenced case could have an adverse, anticompetitive effect upon certain independent credit bureaus. In particular, the decree's requirement that Credit Bureau Services of New Hampshire terminate its arrangements for purchasing data processing and network services from Chilton Corporation (which would be acquired by TRW if the acquisition is approved) may unfairly deprive CBS-NH of the capacity to compete effectively.

I am concerned that the consent decree may inadvertently impose unwarranted and ultimately anticompetitive restrictions on CBS-NH. This would be unfair inasmuch as CBS-NH is not engaged in, or about to engage in, any anticompetitive activity or arrangements which are alleged to violate the antitrust laws in the Department's complaint.

As I understand the facts, the decree would hinder independent credit bureaus like CBS-NH from providing

full-service credit reporting to credit grantors. While the decree bars CBS–NH from access to the data processing and networking services it now obtains from Chilton, other sources of equivalent services are not readily available. As a result, CBS–NH stands to lose a sizeable portion of the wholesale sub-market it now services as an independent bureau.

In proposing arrangements to accommodate TRW's acquisition of Chilton, it seems counterproductive to impose restrictions which curtail the ability of independent credit bureaus like CBS–NH to compete effectively with credit bureaus wholly-owned by TRW and other large vendors.

I hope that the Department will give careful consideration to these concerns, as more fully expressed in the comments filed by CBS–NH in its submission to you dated January 18, 1989.

Sincerely,

Gordon J. Humphrey, USS.

[FR Doc. 89–5682 Filed 3–10–89; 8:45 am]

BILLING CODE 4410–01–M

National Cooperative Research Act of 1984, CAD Framework Initiative, Inc.

Notice is hereby given that, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), CAD Framework Initiative, Inc. ("CFI") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties to CFI and its general area of planned activity are given below:

The following entities are Corporate Members of CFI:

Advanced Micro Devices, Inc.
Alcatel NV
Apollo Computer, Inc.
AT&T Bell Laboratories
Bull, S.A.
CADENCE Design Systems, Inc.
Control Data Corp.
Daisy Systems Corp.
Digital Equipment Corporation
EDA Systems, Inc.
GE Aerospace
General Motors/Delco Electronics
Harris Semiconductor
Hewlett-Packard Company
Honeywell, Inc.
IMEC, VZW
Intergraph Corp.
International Computers Ltd.
Mentor Graphics Corporation
Microelectronics and Computer Technology Corporation
Motorola, Inc.
NCR Corp.
Nixdorf Computer AG
Objective Design, Inc.
Objectivity, Inc.
Robert Bosch GbmH
SCME Foundation Centers for Micro-Electronics
SGS Thomson Microelectronics
Siemens AG
Sony Corporation
Sun Microsystems
Texas Instruments, Inc.
Valid Logic Systems, Inc.
VIEWLOGIC Systems, Inc.
VLSI Technology
Westinghouse Electric Corp.

The following entities are Associate Members of CFI:

Delft University of Technology
Frauhofer AIS
Gesellschaft Fur Mathematik and Datenverarbeitung mbH (GMD)
Intel Corp.
PTT Research Neher Laboratories
Semiconductor Research Corporation
Kenneth Bakalar
Bill Harding
David Jakopac
Moe Shahdad
Erwin Warshawsky

The objective of CFI is to develop industry acceptable standards, specifications and guidelines for design automation frameworks which will enable the coexistence and cooperation of a variety of computer hardware and software products used for computer aided design.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 89–5642 Filed 3–10–89; 8:45 am]

BILLING CODE 4410–01–M

National Cooperative Research Act of 1984, Semiconductor Research Corp.

Notice is hereby given that, on January 30, 1989, pursuant to section 6(a) of the National Cooperative Research Act of 1984, Pub. L. 98–462 ("the Act"), Semiconductor Research Corporation ("SRC") filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing certain changes in the membership of SRC. The changes consist of the deletion of GTE Laboratories, Incorporated, Loral Systems Group, Monsanto Company and Unisys from the SRC membership and the addition of SEMATECH, Inc.

SRC filed its notification of these membership changes for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties to SRC and SRC's general area of planned activity are given below.

SRC is a joint venture which, with the deletions and additions of the previously identified companies, comprises the following members:

Advanced Micro Devices, Incorporated
Applied Materials, Inc.
AT&T Technology, Incorporated
Control Data Corporation
Digital Equipment Corporation
E.I. du Pont de Nemours & Company
Eastman Kodak Company
Eaton Corporation
E–Systems, Inc.
General Electric Company/RCA
General Motors Corporation
Harris Corporation
Hewlett-Packard Company
Honeywell, Incorporated
IBM Corporation
Intel Corporation
LSI Logic Corporation
Micron Technology, Inc.
Motorola, Incorporated
National Semiconductor Corporation
NCR Corporation
Perkin-Elmer Corporation
Rockwell International Corp.
SEMATECH, Inc.

SEMI Chapter, the members of which are the following:

AG Associates
American Technical Ceramics
ASYST Technologies, Inc.
Coors Ceramics
Emergent Technologies Corporation
FSI Corporation
Genus, Inc.
Hercules Specialty Chemicals Company
Ion Implant Services
Lehighton Electronics, Inc.
Logical Solutions Technology, Inc.
MacDermid, Inc.
Micrion Corporation
Optical Specialties, Inc.
Pacific Western Systems, Inc.
Peak Systems, Inc.
Sage Enterprises, Inc.
The SEMI Group, Inc.
SILVACO Data Systems
SOHIO Engineered Materials Co.
Solid State Equipment Corp.
Technology Modeling Associates, Inc.
Thermco Systems, Inc.
VLSI Standard, Inc.
Silicon Systems, Incorporated
Texas Instruments, Incorporated
Union Carbide Corporation
Varian Associates, Incorporated

Westinghouse Electric Corporation
Xerox Corporation.

SRC's purpose is to plan, promote, coordinate, sponsor, and conduct research supportive of the semiconductor industry and directed toward:

1. Increasing knowledge of semiconductor materials and phenomena, and of related scientific and engineering subjects that are required for the useful application of semiconductors;
2. Developing new and more efficient designs and manufacturing technologies for semiconductor devices;
3. Identifying directions, limits, opportunities, and problems in generic semiconductor technologies;
4. Increasing the number of scientists and engineers proficient in research, development, and manufacture of semiconductor devices;
5. Increasing industry-university ties, establishing university semiconductor research centers with major long-term research thrusts, and developing university semiconductor research activities with more precisely defined, short-term objectives;
6. Developing more relevant graduate school education and a larger supply of graduate students in areas related to semiconductor technology;
7. Increasing the ability of universities to attract and retain competent faculty in the semiconductor field;
8. Decreasing fragmentation and redundancy in United States semiconductor research;
9. Establishing advanced research efforts for critical semiconductor technology areas that are beyond the individual resources of many SRC members; and
10. Promoting efficient communication of research results to SRC members and to the United States semiconductor community as a whole.

On January 7, 1985, SRC 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 Janaury 30, 1985 (50 FR 4281). SRC filed additional notifications on June 6, 1985, November 4, 1985, February 19, 1986, and September 11, 1987, notice of which the Department published on June 28, 1985 (50 FR 26850), December 24, 1985 (50 FR 52568), March 18, 1986 (51 FR 9287), and October 9, 1987 (52 FR 37849), respectively. SRC also filed additional notifications on December 19, 1986 and January 30, 1987; the Department published notice of both on February 13, 1987 (52 FR 4671). SRC also filed an additional notification on December 13, 1988, notice of which the Department published on January 13, 1989 (54 FR 1454).

Joseph H. Widmar,
Director of Operations, Antitrust Division.
FR Doc. 89-5641 Filed 3-10-89; 8:45 am]
BILLING CODE 4410-01-M

National Cooperative Research Act of 1984; Wet Welding at Greater Depths; Southwest Research Institute

Notice is hereby given that, on January 30, 1989, 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 of a project entitled "Wet Welding at Greater Depths" disclosing (1) the identities of the parties to the project and (2) the nature and objectives of the project. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plantiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties to the project and its general areas of planned activities are given below.

The parties to the project are Amoco Corporation; ARCO Oil and Gas Company, a division of Atlantic Richfield Company; Chevron Corporation; Columbia Gas System Service Corporation; Exxon Production Research Company; Mobil Research and Development, Offshore Engineering; Shell Development Company, a division of Shell Oil Company; and Sun Exploration and Production Company.

The purpose of the project is to advance the state of the art of wet welding in order to develop the welding processes and consumables to a level where the welds are verifiably suitable for pipelines and critical platform members. The research and development program is designed to analyze the existing information on wet welding; to generate the information necessary to obtain an understanding of the problems of SMAW (Wet Shielded Metal Arc Welding) by experimental testing in a systematic manner; to evaluate the knowledge gained by manipulation of the welding consumables' (SMAW) composition and operating characteristics to overcome the existing shortcomings and fully test these principles; and to apply the knowledge from the SMAW tests to a different welding process (FCAW—Flux Cored Arc Welding) that could ultimately be automated for welding at great depth.

Membership in this group project remains open, and the parties intend to file additional written notification disclosing all changes in membership of this project.

Joseph H. Widmar,
Director of Operations, Antitrust Division.
[FR Doc. 89-5640 Filed 3-10-89; 8:45 am]
BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Office of the Secretary

Agency Recordkeeping/Reporting Requirements Under Review by the Office of Management and Budget (OMB)

Background

The Department of Labor, in carrying out its responsibilities under the Paperwork Reduction Act (44 U.S.C. Chapter 35), considers comments on the reporting and recordkeeping requirements that will affect the public.

List of Recordkeeping/Reporting Requirements Under Review

As necessary, the Department of Labor will publish a list of the Agency recordkeeping/reporting requirements under review by the Office of Management and Budget (OMB) since the last list was published. The list will have all entries grouped into new collections, revisions, extensions, or reinstatements. The Departmental Clearance Officer will, upon request, be able to advise members of the public of the nature of the particular submission they are interested in.

Each entry may contain the following information:

The Agency of the Department issuing this recordkeeping/reporting requirement.

The title of the recordkeeping/reporting requirement.

The OMB and Agency identification numbers, if applicable.

How often the recordkeeping/reporting requirement is needed.

Who will be required to or asked to report or keep records.

Whether small businesses or organizations are affected.

An estimate of the total number of hours needed to comply with the recordkeeping/reporting requirements and the average hours per respondent.

The number of forms in the request for approval, if applicable.

An abstract describing the need for and uses of the information collection.

Comments and Questions

Copies of the recordkeeping/reporting requirements may be obtained by calling the Departmental Clearance Officer, Paul E. Larson, telephone (202) 523-6331. Comments and questions about the items on this list should be directed to Mr. Larson, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-1301, Washington, DC 20210. Comments should also be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for (BLS/DM/ESA/ETA/OLMS/MSHA/OSHA/PWBA/VETS), Office of Management and Budget, Room 3208, Washington, DC 20503 (Telephone (202) 395-6880).

Any member of the public who wants to comment on a recordkeeping/reporting requirement which has been submitted to OMB should advise Mr. Larson of this intent at the earliest possible date.

New

Employment and Training Administration
New
On occasion
State or local governments
33 respondents; 33 total hours; 1 hour per response; no forms

To establish procedures to identify, account for and monitor balances of obligated "Reed Act" funds in State unemployment trust fund accounts. States with unexpended balances of Reed Act obligations are requested to certify by letter the amount of such balances as of 11/30/88 to ETA/UIS. Future obligation amounts must also be certified in a similar manner.

Extension

Occupational Safety and Health Administration

Designation of Competent Person; Log of Inspection and Tests by Competent Person
1218-0011; OSHA 73 and 74
On occasion
Businesses or other for profit; Small businesses or organizations

Form No.	Affected public	Respondents	Frequency	Average time per response (minutes)
73	As listed above	300	On occasion	5
74	As listed above	3,200	On occasion	15

825 total hours

To ensure that shipyard personnel do not enter confined spaces that contain oxygen deficient, toxic, or flammable atmospheres, qualified personnel must test these spaces and the results of these tests must be available to those who must enter these spaces. Shipyards, barge cleaners, and repair facilities are affected.

Employment and Training Administration

Business Confidential Data Request—Oil and Gas Drilling and Exploration Oilfield Services
1205-0272; ETA 9018
On occasion

Businesses or other for-profit; Small businesses or organizations 1,000 respondents; 3,000 total hours; 3 hrs. per response; 1 form Statutory requirements under the Trade Act of 1974 as amended require complete and accurate business confidential data in order to make determinations as to whether imports have contributed to worker separation. The Secretary of Labor's determinations decide if petitioning workers are eligible to apply for worker adjustment assistance.

Mine Safety and Health Administration

Certificate of Electrical/Noise Training, MSHA Form 5000-1
1219-0001
On occasion
Businesses and other for profit; small businesses or organizations
10,393 respondents; 1 minute per response; 208 total burden hours

MSHA Form 5000-1, Certificate of Electrical/Noise Training, is required to be used by instructors to report to MSHA for certification those persons who have satisfactorily completed either a coal mine electrical training program or a noise training course.

Pension and Welfare Benefits Administration

Prohibited Transaction Class Exemption 82-63
1210-0062
On occasion
Businesses and other for-profit
11,642 respondents; 1940 hours, 5 minutes per response

The class exemption allows the payment of compensation under certain conditions for the provision by an employee benefit plan fiduciary of security lending services to the plan.

Pension and Welfare Benefits Administration

Prohibited Transaction Class Exemption 77-8
1210-0063
Other (annually when exemption is used)
Business and other for profit; small business or organizations
8,668 responses; 1445 hours, 10 minutes per response; 0 forms

The class exemption exempts from the prohibited transaction restrictions of ERISA the sale of individual life insurance or annuity contracts by a plan to participants, relatives of participants, employers any of whose employees are covered by the plan, or other employee benefit plans which are parties in interest.

Occupational Safety and Health Administration

Cotton Dust Standard
1218-0061
On Occasion
Business or other for-profit, small business or organizations 597 respondents; 209,312 burden hours; 46 hours per response; 0 form

The cotton dust standard requires employers to establish and maintain accurate records of employee exposure to cotton dust, as well as medical surveillance records obtained in compliance with the provisions of the cotton dust standard. These records are used by employees, physicians, employers, and the Government; to determine the presence of byssinosis; and in determining the effectiveness of the employers' compliance efforts.

	Proposed total burden hours	Estimated average burden hours per task
(A) Exposure monitoring:		
(1) & (2) Initial Monitoring & Periodic Monitoring	12,402	.13
(3) Employee Notification of monitoring results	38,160	.4
(B) Methods of Compliance: Compliance Program & Work Practices	100	10
(C) Respirator Program	0	0

	Proposed total burden hours	Estimated average burden hours per task
(D) Medical Surveillance:		
(1) Initial Examination		
Textile	77,465	2.8
Nontextile	4,362	3.8
(2) Periodic/Retesting Exams		
Textile	59,803	1.1
Nontextile	468	1.1
(3) Information to the Physician	6,941	.083
(4) Physician's Written Opinion	6,941	.083
(E) Employee education and training	2,600	.5
Total	209,312	

Mine Safety and Health Administration

Applications for Approval of Sanitary Toilet Facilities (30 CFR 71.500 and 75.1712–6)

1219–0101

On occasion

Businesses and other for profit; small businesses or organizations

2 respondents; 8 hours per response; 16 total hours

Contains procedures by which manufacturers of sanitary toilet facilities may apply for, and have their product approved as permissible for use in coal mines. To gain approval, the manufacturer must submit sufficient information needed to make an effective evaluation of the sanitary features of the facilities.

Revision

U.S. Department of Labor

Occupational Wage Survey Program

1220–0007

MULTIPLE FORM/COLLECTION

Form #	Affected public	Respondents	Frequency	Average time per response
AWS				
2751A	Private nonfarm employers	15,000	Annual	60 mins.
2752A	do	15,000	do	15 mins.
2752B	do	15,000	do	30 mins.
2753F	do	15,000	do	1 hour and 45 mins.
2753G	do	15,000	do	2 hours
552	do	.....	do	2 hours
275552	do	650	do	30 mins.
275AF	do	650	do	5 mins.
SCA				
2751A	do	10,000	do	45 mins.
2752A	do	10,000	do	15 mins.
2752B	do	10,000	do	15 mins.
2752C	do	100	do	5 mins.
2753F	do	10,000	do	45 mins.
2753G	do	10,000	do	60 mins.
IWS				
2751A	do	12,000	do	50 mins.
2752A	do	12,000	do	10 mins.
2753F	do	6,000	do	3 hours and 15 mins.
2753G	do	6,000	do	2 hours and 45 mins.
PATC White-Collar				
2751A	do	10,000	do	18 mins.
2752A	do	10,000	do	10 mins.
2753F	do	5,000	do	4 hours and 15 mins.
2753G	do	5,000	do	3 hours and 45 mins.
Demo. Form	do	1,000	do	30 mins.
77,198 total hours				

Occupational wage survey data serve a variety of uses, including wage administration, negotiations, mediation, plant location decisions, and general economic analysis. The data are also used in the administration of the Federal Pay Comparability Act of 1970 and the Service Contract Act of 1965.

Signed at Washington, DC, this 7th day of March, 1989.

Paul E. Larson,

Departmental Clearance Officer.

[FR Doc. 89–5750 Filed 3–10–89; 8:45 am]

BILLING CODE 4510–26–M

Employment and Training Administration

Job Training Partnership Act: Requirements for Acceptable Fixed Unit Price, Performance-Based Contracts

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor is publishing its official interpretation of the requirements for writing acceptable fixed unit price, performance-based contracts which conform to the cost classification provisions of 20 CFR 629.38(e)(2) of the Job Training Partnership Act (JTPA) regulations, and other pertinent sections of JTPA and JTPA regulations.

EFFECTIVE DATE: July 1, 1989, to coincide with the start of Federal Program Year 1989.

FOR FURTHER INFORMATION CONTACT: Dolores Battle, Administrator, Office of Job Training Programs, Employment and Training Administration, Room N-4469, 200 Constitution Avenue, NW., Washington, DC 20210; or call Robert N. Colombo, Telephone: (202) 535–0577.

SUPPLEMENTARY INFORMATION: The Department of Labor (DOL) is publishing the following official policy intepretation of the requirements for JTPA Title II and III agreements to serve adults and youth, which are fixed unit price, performance-based contracts

written under the provisions of 20 CFR 629.38(e)(2) in the current JTPA regulations. This notice follows a year-long public discussion of performance-based contracting in JTPA in a broad spectrum of forums, and in response to DOL's March 11, 1988, publication of an issues/options paper, and the August 9, 1988, publication of a proposed policy interpretation for public comment.

The March paper elicited a strong and noteworthy response from the JTPA system, in over 210 letters and position papers. These were studied and weighed by the Department prior to the August publication, which in turn generated 165 comments. The latest comments offered new points in reaction to the proposed policy interpretation and also made reference to views expressed earlier on performance contracting. The August-October comments have been fully considered by DOL in preparing the final official policy interpretation.

In a September 29, 1988, hearing of the U.S. House of Representatives' Committee on Education and Labor, a series of concerns were expressed by the General Accounting Office (GAO) that, based on results of a two-year study in progress, the JTPA system does not appear to have targeted services, particularly more intensive training, to those eligibles least ready to independently obtain jobs; that there is an important link between the quality of the training intervention provided to participants and their ability to be employed in higher skill jobs; and that on-the-job training contracts were identified which subsidized inappropriately long periods of training for jobs requiring less skilled workers.

At the same hearing, the Office of the Inspector General (OIG) of the Department of Labor provided its own independent assessment of training and accountability issues as a result of three years of its audit work. The OIG expressed concerns regarding the characteristics of participants, the impact of training received under JTPA, and the effect the OIG perceives performance-based contracting is having on program accountability. A more detailed discussion of the OIG's critique and their resultant conclusion regarding performance-based contracting will follow later in this notice.

Since a substantial number of Service Delivery Areas (SDAs) rely on performance-based agreements as their principal method of contracting for services, review of the record of JTPA programs to date in meeting the needs of at-risk individuals and the harder-to-serve portion of the JTPA-eligible population leads directly to questions concerning the impact of this particular contract mode and the impact of service provider procurement practices on overall program performance. During the past year, DOL has discussed this interconnection between performance contracting, whom the program serves, the quality of training intervention, and how Congress, the OIG and other auditors will adjudge the effectiveness of the JTPA system in addressing local and national needs for training and employment.

DOL believes that to an important extent the colloquy of the past year has been successful in developing both an appropriate policy and an understanding of the dynamics of performance contracting, and is proceeding to issue the official policy interpretation on 20 CFR 629.38(e)(2) with minor adjustments which respond to comments on the August proposed interpretation.

Since legislative proposals are now being entertained in the Congress which deal with JTPA administrative issues, including procurement, the JTPA system should be advised that this policy may serve as a interim step. A subsequent proposal for amendments to adjust JTPA in this and other areas may be made as well by the Department.

Offical Policy Interpretation of the Requirements for Acceptable Fixed Unit Price, Performance-Based Contracts Written Under 20 CFR 629.38(e)(2)

Introduction

This notice presents the Department of Labor's final official interpretation of the requirements for contracts written with JTPA service providers pursuant to 20 CFR 629.38(e)(2). It also identifies a number of policy provisions recommended for adoption by States which are not found within the specific language of 20 CFR 629.38(e)(2) and, therefore, are not required. These recommendations are, however, in the Department's judgment necessary and appropriate for the proper administration of fixed unit price, performance-based contracts given the nature of the JTPA system and of statutory design.

The official policy interpretation will follow the order of the August 9, 1988, publication of the proposed policy (53 FR 29961). The three main areas are:

—The nature of training activities properly chargeable under 20 CFR 629.38(e)(2);
—Issues surrounding current practices in the JTPA system for making payments to contractors; and
—The allowable uses for revenues in excess of costs (or "profits") realized through agreements with public and private non-profit agencies.

The statement of the official policy interpretation will be preceded by a summary of the comments received by the Department in response to the August 9 proposed policy interpretation, and by a listing of the principles which the Department followed in debating and formulating the final policy.

Background on the Final Policy

The policy now being issued in final form clarifies and provides greater detail regarding Federal expectations of how fixed unit price performance-based agreements are to be written under this regulation, but leaves the primary implementation of the regulation to States and to SDAs in accordance with State and local requirements and procurement codes. The decision to publish the final policy represents a continued commitment on the part of DOL to a Federal-State-local partnership between business and government to design and direct job training programs, and is consistent with original concepts for JTPA management. Since JTPA is now a mature program, with a track record of both successes and difficulties, DOL points to the general responsibility shared by all partners to address problems, and implement major adjustments and reforms as may be warranted by circumstances at the SDA, State, or national level.

In the final official policy interpretation, a good deal of flexibility has been maintained for non-Federal partners to manage JTPA under varied local structures, and to innovate in planning and operating programs as long as Federal concerns regarding the use of performance-based contracts are addressed, and there is effective compliance with procurement requirements, especially with requirements for competitive award whenever possible. SDAs and other JTPA entities which do not presently have sound procurement codes and systems in place are strongly urged to adopt new codes and modify procedures, after consulting with their State JTPA agency regarding the adequacy of any proposed system, and whether proposed changes are consistent with State policy.

DOL's official policy interpretation maintains the features outlined in the August proposed policy. Both vocationally specific and remedial skills training are authorized under the provisions of 20 CFR 629.38(e)(2) as long as training is designed to lead to placement in an occupational target. Benchmark payments for demonstrated participant attainments prior to participant placement can be the basis

of earned payments for contractors, which should facilitate greater investment in longer-term and more enriched programs for the harder-to-serve portion of the eligible population. Despite some sustained disagreement at the SDA and service provider levels with DOL's proposed policy to limit use of profits earned through performance-based agreements to additional JTPA activities, DOL's final policy defines properly earned revenues in excess of costs accrued by public and private non-profit agencies through JTPA contracts to be program income, which is to be used in accordance with JTPA regulations at 20 CFR 629.32. This will offer agencies who are successful in meeting or surpassing contract goals the incentive of gain through additional earned payments and flexibility in expanding JTPA services, but will preclude a loss in accountability for JTPA resources and possible abuse through the channeling of unrestricted-use profits into activities and enterprises not related to JTPA's statutory purpose.

Other references on performance-based contracting under JTPA include:

1. The March 15, 1983, implementation regulations for JTPA [48 FR 11081], which contained the provisions of 20 CFR 629.38(e)(2) governing the use of fixed unit price, performance contracts.

This section of JTPA regulations established conditions for contracts written for training that were fixed unit price and specified the following performance criteria for full payment:

Participants are to complete training:
—Be placed;
—In the occupation trained for;
—At not less than the wage specified in the agreement.

The source of this regulation was an administrative action on the part of DOL to transfer into JTPA an identical provision from the Comprehensive Employment and Training Act (CETA) regulations. The CETA regulation had been adopted after the enactment of the CETA Amendments of 1978, to give flexibility to certain private sector trainers to bid on a fixed price basis for performance-based training contracts without being required to break out the administrative cost component of their fixed price total.

2. The June 15, 1985 revision to JTPA Regulations (50 FR 24764), to incorporate a provision of section 131(d)(3) of JTPA on training packages for youth.

This revision resulted from section 7 of Carl Perkins Vocational Education Act of 1984, Pub. L. 95–524.

3. Training and Employment Guidance Letter (TEGL) 3–87 of November 18, 1987, entitled "Mounting Concerns Regarding 'Problem Contracts' Written under 20 CFR 629.38(e)(2)."

The TEGL resulted from a 6-month review to examine current practices in the JTPA system regarding administration of fixed unit price, performance-based contracts, and procurement systems in general. In some localities, a vacuum existed which made poor procurements, loosely written agreements not conforming fully to 20 CFR 629.38(e)(2), and questionable administrative arrangements possible. In the TEGL, DOL described a series of problems that had been identified with fixed unit price performance-based agreements, enumerated types of "problem contracts," and asked for the cooperation of States, SDAs and PICs to examine local contracting practices, focusing on compliance with procurement codes.

4. "Policy Considerations in Administering JTPA Regulations on Fixed Unit Price, Performance-Based Contracts," a February 1988 issues/options paper which was published as a Notice for 30-day comment in the **Federal Register** on March 11, 1988 [53 FR 7989].

This paper presented for public review and comment an analysis of the main issues and the Department's options for policy guidance and regulatory interpretation, or new rulemaking. The paper was released to public interest groups and was the basis for a briefing for Congressional staff from House and Senate Committees.

Comments on the August Publication of the Proposed Policy

Letters and detailed statements of comment were received from a total of 165 respondents, as follows:

31 States
59 Service Delivery Areas
13 Private Industry Councils
46 Service providers
7 National organizations/public interest groups
3 Members of Congress
2 Private citizens
4 Other

In general, comments were submitted by many of the same parties that had commented extensively on the March 11 Issues/Options paper publication, and commenters whose views on particular points had not changed referred to their earlier statements. Many commenters, especially a number of States, took an overall positive approach to the proposed policy, and their areas of agreement or acceptance of proposed policy were reflected in shorter comment statements. Most commenters noted DOL's evident commitment to consultaiton with its partners in the JTPA system, and DOL's incorporation of commenters' input in developing the proposed policy. There were, however, a substantial number of commenters remaining in disagreement with DOL's proposed policy, or specific portions of the proposed policy. Particularly at the SDA and service provider levels, objections were raised to any DOL policy which would limit local options in contracting under 20 CFR 629.38(e)(2) or in the use of excess revenues/"profits" generated by public and private non-profit agencies through fixed unit price, performance-based agreements.

Since the DOL official policy interpretation is of the existing JTPA regulations at 20 CFR 629.38(e)(2) and not a rewriting of JTPA regulations, a number of commenters raised potential difficulties that could develop during the conduct of audits of JTPA activities by SDAs, States, and by other auditors, should auditors apply the interpretation rather than the JTPA regulation itself in determining whether specific costs incurred under fixed unit price, performance-based contracts were allowable costs.

In the "Basic Principles" section of the Final Official Policy Interpretation, DOL has clarified that the regulation at 20 CFR 629.38(e)(2) and other applicable regulations are the proper basis for audit findings. The JTPA regulations do, however, grant binding status to the guidelines adopted by the Governor "to the extent such as consistent with Act and applicable rules and regulations" (20 CFR 627.1), and establish the authority of State rules and regulations in determining the allowability of costs (20 CFR 629.37(a)). Therefore, recipients and subrecipients operating fixed unit price, performance-based agreements must comply with Federal law and regulations, and State laws, regulations and guidelines for the purpose of audit. Importantly, this includes all State and local procurement codes and requirements in effect at the time of a JTPA procurement.

While the official policy interpretation is not intended to serve as a separate standard for the purpose of conducting financial audits, it is the official interpretation of the Department's regulations and could be brought to bear in an audit. DOL will apply this interpretation nationwide through oversight of State JTPA systems and programs. States are to use this interpretation and related State policy issuances when monitoring SDAs and their subrecipients, and in other State oversight activities.

Prior to the September 29 Congressional hearing, the Department's OIG commented formally on the August 9 proposed policy, recommending that the JTPA regulation at 20 CFR 629.38(e)(2) be eliminated. The OIG noted its position was based on "the result of a significant amount of audit work in the area of JTPA fixed unit price contracting," and its concerns that the intent of Congress regarding Section 108 of JTPA, "Limitations on certain costs," be met. The Employment and Training Administration respects the OIG's perspective and its concerns for accountability, but has recognized since the summer of 1987 that any regulatory move to eliminate fixed unit price agreements written under 20 CFR 629.38(e)(2) so as to be chargeable 100 percent to the training cost category would be profoundly disruptive to the JTPA system, both philosophically and practically. As indicated in earlier publications, the Department is fully aware of the strong preference on the part of many PICs for a rewards-sanctions, payment for documented performance approach in the procurement of service providers. This philosophy evolved early in the implementation of JTPA, as an extension of the performance standards-driven design of the Act, and pursuant to rules and guidelines for allowability of costs and for procurement issued by States under the Governor's authority.

As a practical matter, it would not appear possible to eliminate the provisions of paragraph (e)(2) of § 629.38, without full consideration of the likely impact on SDAs at this time, nearly 5 years after JTPA was implemented. Small and mid-sized jurisdictions, which chose to become service delivery areas and are now fully institutionalized and have private-sector volunteers committed to locally directed programs, would experience a serious crisis if the flexibility of 20 CFR 629.38(e)(2) were eliminated, and local public or private resources were not available to subsidize overhead. Any decision to return to mandatory allocation of all contract costs, including those written as fixed unit price, performance-based agreements, would, in the Department's view, occur most appropriately at the time of future leigislative amendment, when this decision could be made in conjunction with overall considerations of the delivery system structure, the nature of costs, and desired program results.

The OIG further recommended in its comments that, should 20 CFR 629.38(e)(2) be retained, the regulation be amended to incorporate DOL's new clarifying language and standards of accountability directly into the regulation. The Employment and Training Administration (ETA) has openly discussed this possibility with the JTPA community during the dialogue of the past year, and has concluded that Federal efforts to obtain the cooperation of State and local partners to review and as necessary improve contracting practices have been largely successful. The response of the JTPA system, while frequently expressing misgivings about a perceived change in the Federal role, has impressed the Department with the commitment of the commenters to their programs, and the quality of study that has been directed towards the questions of performance contracting and procurement in general. It would appear that on a decentralized basis, States and SDAs have improved practices, initiated new policies, and have begun monitoring compliance with local, legally required procurement systems in a way that substantially addresses the OIG's valid interest in more complete accountability. The Department plans, resultantly, to take the OIG's recommendation for regulatory amendment under advisement, and await developments during the next program year to determine whether States, SDAs, and service providers have complied with the official interpretation of 20 CFR 629.38(e)(2), or whether a revision of the regulation specifying Federal-level definitions and controls is necessary.

Training Activities Chargeable Under 20 CFR 629.38(e)(2)

Taken together, commenters expressed strong support for the concept of core training in performance-based contracting, which may be either occupational training or basic skills/remediation training geared to make participants employment competent. In the final policy, DOL has clarified that the "retraining services" enumerated under Section 314(d)(1) of the Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) (Title VI Subtitle D. Pub. L. 100-418, 102 Stat. 1107) will satisfy this *core* training requirement, with the exclusion of out-of-area job search and relocation (Section 314 (d)(1), items (D) and (E)). The final policy also emphasizes that core training must be the primary purpose of contracts written under the 20 CFR 629.38(e)(2) regulation.

A number of commenters, especially at the SDA and service provider levels, argued that it is impractical and prohibitively burdensome for the Department's interpretation to require that each contract separately price each training curriculum to be provided under a contract charged per 20 CFR 629.38(e)(2). Contracts may be written for program-year long training services from a community college, for example, without knowing in advance the specific training needs and, thus, curricula that individual JTPA participants will require to successfully compete for local employment. The Department has decided to accept the rationale offered by several commenters that a tightly drawn proposal for training can be constructed, based on planned types of training to be offered, the duration of each type, and instructional, material and facility costs involved. Such a proposal can specify a proposed fixed unit price for each type of training curriculum, which then can be assessed for price reasonableness during the analysis of proposed costs required by the State/local procurement system, prior to award. The final official policy interpretation has been adjusted accordingly.

The Department reviewed comments on the proposed policy's requirement for specification of the elements of training packages charged under 20 CFR 629.38(e)(2). The Department believes that the training package concept as outlined contains sufficient flexibility for service providers to tailor an individual participant's program, while requiring the level of detail needed for proposers to construct a price and the JTPA procurement officers to determine price reasonableness.

The August 9 proposed policy under "Specifications for acceptable contracts" did not, in the view of many commenters, adequately allow for the realities of on-the-job training (OJT) agreements. As was the case earlier in the development of DOL's performance-based contracting policy, the arguments put forth suggested that DOL rethink its position. DOL has in the past assumed that OJT agreements would most naturally continue to be in the form of cost reimbursable contracts written directly with private employer trainers, or in the form of cost reimbursable general contracts written with one agency, community organization, or for-profit entity which in turn develops and writes specific OJT contracts with interested employers. Having shifted to the performance contracting mode as the preferred method, many SDAs and PICs contract the OJT portion of their overall JTPA system using fixed unit price, performance-based contracts. DOL's proposed policy requiring contract specificity in OJT would apply equally to any general OJT contract written by an SDA, and commenters

pointed out that the policy as proposed would effectively preclude a performance-based general contract enabling small-sized contracts, geographically dispersed with rural employers, and contracts for immediate training positions developed with employers on a short turn around basis.

The Department has strongly encouraged maximal use of OJT in JTPA programs, research under JTPA and previous program legislation having demonstrated that this method of training on the average to be the most effective pathway to placement, retention and long-term wage gain for eligible trainees. Further, DOL understands that a general contractor is frequently used to market OJT, develop contracts, and often provide centralized participant recruitment, counseling services, alternative placement, if needed, and retention followup. Consistent with DOL's present emphasis, a general contractor might be responsible to provide ancillary basic skill remediation which the harder-to-serve portion of the local JTPA-eligible population may require in order to successfully participate in OJT. Given these considerations, the section "Specifications for acceptable contracts" has been revised to include a new discussion on OJT contracts, which lays out guidelines for acceptable general contractor arrangements for OJT written on a fixed unit price basis under 20 CFR 629.38(e)(2).

Most commenters endorsed DOL's recommendation that States establish policies for performance-based agreements to be structured to serve more of the harder-to-serve in the local eligible population, through expanded skill remediation capabilities and adjustments to the unit price to reflect costs and performance risks undertaken in successfully training and placing such persons. Several commenters stated that focus on the harder-to-serve might deflect JTPA away from higher skill job opportunities and the technical training needed to prepare for these jobs. The challenge to prepare the JTPA population for emerging jobs is generally recognized in the employment and training community to be an unavoidable dynamic of the changing labor market, and "creaming" strategies or low-investment training interventions, while possible in the short run, will in the longer run fail both local employers and local JTPA-eligible jobseekers. PICs and SDA managers can use their procurement process, whether through cost reimbursement or fixed price, performance-based contracts, to refocus their JTPA system on longer term interventions. An SDA's proposal solicitation can specify not only increased investment of JTPA funds in training, but also put a premium on outside training, services, and support that a proposer may be able to leverage with JTPA dollars, for a total approach that better enables participants to remain in and benefit from longer skill training.

The August 9 proposed policy's provision regarding umbrella contracts (and contracts termed "blanket" and "comprehensive service") caused a number of SDAs and several States with large rural districts to disagree. The Department believes that it is possible to write broad-based training contracts carefully so that the contracts conform to all of the requirements for acceptable fixed price contracts chargeable to training under 20 CFR 629.38(e)(2), with additional effort in proposal development and in procurement review. If it does not appear possible to conform with these guidelines within a given locality, it is not acceptable to the Department that such agreements be entered into, reflecting a lack of the full specificity regarding deliverables which is required for any contract to be priced during procurement. The Department will not make it easy to contract for undefined services by condoning the use of the administrative cost flexibility under 20 CFR 629.38(e)(2), so that such a contract is chargeable 100 percent to the training cost category. No change has been made, therefore, in this provision for the final policy interpretation.

Payments to Contractors

The body of comments on this section of the proposed policy were reviewed to determine what adjustments, in balance, should be made to arrive at a responsible final policy. The Department has made several adjustments.

On the question of the amount of the total contract that should be held back to "ride" on the full performance, placement record of the contractor, a national organization and a number of service providers expressed concern that SDAs and other contracting agencies may establish excessively high holdbacks that could drive service providers without other cash reserves out of the JTPA business. DOL understands the argument that excessively close-fisted policies also can actually drive up unit prices for the same deliverables, as a result of greater payment delay and carrying costs for those contractors willing to bid. Language has been added to the provision on payments withheld to suggest that States and SDAs consider these possible disincentives to community based service providers when establishing or revising their holdback policies.

One commenter raised an important question regarding the need of recipients and subrecipients to maintain records allowing for the proper allocation of costs charged to JTPA should a fixed unit price, performance-based contract be found not to have met the provisions specified at 20 CFR 629.38(e)(2), or should the contract have failed to meet a preestablished performance threshold and not qualify under State/SDA rules to be charged 100 percent to the training cost category.

In considering this comment, DOL has reviewed requirements that have applied to all of JTPA since the inception of programs under the Act. The March 15, 1983 regulations [48 FR 11080–11083] contain a number of important references to the types of records necesary for a subrecipient to collect and maintain in order to demonstrate compliance with the Act and those rules, interpretations and definitions adopted by the State in accordance with the Governor's authority (20 CFR 627.1). At 20 CFR 629.35, in paragraph (a), the Governor is directed to ensure that financial systems within the State provide fiscal control and accounting procedures sufficient to permit the tracing of expenditures to establish that funds have not been used in violation of any restrictions on their use. Paragraphs (e) through (f) of this subsection indicate the State's responsibility to see that all financial, participant and others records and supporting documentation are maintained for a period of three years.

The JTPA regulation at 20 CFR 629.38(a) and (b) provides that allowable costs shall be charged against the training, administration, and participant support cost categories, and properly allocated. Paragraphs (c) and (d) outline the Governor's responsibility to ensure that programs administered at the State level and the SDA level "plan, control, and charge expenditures against the afforementioned cost categories." This same language is repeated at 20 CFR 631.13(a)(1) and (2), in "Additional Title III Administrative Standards and Procedures." Therefore, States have an ongoing responsibility to issue specific cost accounting and recordkeeping requirements to SDAs and statewide programs within the State, so that all JTPA programs, including those contracted for on a fixed unit price, performance basis, can demonstrate expenditures have been controlled against applicable cost limits.

A related recordkeeping requirement regards the treatment of program income under State rules. Since as discussed elsewhere in this policy interpretation, revenue in excess of cost accrued by public and private non-profit agencies through performance-based agreements has been determined by DOL to be program income, State accounting and recordkeeping requirements established under 20 CFR 629.32, "program income" are to include a method for determining what amount of program income has been accrued by contractors, and a method for maintaining records on the expenditure of such income.

A number of commenters indicated difficulty accommodating themselves to the failed contract concept which was strongly recommended under "Threshold for Contract Performance in Order to Qualify for Provisions at 20 CFR 629.38(e)(2)." Among these commenters were several who make a strong case that "failed contracts" is in fact a front-end, procurement award problem, and noted that improved proposal review should eliminate service providers incapable of placement results. Other stated that contractors who achieve unacceptably low placement records will, under local SDA policies, earn very little payment. The Department introduced the concept in the August 9 publication precisely because it has been seen possible under some payment policies for a contractor to fail to place most participants per a performance contract's goals, but still be substantially reimbursed for costs.

In this circumstance, the Department does not believe the contract to be truly "performance based" and, therefore, concludes that the cost of such a failed contract should be allocated among the regular JTPA cost categories of administration, services, and training. In the proposed policy, the Department did not peg a performance threshold at which "failure" occurs, considering this question one best taken up by States and SDAs in the context of improvements to their procurement systems. Some SDAs with smaller allocations have indicated that the size of their normal 15 percent administrative budget does not allow much leeway should a contract written under 20 CFR 639.38(e)(2) be later deemed to fail, and find unacceptable the fiscal uncertainly that they might inadvertently exceed their administrative allowance and owe the Federal Government for an overexpenditure. After weighing these comments, the Department has adjusted the wording for this provision from "strongly recommends" to "recommends", with the suggestion that jurisdictions not able to incorporate this provision recognize the particular emphasis they must place on proposal review and on sound practices for payments earned prior to full performance.

The Department does not believe it prudent to endorse non-contingent benchmark payments for intake, enrollment, and assessment activities performed by contractors. Local policies can provide for up-front advances to contractors needing funds to cover this portion of their program, and advances can be offset by contractor earnings once measurable benchmarks involving participant attainments in actual training are achieved. On the other hand, the Department having accepted the extensive arguments offered by States, SDAs, and national organizations that benchmark payments for measurable pre-placement attainments could be legitimately earned if payment was made for documented benchmarks, there would appear to be no benefit to now encourage or require States to adopt policies advocated by one commenter which would treat all payments prior to full performance as a form of advance, not earned but contingent on placement.

In response to a number of commenters, the Department still believes that the matter of trainees who drop out prior to completing their training but who self-place in the general occupational field is relevant in determining what a contractor might earn for providing a segment of training before the participant quit the program and, therefore, should logically be reflected in a reduced full payment.

Revenues in Excess of Costs Accrued by Public and Private Non-Profit Agencies

The Department believes that the position taken in the August 9 proposed policy interpretation is the right position, and is not dissuaded from its position by comments received from a number of respected sources in the JTPA community. Properly earned revenues in excess of costs realized by public and private non-profit agencies through the provision of JTPA services under performance-based contracts should properly be classified as program income, and administered consistent with the purposes of JTPA and in accordance with State policy. The principle of gain is maintained; an agency earning program income has the flexibility to expand its JTPA activities, initiating additional training or experimenting with new training approaches. The concept of free-use profit, which could be diverted from JTPA purposes to other functions and purposes of an agency, is not acceptable to DOL nor to Congressional commenters, regardless of the worth of many of the intended non-JTPA related uses that have been described. The Department agrees with a number of commenters that the question of excessive profits is a separate and important question, applying equally to contracts with private for-profit service providers as well as private non-profit and public agencies excessive profits are controlled through strong procurement systems, which emphasize competition whenever possible; which require proposals to specify all training, services and other deliverables to be provided; which require contracts to be carefully written to preclude low-option services billed as full price interventions; and which carefully evaluate the reasonableness of proposed costs before contracts are awarded. To preserve the soundness of the JTPA system, it is necessasry both to ensure that contractor profits are reasonable, given the risks and costs involved, and that public and private non-profit sector organizations do not divert JTPA's limited resources for other purposes.

Official Interpretation of the Requirements of 20 CFR 629.38(e)(2)

Basic Principles of the Department in Establishing an Official Policy Interpretation:

—The Department of Labor's overall objective is to provide operational guidance within the framework of the current 20 CFR 629.38(e)(2) regulation, but proper administration of performance-based contracts calls for the establishment of some new policies, which DOL will recommend for State adoption.

—Since the purpose of the policy interpretation is to provide operational guidance on the application of fixed unit price contracting under the existing JTPA regulation at 20 CFR 629.38(e)(2), it should be clarified that DOL did not prepare the policy interpretation to serve as a standard for conducting financial audits, but as the official interpretation of the Department's regulations, this policy could be brought to bear in an audit. Also, it should be noted that financial audits will continue to be performed based on the requirements of Federal law, the JTPA Act and regulations, and compliance with State law, State/local procurement codes and other applicable State/local policies (including provisions governing competition, sole-source awards,

proposal evaluation, documentation of the reasonableness of proposed costs, etc.). All State regulations and official policies issued pursuant to the Governor's authority to establish within-State requirements for JTPA programs provide an appropriate, legally binding basis for State and Federal financial audits.

—DOL will apply this policy interpretation through its oversight of State JTPA systems and program administration. States are to utilize the DOL policy interpretation and any related State policy issuances in conducting monitoring and State oversight of SDAs and subrecipients. DOL will also apply the policy interpretation in the field through the special review work and in-depth program reviews DOL conducts at the State and substate levels from time to time.

—There is no entitlement on the part of the system to the use of performance-based contracts per 20 CFR 629.38(e)(2). It is available only if DOL and State specifications for these contracts are met.

—Performance-based contracting can enhance the capabilities of the JTPA system only when it is implemented carefully within the structure of good State/SDA procurement systems and policies. Poor procurement systems, or failure to comply fully with systems undermines the validity of the concept. Performance-based agreements should be procured competitively, whenever practicable. It is the Department's expectation that sole-source procurements will be made in an objective manner and fully documented, in accordance with sound State/SDA systems.

—The Department continues to maintain that properly written, performance-based contracts under 20 CFR 629.38(e)(2) are not required to separately report or break out administrative costs for reimbursement or routine accounting purposes. However, as provided under JTPA regulations at 20 CFR 629.35 and subsections 629.38(a) through (d) and 631.13(a), sufficient records must be maintained to allow costs to be properly charged should the contractor fail to meet the provisions of 20 CFR 629.38(e)(2) or applicable State procurement policy.

—In exchange for the advantage offered by the performance contracting mode, the JTPA system must accept that risk is an inherent feature, both for service providers and SDAs.

—DOL is committed to maintaining the opportunity for rewards and incentives for successful operators, but recognizes that public and private non-profit agency excess revenue accruing from contracts must remain within the JTPA system.

—The new policy framework for performance-based contracts should be undertaken within the context of current policy objectives for the JTPA system, namely: increase the level of participation of at-risk populations in the program; increase the quality of the training intervention; expand the amount of basic skills training being provided; and thus improve the quality of placements for JTPA participants.

—The Department has undertaken the establishment of new policy on performance-based contracting collegially, making clear DOL objectives and DOL's rethinking and reformulation of issues, with the goal that the JTPA system fully understand and accept DOL's objectives even if there is not full agreement on all aspects of the Department's interpretation.

—Explicit instruction needs to be provided by both DOL and States on the elements necessary for an acceptable performance-based contract.

—It is clear that technical assistance is needed for procurement in general and specifically for the new performance-based contracting policy. This may include assistance to States in setting rules.

States and SDAs should implement DOL's interpretations and policy guidance regarding 20 CFR 629.38(e)(2) within the framework of the principles stated above.

Elements of the Department's Interpretation

I. Training Activities Chargeable

A. Definition of allowable adult and youth training activities for the purposes of 20 CFR 629.38(e)(2):

• Training must consist of a core of either occupational training or basic skills/remediation training, or both. For programs authorized under the EDWAA amendments to JTPA, core training will consist of the activities authorized under JTPA section 314(d)(1), "retraining services", with the exclusion of out-of-area job search and relocation (section 314(d)(1), items (D)(E)). The provision of core training activities must be the primary purpose of contracts written under this regulation governing fixed unit price, performance-based agreements charged 100 percent to the JTPA cost category.

• All training must be geared to make participants employment compentent and must be tied to a specific or a general occupational target. This training need not involve a specific job title, but can encompass a range of jobs with similar entry requirements.

• Placement must be at or above the specific wage in the agreement, and reflect an appropriate entry wage rate for the specific or general occupational target, given the relative skill level of trainees. Again, this can mean a range of jobs. For example, the skills needed for a data entry technician allow entry into jobs with different occupational titles and types of companies.

B. Clarification of the allowability of training packages for the purposes of 20 CFR 629.38(e)(2):

Acceptable elements may include but are not limited to outreach, intake, skill assessment and employability development planning, participant services, basic skills development, counseling, pre-employment/work maturity training, job search assistance, and followup services, provided that a core of basic skills and/or specific occupational training per I.A. above is the primary purpose of the contract. Also, the program must be designed for all participants to receive the core training.

C. Specifications for acceptable fixed unit price, performance-based contracts:

• In general, these contracts are to be written in accordance with sound procurement practices and applicable codes. This includes methods for assuring arm's length negotiation of contracts, proposal review which verifies and documents the reasonableness of proposed costs, and, whenever possible, competition for award.

• Each contract must clearly list and separately price each type of training curriculum to be provided. Curricula are to be priced by type, duration, and other factors governing instructional costs, material costs, or facility costs, and each contract must specify the fixed unit price of each type of planned training.

All elements constituting the training package must be clearly spelled out in the contract. This includes the course schedule for each element, the hours and/or the numbers of weeks of training, the expected number of participants who would require the element, the policy regarding non-completers and the measurable outcome.

• Pursuant to State/SDA policies, the contract must clearly indicate the organization which is providing the training, participant services and administration being charged to the contract. Care is to be given to assuring

that only those administrative costs attributable to the training are chargeable under the contract. However, DOL is not promulgating a Federal requirement stipulating that performance-based contract document separately list administrative costs, or requiring a separate reporting of actual administrative costs.

• Job Search Assistance (JSA) designs. Services and participant sequences that do *not* involve core training per I.A. above such as JSA-only interventions, are not chargeable under the 20 CFR 629.38(e)(2) regulation.

• On-the-Job Training (OJT). When written as fixed unit price, performance-based contracts rather than as cost-reimbursable agreements, it is recommended that contracts for OJT be written directly with the employer or other service provider whenever possible, particularly in the case of large contracts and those developed in advance. However, in order to facilitate the writing of small OJT agreements, especially contracts for one or small groups of trainees and to facilitate offering OJT through interested employers across large, less populated SDAs, it is also acceptable for OJT agreements to be developed during the program year pursuant to one general contract with a public agency, community based organization, or other JTPA service provider, provided that the general contract specifies the types and duration of OJT to be developed and other services to be performed so that proposed costs can be fairly analyzed, and that the awarding of the general contract is in accordance with State/local procurement requirements. Additionally, a general contract for OJT must identify whatever outreach, recruitment, participant training, counseling, placement, followup or other services the general contractor agrees to provide within its own organization, what will be provided by the employers actually conducting the OJT, and what planned services may be provided with or without cost by the other agencies and subcontractors. The general contractor must be required to ensure the reasonableness of all elements of subcontractor cost, and document its subcontract negotiations.

In addition to clear delineation of deliverables, providers, and costs, a general contract for OJT must be priced using some rational method, for example, based on local historical costs for OJT, and factoring in the cost of any enhancements through outside skill remediation or any new services planned to improve upon local OJT quality and placement retention.

• Further, it is strongly recommended that States establish policies for performance-based contracts to be designed to accommodate and encourage service to more at-risk populations. This might involve an additional adjustment to the unit price to provide increased financial incentive for training and placing a more at-risk population.

D. Allowability of Umbrella Contracts:

All contracts, including umbrella, blanket, or comprehensive service contracts must meet the requirements of elements I.A., B., and C. above in order to qualify for the cost charging provisions under 20 CFR 629.38(e)(2). The costs of fixed unit price, performance-based agreements which do not satisfy these requirements must be allocated among the normal JTPA cost categories of training, participant support, and administration.

E. Clarification Regarding Training Packages for Youth:

Contracts may be written under 20 CFR 629.38(e)(2) for training packages for youth, which stipulate full performance as attainment of one or more PIC-recognized competency skill areas per the list of positive outcomes found in Section 106(b)(2) of JTPA, or if the training results in employment.

II. Payments to Contractors Under 20 CFR 639.38(e)(2)

A. Full Payment. Full payment of the full unit price must be contingent upon:

• Completion of training;

• Placement in the occupation trained for or within a general occupational target;

• At not less than the wage rate specified in the agreement.

Also, the Department recommends (but does not require) that States/SDAs set a policy indicating this wage rate should reflect the entry level wage for the occupational target.

• The agreement must provide for a method to reduce payment in cases where individuals do not complete the training but do place successfully in an occupation specified, or complete the training and are placed below the specified wage level. For example, a participant is word processing drops out in the fifth week of a 10-week training program, but obtains a training related job within the general occupational target at or above the specified wage.

Further, the Department recommends (but does not require) that State/SDA policies provide that participants who leave before entering core training per I.A. above either

—Cannot be the basis of any payment earned by the contractor; or

—Are only the basis for earned payments that are apportioned or prorated among the regular JTPA cost categories, and not charged 100 percent to training.

B. Partial earned payments for attainment of performance benchmarks. The Department has determined that in specific circumstances performance short of full peformance/placement can be the basis of earned payments for partial performance when:

• The performance is measureable and documented and include training per I.A. above;

• The payment schedule amount for any intermediate benchmark is not more than the estimated costs of providing that increment of the planned training. However, the subtotal of possible payment schedule amounts for all performance benchmarks prior to full performance/placement must be clearly less than the point at which the contractor's costs are covered, in order to ensure the principle of contractor risk and to stimulate contractor performance to earn full payment.

• Costs associated with intake, enrollment and assessment activities alone without participation in core training can not be the basis of earned benchmark payments chargeable 100 percent to the training cost category per 20 CFR 629.38(e)(2).

C. Advance Payments. All payments made to contractors prior to full performance/placement that do not conform to the above requirements for benchmarks must be considered advances contingent on the full performance/placement record of the contract.

D. Guidance on Payments to be Withheld Prior to Full Performance. Whether payments made to contractors prior to full performance/placement are advance payments or partial earned payments for the attainment of performance benchmarks, in principle a significant portion of the total fixed price should be held back until earned through placement. States and SDAs have latitude to adjust the amount held back to accommodate longer-term and more intensive programs serving at-risk populations, recognizing the operational needs of contractors for funds. As a matter of general guidance, an amount equal to 25 to 30 precent of the total contract cost would appear to be a prudent and significant holdback level, well below reimbursement of total contractor expenses, and insuring that contracts are consistent with the

performance-based contracting concept of risk prior to full performance.

Conversely, States and SDAs should recognize the disincentive effect that parsimonious payment policies and holdbacks might have on their potential JTPA service providers. A balance needs to be struck between natural PIC/SDA interests in ensuring contractor performance, and good judgment in administering policies that are amenable to responsible potential deliverers, including community based organizations.

E. Threshold for Contract Performance in Order to Qualify for Provisions at 20 CFR 629.38(e)(2).

In the Department's consideration of payment issues, it was determined that there is a level of contract placement performance below which the contract should be viewed as failed. Failed contracts should not be afforded under State/SDA policies the advantage of assigning all costs to training according to the provisions of 20 CFR 629.38(e)(2). Therefore, the Department recommends (but does not require) that States and SDAs define a threshold level of placement performance below which a performance-based contract written under 20 CFR 629.38(e)(2) would be determined to have failed. States and SDAs should establish procedures for properly charging of all costs of such failed contracts among the regular three JTPA cost categories. This threshold level should be appropriately specified, taking into account greater or lesser contractor risk in terms of length, complexity of training, and the population to be served by a contract.

F. Direct Contracts Versus Tiered Administrative Structures. Contracts which qualify for the cost allocation provisions of 20 CFR 629.38(e)(2) are contracts for the direct provision of training by an agency, institution, or business, and must not, with the exception of OJT as dicussed in section I. of this policy interpretation, involve intermediary administrative entities. Such an entity, if needed, are to be charged to the administrative cost category. This element of DOL's interpretation does not preclude subcontracting on a fee payment or on a cost reimbursement basis by the training contractor of some specialized client services if this is determined to be more effective and efficient, and is authorized by State/SDA policies and the contract document.

III. Revenues in Excess of Costs, or "Profits"

Public or private non-profit contractor revenues in excess of costs (which have been properly earned) are to be treated as program income pursuant to 20 CFR 629.32. Accordingly, these funds may be retained by the service provider (or by the SDA or the Governor) to underwrite additional training or training related services pursuant to the project or program which generated them, consistent with the purposes of JTPA. As with other JTPA program income, contractors are to comply with State accounting and recordkeeping requirements, so that the amount of program income accured by the contractor can be determined, and the contractor maintains records which account for the use of these funds, in anticipation of possible audit.

Conclusion

The above final official policy interpretation on contracting under the 20 CFR 629.38(e)(2) regulation follows a long consultative process during which the Department, and later other Federal agencies, have presented concerns regarding the acceptability of some of the applications extant in the JTPA system, and have raised larger and related questions about procurement practrices in general, and what training the JTPA system produces for eligible persons needing training and jobs. States, SDAs and private sector volunteers who partner with the Federal Government and make JTPA happen have shared a considerable amount of information with the Department describing the realities of training contracts, and how they believe the flexibility 20 CFR 629.38(e)(2) can be legitimately used. Commenters have touched on nearly all aspects of program operations in their correspondence, given the extent of performance contracting today. The Department appreciates the great amount of thinking that went into the response from the system, and particularly the effort to have performance-based contracting understood in context. DOL believes that States and SDAs have exhibited a willingness to respond not only with discussion, but with changes and improvements that are now completed or in progress. The dialogue has been very educational for DOL, and as the Department developed a better understanding, it has been possible to update the agency's thinking on performance contracting and adopt modified policies without losing sight of Federal concerns for sound and defensible practices. The process of developing the final policy interpretation has been brought to this point without a modification to the present JTPA regulation at 20 CFR 629.38(e)(2), or a change in the basic partnership arrangement for the administration of JTPA which the 1983 regulations established.

Signed at Washington, DC, this 8th day of March 1989.

Roberts T. Jones,

Assistant Secretary for Employment and Training.

[FR Doc. 89-5757 Filed 3-10-89; 8:45 am]

BILLING CODE 4510-30-M

Mine Safety and Health Administration

[Docket No. M-89-16-C]

SBM Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

SBM Coal Company, R.D. 2, Box 97A, Hegins, Pennsylvania 17938 has filed a petition to modify the application of 30 CFR 75.1400 (hoisting equipment; general) to its M & R Slope (I.D. No. 36-05495) located in Northumberland County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that cages, platforms or other devices which are used to transport persons in shafts and slopes be equipped with safety catches or other approved devices that act quickly and effectively in an emergency.

2. Petitioner states that no such safety catch or device is available for the steeply pitching and undulating slopes with numerous curves and knuckles present in the main haulage slopes of this anthracite mine.

3. Petitioner further believes that if "makeshift" safety devices were installed they would be activated on knuckles and curves when no emergency existed and cause a tumbling effect on the conveyance.

4. As an alternate method, petitioner proposes to operate the man cage or steel gunboat with secondary safety connections securely fastened around the gunboat and to the hoisting rope, above the main connecting device. The hoisting ropes would have a factor of safety in excess of the design factor as determined by the formula specified in the American National Standard for Wire Rope for Mines.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office

of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before April 12, 1989. Copies of the petition are available for inspection at that address.

Dated: March 2, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-5751 Filed 3-10-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-18-C]

Whitley Gap Mining, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Whitley Gap Mining, Inc., P.O. Box 120, Gray, Kentucky 40734 has filed a petition to modify the application of 30 CFR 75.313 (methane monitor) to its Mine No. 1 (I.D. No. 15-16210) located in Knox County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a methane monitor be installed on electric tractors used to load coal at the face. The monitor is required to be kept operative and properly maintained and frequently tested.

2. No methane has been detected in the mine.

3. The three-wheel tractors are permissible DC-powered machines, with no hydraulics. The bucket is a drag type, where approximately 30-40% of the coal is hand loaded. Approximately 20% of the time that the tractor is in use, it is used as a man trip and supply vehicle.

4. As an alternate method, petitioner proposes to use hand-held continuous oxygen and methane monitors instead of methane monitors on three-wheel tractors. In further support of this request, petitioner states that:

(a) Each three-wheel tractor would be equipped with a hand-held continuous monitoring methane and oxygen detector and all persons would be trained in the use of the detector;

(b) Prior to allowing the coal loading tractor in the face area, a gas test would be performed to determine the methane concentration in the atmosphere. When the elapsed time between trips does not exceed 20 minutes, the air quality would be monitored continuously after each trip. This would provide continuous monitoring of the mine atmosphere for methane to assure the detection of any methane buildup between trips;

(c) Each monitor would be removed from the mine at the end of the shift, and would be inspected and charged by a qualified person. The monitor would also be calibrated monthly.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before April 12, 1989.

Copies of the petition are available for inspection at that address.

Date: March 2, 1989.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 89-5752 Filed 3-10-89; 8:45 am]

BILLING CODE 4510-43-M

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Agency Information Collection Activities Under OMB Review

AGENCY: National Endowment for the Arts.

ACTION: Notice.

SUMMARY: The National Endowment for the Arts (NEA) has sent to the Office of Management and Budget (OMB) the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATE: Comments on this information collection must be submitted by April 12, 1989.

ADDRESSES: Send comments to Mr. Jim Houser, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., Room 3002, Washington, DC 20503; (202-395-7316). In addition, copies of such comments may be sent to Mrs. Anne C. Doyle, National Endowment for the Arts, Administrative Services Division, Room 203, 1100 Pennsylvania Avenue, NW., Washington, DC 20506; (202-682-5401).

FOR FURTHER INFORMATION CONTACT: Mrs. Anne C. Doyle, National Endowment for the Arts, Administrative Services Division, Room 203, 1100 Pennsylvania Avenue, NW., Washington, DC 20506; (202-682-5401) from whom copies of the documents are available.

SUPPLEMENTARY INFORMATION: The Endowment requests a review of a new collection of information. This entry is issued by the Endowment and contains the following information:

(1) The title of the form; (2) how often the required information must be reported; (3) who will be required or asked to report; (4) what the form will be used for; (5) an estimate of the number of responses; (6) the average burden hours per response; (7) an estimate of the total number of hours needed to prepare the form. This entry is not subject to 44 U.S.C. 3504(h).

Title: Resource Information/ Accessible Programs.

Frequency of Collection: Annually.

Respondents: State or local governments.

Use: Materials and information compiled will be used to assist Endowment grantees in making their programs more available to special constituencies. Individuals requiring assistance would be referred to a specific program in their state or region and/or sent copies of the information provided.

Estimated Number of Respondents: 56.

Average Burden Hours per Response: 2.

Total Estimated Burden: 112.

Anne C. Doyle,

Administrative Services Division, National Endowment for the Arts.

[FR Doc. 89-5729 Filed 3-10-89; 8:45 am]

BILLING CODE 7537-01-M

NATIONAL SCIENCE FOUNDATION

Meeting; Engineering Advisory Committee

The National Science Foundation announces the following meeting:

Name: Advisory Committee for Engineering.

Date and Time:

March 30-31, 1989

9:30 a.m.-4:45 p.m., March 30, 1989 (open)

8:00 a.m.-9:00 a.m., March 31, 1989 (closed)

9:00 a.m.-12:00 Noon, March 31, 1989 (open)

Place: National Science Foundation, 1800 "G" Street, NW., Room 540, Washington, DC 20550.

Type of Meeting: Partially Closed.

Contact Person: Mrs. Mary Poats, Executive Secretary, Advisory Committee for Engineering, Room 537, National Science Foundation, Washington, DC 20550, Telephone: (202) 357–9571.

Minutes: Mrs. Mary Poats at the above address.

Purpose of Meeting: To provide advice, recommendations, and counsel on major goals and policies pertaining to Engineering programs and activities.

Reason for Closing: The personnel matters being discussed include information of a personal nature where disclosure would constitute unwarranted invasions of personal privacy. These matters are within exemption 6 of U.S.C. 552b(c), Government in the Sunshine Act.

Authority to Close Meeting: The determination made on February 22, 1989 by the Director of the National Science Foundation pursuant to the provisions of section 10 (d) of Pub.L. 92–463.

Agenda:

Friday, March 31, 1989, Room 540—8:00 a.m. to 9:00 a.m.—Closed

Discussion of personnel issues.

Thursday, March 30, 1989, Room 540—9:30 a.m. to 4:45 p.m., and Friday, March 31, 1989, Room 540—9:00 a.m. to 12:00 Noon—Open

Discussion on issues, opportunities and future directions for the Engineering Directorate; discussion of Engineering Directorate budget situation as well as other items.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 89–5676 Filed 3–10–89; 8:45 am]

BILLING CODE 7555-01-M

Advisory Panel For Physiological Processes; Meeting

In accordance with the Federal Advisory Committee Act, as amended, Pub. L. 92 463, the National Science Foundation announces the following meeting:

Name: Advisory Panel for Physiological Processes.

Date and Time: April 3–7, 1989 8:30 a.m. to 5:00 p.m.

Place: Room 1243, National Science Foundation, 1800 G Street NW., Washington, DC 20550.

Type of Meeting: Part Open—

April 4–12:00 p.m.–1:00 p.m. (open)

April 5–12:00 p.m.–1:30 p.m. (open)

April 6–12:00 p.m.–1:00 p.m. (open)

All other times the meeting is closed.

Contact Person: Dr. Ernest J. Peck, Program Director, Physiological Processes, Room 321, National Science Foundation, Washington, DC 20550, Telephone (202) 357–7975.

Purpose of Advisory Panel: To provide advice and recommendations concerning support for research in Physiological Processes.

Agenda:

Open—General discussion of the current status and future plans of the Physiological Processes Program.

Closed—To review and evaluate research proposals as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are within exemptions (4) and (6) of 5 U.S.C. 552b(c), Government in the Sunshine Act.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 89–5677 Filed 3–10–89; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

Documents Containing Reporting or Recordkeeping Requirements; Office of Management And Budget Review

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the Office of Management and Budget review of information collection.

SUMMARY: The Nuclear Regulatory Commission has recently submitted to the Office of Management and Budget (OMB) for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

1. Type of submission—new, revision, or extension: Extension.

2. The title of the informaiton collection: Reactor Operator and Senior Rector Operator Licensing Training and Requalification Programs.

3. The form number if applicable: N/A.

4. How often the collection is required: Semi-annually and annually.

5. Who will be required to asked to report: All reactor licensees and applicants for an operating license.

6. An estimate of the number of responses: 200 annually.

7. An estimate of the total number of hours needed to complete the requirement or request: 1,689 annually; approximately 7.7 hours per response.

8. Section 3504(h), Pub. L. 96–511 does not apply.

9. Abstract: Requests copies of training and requalification material from reactor licensees/applicants. This training material will be used by appropriate NRC staff to develop operator and senior operator licensing and requalification examinations.

ADDRESS: Copies of the submittal will be made available for inspection or copying for a fee at the NRC Public Docment Room, 2120 L Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Comments and questions can be directed by mail to the OMB reviewer: Nicolas B. Garcia, Paperwork Reduction Project (3150–0101), Office of Management and Budget, Washington, DC 20503.

Comments can also be communicated by telephone at (202) 395–3084.

NRC Clearance officer is Brenda J. Shelton, (301) 492–8132.

Dated at Bethesda, Maryland, this seventh day of March, 1989.

For the Nuclear Regulatory Commission.

Joyce A. Amenta,

Designated Senior Official for Information Resources Management.

[FR Doc. 89–5704 Filed 3–10–89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 40–8064]

EXXON Coal and Minerals Co.; Final Finding of No Significant Impact Regarding Termination of the Source and Byproduct Material License for Operation of Highland In-Situ Pilot Test Project, Converse County, WY

March 2, 1989.

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of final finding of no significant impact.

1. Proposed Action

The proposed administrative action is to terminate the source and byproduct material license authorizing Exxon Coal and Minerals Company to operate the Highland In-situ Pilot Test Project facility located in Converse County, Wyoming.

2. Reasons for Final Finding of No Significant Impact

The Exxon Highland Pilot Test Project operated from 1978 to 1981. Groundwater restoration activities began in 1981 and continued until 1986. The

staff's evaluation and approval of restoration activities is documented in a memorandum dated October 19, 1987.

The NRC staff approved a decommissioning plan for the Highland Project on March 16, 1988. Facility decommissioning activities were conducted between July and September 1988. The staff review of the decommissioning activities is documented in a memorandum dated March 2, 1989. Exxon requested that remaining facilities and responsibilities at the stie be transferred to Everest Minerals Corporation, holder of Source and Byproduct Material License No. SUA–1511. Everest Minerals Corporation agreed to accept full responsibility for all remaining facilities by letter dated October 20, 1988.

Based on the staff reviews referenced above, the Commission has determined that no significant impact will result from the proposed administrative action. The following statements support the final finding of no significant impact and summarize the conclusions resulting from the environmental evaluations.

A. Ground-water quality at the site has been restored to background levels.

B. Facility decommissioning activities were conducted in accordance with an NRC-approved plan.

C. Remaining facilities and responsibilities at the site were transferred to Everest Minerals Corporation by issuance of an amendment to Source Material License No. SUA–1511 on February 17, 1989.

In accordance with 10 CFR Part 51.33(a), the Director, Uranium Recovery Field Office (URFO), made the determination to issue a final finding of no significant impact in the **Federal Register**. Concurrent with this finding, Source Material License SUA–1064 for the Exxon Highland Pilot Test Project will be terminated.

The environmental evaluations setting forth the basis for the finding are available for public inspection and copying at the Commission's Uranium Recovery Field Office at 730 Simms Street, Golden, Colorado, and at the Commission's Public Document Room at 1717 H Street, Washington, DC.

Dated at Denver, Colorado, this 2d day of March, 1989.

For the Nuclear Regulatory Commission.

Edward F. Hawkins,

Branch Chief, Uranium Recovery Field Office, Retion IV.

[FR Doc. 89–5705 Filed 3–10–89; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF MANAGEMENT AND BUDGET

Circular No. A–76; Amendment

AGENCY: Office of Management and Budget.

ACTION: Issuance of Transmittal Memorandum No. 8 amending OMB Circular No. A–76, "Performance of Commercial Activities."

SUMMARY: This Notice contains Transmittal Memorandum No. 8, dated March 1, 1989, to Circular No. A–76, "Performance of Commercial Activities."

This Transmittal Memorandum updates the federal pay assumptions and updates the inflation factor used for computing non-pay categories (supplies, equipment, etc.) for Fiscal Years 1990 through 1994 to reflect the assumptions contained in the President's FY 1990 Budget.

The inflation factor for non-pay categories for 1994 is new. Figures for 1990 through 1993 remain at the rates specified in Transmittal Memorandum No. 6, dated March 4, 1988.

The revision does not require any agency to (1) create or maintain a duplicative control/monitoring/reporting system or (2) adopt any additional controls, not presently in compliance with the Federal Acquisition Regulations (FAR).

FOR FURTHER INFORMATION CONTACT: Linda Mesaros, Office of Federal Procurement Policy, Office of Management and Budget, (202) 395–3300.

Allan V. Burman,

Deputy Administrator and Acting Administrator.

Dated: February 28, 1989.

[FR Doc. 89–5646 Filed 3–10–89; 8:45 am]

BILLING CODE 3110–01–M

POSTAL SERVICE

Privacy Act of 1974; New System of Records

AGENCY: Postal Service.

ACTION: Notice of new system of records.

SUMMARY: The purpose of this document is to publish advance notice of the creation of a new system of records, USPS 040.030, "Customer Programs—Auction Customer Address File." The system will contain names and addresses of persons who wish to be on a mailing list to receive advance notice of Dead Parcel Branch auctions.

EFFECTIVE DATE: The proposed action will be effective without further notice on May 12, 1989, unless comments are received which would result in a contrary determination.

ADDRESS: Comments may be mailed to the Records Office, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–5010, or delivered to Room 10670 at the above address between 8:15 a.m. and 4:45 p.m. Comments received also may be inspected during the above hours in Room 10670.

FOR FURTHER INFORMATION CONTACT: Betty Sheriff (202) 268–5158.

SUPPLEMENTARY INFORMATION: Dead Parcel Branches of the Postal Service must periodically conduct public auctions to dispose of unclaimed merchandise and claim-paid items. The proposed system of records will comprise a list of names and addresses of auction attendees and others who indicate a desire to be notified in advance of future auctions. Advance notice to interested persons performs a customer service while optimizing revenue from auctions conducted to dispose efficiently of dead parcel matter.

Customers desiring this service will enter their name and address on a sheet available at each auction. That information will be transferred onto an automated address file which will be accessible only by Dead Parcel Branch personnel responsible for maintaining the file and making the mailings. The possibility of infringement upon any individual's privacy rights is almost non-existent since the information collected is limited to names and addresses, is password-protected, and is subject to both the disclosure restrictions imposed by the Privacy Act as well as the Postal Reorganization Act (39 U.S.C. 412) which prohibits the Postal Service from releasing lists of postal customers.

A new system report, as required by 5 U.S.C. 552a(o) of the Privacy Act, has been submitted to OMB and Congress, pursuant to paragraph 4b of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated December 12, 1985.

Accordingly, the proposed system description follows:

USPS 040.030

System Name:

Customer Programs—Auction Customer Address File.

System Location:

Post offices having Dead Parcel Branches.

Categories of Individuals Covered by the System:

Customers who wish to be on a mailing list to receive notices of future Dead Parcel Branch auctions.

CATEGORIES OF RECORDS COVERED BY THE SYSTEM:

Customer names and addresses.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C 401, 404.

PURPOSES(S):

To maintain a list of names and addresses of customers who wish to be on a mailing list to receive notices of future Dead Parcel Branch auctions.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. When the Postal Service becomes aware of an indication of a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, or in response to the appropriate agency's request upon a reasonable belief that a violation has occurred, the relevant records may be referred to the appropriate agency, whether Federal, State, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

2. A record from this system may be disclosed to the Department of Justice, to other counsel representing the Postal Service or in a proceeding before a court or adjudicative body before which the Postal Service is authorized to appear, when (a) the Postal Service; or (b) any postal employee in his or her official capacity; or (c) any postal employee in his or her individual capacity whom the Department of Justice has agreed to represent; or (d) the United States when it is determined that the Postal Service is likely to be affected by the litigation, is a party to litigation or has an interest in such litigation, and such records are determined by the Postal Service or its counsel to be arguably relevant to the litigation, provided, however, that in each case, the Postal Service determines that disclosure of the records is a use of the information that is compatible with the purpose for which it was collected.

3. Disclosure may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual

4. Information from this system may be disclosed to an expert consultant, or other person who is under contract to the Postal Service to fulfill an agency function, but only to the extent necessary to fulfill that function. This may include disclosure to any person with whom the Postal Service contracts to reproduce, by typing, photocopy or other means, any record for use by Postal Service officials in connection with their official duties or to any person who performs clerical or stenographic functions relating to the official business of the Postal Service.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records or magnetic disks.

RETRIEVABILITY:

Customer name.

SAFEGUARDS:

Paper records and disks are kept in locked cabinets; automated data is password protected.

RETENTION AND DISPOSAL:

Records are kept for one year after entry and then destroyed by deletion (if automated) or by shredding (if paper).

SYSTEM MANAGER(S) AND ADDRESS:

APMG, Rates & Classification Department, Headquarters, Washington, DC 20260–5300.

NOTIFICATION PROCEDURE:

Customers wishing to know whether information about them is maintained in this system of records should address inquiries to the manager of the Dead Parcel Branch. Inquiries should contain full name and address.

RECORD ACCESS PROCEDURE:

Requests for access should be made in accordance with the Notification Procedure above and the USPS Privacy Act regulations regarding access to records and verification of identity set forth at 39 CFR 266.6.

CONTESTING RECORD PROCEDURE:

See Notification and Record Access Procedures above.

RECORD SOURCE CATEGORIES:

Attendees of auctions and others who ask to receive notice of future actions.

Fred Eggleston,

Assistant General Counsel Legislative Division.

[FR Doc. 89–5645 Filed 3–10–89; 8:45 am]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–26602; File No. SR–NYSE–88–44]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by New York Stock Exchange, Inc., Relating to Amended Debt and Equity Listing Fees and the Adoption of an Advance Billing Schedule

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act") and Rule 19b–4 thereunder,[2] the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission") on December 30, 1988, a proposed rule change to amend certain Exchange debt and equity listing fees and listed company billing procedures. In its filing, the NYSE stated that the purpose of the proposed rule change is to offset the increased costs of supplying services provided by the Exchange, including manpower, automation, utilities and other costs associated with providing marketplace facilities and services. These fees are effective commencing January 1, 1989.

Notice of the proposed rule change was provided by the issuance of a Commission release (Securities Exchange Act Release No. 26483, January 23, 1989) and by publication in the **Federal Register** (54 FR 4358, January 30, 1989). The Commission received no comments on the proposed rule change.

For purposes of the initial listing of debt issues on the NYSE, the Exchange calculates bond listing fees (including outstanding unlisted debt) on a sliding scale based on the maturity and total par value of the particular bond issue. There are four maturity ranges for purposes of the initial listing of debt issues on the NYSE: 1–5 years, 6–14 years, 15–25 years and 26 or more years. Likewise, there are four par valuation intervals for purposes of the initial listing of debt issues on the NYSE, with the base rate set at $0–$500 million par value and regressive rates set for the remaining par value increments of $250 million. Utilizing these parameters, the Exchange calculates a debt issue's initial listing fee by multiplying each one million dollars of par value by the appropriate fee assigned to the issue's maturity range.[3] Currently, bond issues

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] To illustrate this, assume that a $1,250,000,000 seven year note is listed on the Exchange. Under the proposed rule change, the issuer would be billed $202,500: the first $500MM par value at $230 per

Continued

with a maturity of five (5) years or less are charged a rate of $100 per million dollars for the first $0–$500 million par value. Under the proposed rule change, this amount would be increased to $115. All other maturity and par valuation categories would be increased under the proposed rule change in (5) dollar increments in amounts ranging from five (5) to fifteen (15) dollars.

The Exchange is also increasing the initial and continuing fee schedules applied to NYSE-listed company equity issues. For purposes of the initial listing of equity issues on the NYSE (as well as "warrants or similar securities"), the Exchange would increase the base original listing fee for issuers from $34,700 to $36,800. In addition to the base fee, there is a minimum initial listing fee which has been increased from $1,400 to $1,500, and a per share fee, which has been increased in amounts ranging from $100 to $850 per million shares for the applicable share amount. Additionally, the maximum listing fee for stock splits has been reduced from $500,000 to $250,000, the fee charged for reincorporations has been increased from $5,000 to $5,300 and the fee charged for supplements (*i.e.*, minor information changes to previous applications) has been increased from $400 to $430.

The continuing annual fee payable each year for every equity security listed on the Exchange is equal to the greater of the per-share fee calculation or the applicable range minimums. The Exchange is increasing the per-share fee $100 per million shares for the first two million shares and $50 for each million shares in excess of two million. The Exchange is also increasing the minimum ranges in amounts ranging from $830 to $4,100. Moreover, a maximum continuing annual fee of $500,000 has been established.

Finally, the Exchange is adopting an advance billing schedule affecting initial and continuing listing fees for both debt and equity issues. The advanced billing schedule will be phased in for listed companies over a three-year period. In January 1989, all companies will receive a pro-rated bill based upon the number of calendar days from the anniversary date of listing to December 31, 1988, in addition to the fee for the first four months of 1989. In January 1990, all companies will be billed for the eight remaining months of 1989 and the first eight months of 1990. In January 1991, all companies will be billed for the four remaining months of 1990 and the full year, 1991. In January 1992, all companies will be on a twelve month advance billing schedule. All original listings will be converted immediately to the advance billing cycle. These companies will receive a pro-rated bill based upon the number of calendar days from their listing date to December 31 of the listing year.

The Commission believes that the proposed rule change is consistent with section 6(b) of the Act, and the rules and regulations thereunder applicable to a national securities exchange. More specifically, the Commission believes that the proposed rule change is consistent with section 6(b)(4) of the Act, which requires the equitable allocation of reasonable dues, fees, and other charges among Exchange members and other persons using its facilities.[4] The current increases do not appear excessive in relation to previous fees, and the Commission has not received any comments against the new fees. Accordingly, the Commission believes that it is appropriate to approve the proposed rule change.

It is Therefore Ordered, Pursuant to section 19(b)(2) of the Act, that the above mentioned rule change is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Dated: March 6, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89–5671 Filed 3–10–89; 8:45 am]

BILLING CODE 8010–01–M

million; the next $250MM at $160 per million; the next $250MM at $110 per million; and the final $250MM at $80 per million. This bill represents a 4.6 percent increase, since the issuer would have been billed $193,750 under the Exchange's 1988 fee structure.

[4] We note that the equity and bond listing fees were last increased January 1, 1988. *See* SR–NYSE–87–42 (Rel. 34–25295, January 28, 1988; 53 FR 3281, February 4, 1988) (accelerated approval of increased equity listing fees), and SR–NYSE–87–50 (Rel. 34–25313, February 4, 1988; 53 FR 4068, February 11, 1988) (approval of increased bond listing fees).

[5] *See* 17 CFR 200.30–3(a)(44).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Horizon Air/San Juan Airlines, Inc.; U.S.-Canada Commuter Endorsement Transfer

AGENCY: Office of the Secretary, DOT.

ACTION: Order 89–3–22, transfer of U.S.-Canada commuter endorsement, order to show cause, undocketed.

SUMMARY: By Order 89–3–22, the Department proposes to transfer the U.S.-Canada transborder commuter endorsements for the Seattle-Vancouver, Bellingham-Vancouver, Seattle-Victoria and Port Angeles-Victoria routes from San Juan Airlines, Inc. to Horizon Air Industries, Inc., d/b/a Harizon Air. The Department proposes to make the transfer effective upon Horizon's receipt of the requisite operating authority from the Government of Canada. The endorsements would remain in effect for a period of five years for the Bellingham-Vancouver, Seattle-Victoria and Port Angeles-Victoria routes and for the balance of the five-year endorsement currently held by San Juan for the Seattle-Vancouver route. The Department is tentatively rejecting the request of NPA, Inc., a United Express commuter, for a carrier selection case to select a carrier to serve the routes. The Department tentatively concludes that the transfer request of the carriers is analogous to a certificate route transfer case under section 401(h) of the Federal Aviation Act rather than a route award case and that NPA has presented no compelling reasons for the Department to consider this case any differently.

DATES: Objections to the Department's tentative decision are due March 22, 1989; answers are due not later than March 29, 1989.

ADDRESS: Objections and comments should be addressed to the Licensing Division, P–45, U.S. Department of Transportation, 400 Seventh Street SW., Room 6412, Washington, DC 20590 and should be served on all parties listed in ordering paragraph 6 of Order 89–3–22.

Dated: March 8, 1989.

Patrick V. Murphy, Jr.,

Deputy Assistant Secretary for Policy and International Affairs.

[FR Doc. 89–5732 Filed 3–10–89; 8:45 am]

BILLING CODE 4910–62–M

Order to Show Cause; Federal Express Corporation and the Flying Tiger Line Inc.; Transfer of Certificate Authority

AGENCY: Department of Transportation.

ACTION: Tentative approval of a transfer of certificate authority pursuant to section 401(h)—Docket 46025.

SUMMARY: Federal Express Corporation and The Flying Tiger Line, on December 20, 1988, jointly filed an application in Docket 46025 seeking approval of the transfer of Flying Tiger's operating authority to Federal Express, pursuant to section 401(h) of the Federal Aviation Act. In Order 89–3–21, issued March 8, 1989, the Department has tentatively decided to approve the transfer of Flying Tiger's operating authority (certificate

and exemption) to Federal Express. The Department is inviting interested persons to show cause why this tentative decision should not become final. Those wishing to comment on the tentative conclusions, or having objections to the issuance of an order approving the transfer of certificate authority should file a statement containing evidence and arguments in support of their comments or objections.

DATES: Statements containng all evidence and arguments in support of comments or objections in Docket 46025 should be filed by March 22, 1989. Answers to the comments and objections shall be due March 29, 1989. Parties to the docket listed above may obtain a service copy of the order by calling the Documentary Services Division at (202) 366–9329 or by writing to the address below.

ADDRESSES: Statements containing all evidence and arguments in support of comments or objections, and answers to the comments or objections should be filed in Docket 46025, addressed to the Documentary Services Divisions, U.S. Department of Transportation, 400 Seventh Street, SW., Room 4107, Washington, DC 20590, and should be served on all parties listed in that docket.

Dated: March 8, 1989.

Patrick V. Murphy,

Deputy Assistant Secretary for Policy and International Affairs.

[FR Doc. 89–5731 Filed 3–10–89; 8:45 am]

BILLING CODE 4910–62–M

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q during the Week Ended March 3, 1989.

The following application for certificates of public convenience and necessity and foreign air carrier permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et. seq.). The due date for answers, conforming application, or motion to modify scope are set forth below for each application. Following the answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket No.: 46148

Date Field: February 27, 1989.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 27, 1989.

Description: Application of Federal Express Corporation, pursuant to Section 401 of the Act and Subpart Q of the Regulations, requests issuance of an amended certificate of public convenience and necessity for Route 472, so as to authorize foreign air transportation of property and mail between a point or points in the United States, on the one hand, and a point or points in Canada, on the other hand, subject to conditions.

Docket No.: 46149

Date Field: February 28, 1989.

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: March 28, 1989.

Description: Application of American Airlines, Inc., pursuant to Section 401 of the Act and Subpart Q of the Regulations, applies for a certificate of public convenience and necessity to authorize service between a point or points in the United States ad a point or points in New Zealand.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 89–5730 Filed 3–10–89; 8:45 am]

BILLING CODE 4910–62–M

Coast Guard

[CGD 89–018]

Commercial Fishing Industry Vessel Advisory Committee; Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92–403; U.S.C. App I) notice is hereby given of a meeting of the Commercial Fishing Industry Vessel Advisory Committee. The meeting will begin at 9:30 a.m. on March 29, 1989, at the Department of Transportation, 400 7th Street, SW., Washington, DC, in Room 2230. Any subcommittees formed may agree to meet on March 30th, and rooms will be arranged. The agenda is as follows:

—Introduction.
—Swearing in of members.
—Discussion of Committee purpose and Charter.
—Selection of Chairperson and Vice Chairperson.
—Introduction of USCG programs relating to fishing vessel safety.
—Administrative Procedures Act.
—Committee organizational structure.
—Implementation of the Commercial Fishing Industry Vessel Safety Act.
—Work program and establishment of subcommittees.
—Future meeting dates.
—Adjournment.

The purpose of the Committee is to provide consultation and advice to the Commandant, U.S. Coast Guard, on all areas of commercial fishing vessel safety.

The meeting is open to the public. Members of the public may present written or oral statements at the meeting.

FOR FURTHER INFORMATION CONTACT: Mr. Norman W. Lemley, Executive Director, Commercial Fishing Industry Advisory Committee; or LTJG Wes J. Westphal II, Marine Technical and Hazardous Materials Division (G-MTH), Room 1218, U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001; or telephone (202) 267–0001.

Dated: March 3, 1989.

J.D. Sipes,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 89–5660 Filed 3–10–89; 8:45 am]

BILLING CODE 491–014–M

Federal Aviation Administration

[Summary Notice No. PE–89–9]

Petition for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number

involved and must be received on or before: April 3, 1989.

ADDRESS: Send Comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on February 28, 1989.

Denise Donohue Hall,

Manager, Program Management Staff, Office of the Chief Counsel.

Petitions for Exemption

Docket No.: 25776.
Petitioner: Lynch Flying Service, Inc.
Regulations Affected: 14 CFR 43.3(g).
Description of Relief Sought: To allow properly certificated and trained peitioner's pilots to remove and replace passenger seats, ambulatory stretchers, and base assemblies in its Cessna 400 aircraft.

Docket No.: 24941
Petitioner: The Perris Valley Skydiving Center.
Section of the FAR Affected: 14 CFR 105.43.
Description of Relief Sought/ Disposition: To allow foreign parachutists to participate in the petitioner's parachute jumps without complying with the parachute equipment and packing requirements of § 105.43.
Denial, February 23, 1989, Exemption No. 5021

Docket No.: 24998.
Petitioner: Aeron International Airlines, Inc.
Regulations Affected: 14 CFR 121.371(a) and 121.378.
Description of Relief Sought/ Disposition: To extend Exemption No. 4742 that permit peitioner to contract with specifc foreign repair facilities for the performance of maintenance, preventive maintenance, and alterations on certain Canadair CL-44 aircraft components, accessories, engines, and propellers.
Grant, January 31, 1989. Exemption No. 4742A

Docket No.: 25494
Petitioner: Bohlke International Airways.
Sections of the FAR Affected: 14 CFR 43.3(g).
Description of Relief Sought/ Disposition: To amend Exemption No. 4911 that allows appropriately trained and certificated pilots employed by the petitioner to remove and install aircraft cabin seats, and certain stretcher and base assemblies in petitioner's Aero Commander 690V and Piper Seneca aircraft. The amendment would add the Cessna 402 Aircraft to the exemption
Grant, February 21, 1989, Exemption No. 4911A

[FR Doc. 89-5626 Filed 3-10-89: 8:45 am]
BILLING CODE 4910-13-M

[Summary Notice No. PE-89-8]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR part 11), this notice contains a summary of a petition received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of the FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before April 3, 1989.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915G, FAA Headquarters Building (FOB-10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on February 28, 1989.

Denise Donohue Hall,

Manager, Program Management Staff, Office of the Chief Counsel.

Petition for Exemption

Docket No. 063CE.
Petitioner: Fairchild Aircraft Corporation.
Regulations Affected: 14 CFR 23.777(g).
Description of Relief Sought: Petition for exemption from § 23.777(g) to allow the landing gear control handle to be located to the right of the throttle center line.

[FR Doc. 89-5627 Filed 3-10-89; 8:45 am]
BILLING CODE 4910-13-M

Federal Highway Administration

Environmental Impact Statement; Raleigh and Summers Counties, West Virginia

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for the proposed New River Parkway project in Raleigh and Summers Counties, West Virginia.

FOR FURTHER INFORMATION CONTACT: Billy R. Higginbotham, Division Administrator, Federal Highway Administration, 550 Eagan Street, Suite 300, Charleston, WV 25301; Telephone: (304) 348-3093.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the West Virginia Department of Highways, will prepare an Environmental Impact Statement (EIS) on a proposal to construct the New River Parkway. The New River Parkway, which was included as a demonstration project in the 1987 Surface Transportation and Uniform Relocation Assistance Act (STURAA), proposes construction of a new road from the intersection of Raleigh County Route 26 and West Virginia Route 20 near Hinton, West Virginia to Interstate 64 near its crossing of the New River at the Raleigh-Summers County line. The proposed road will follow the New River Gorge National River for approximately 10 miles and replace approximately 9 miles of existing local access road.

The facility is proposed to be designed as a parkway to provide visitors to the New River Gorge National River access to the river and scenic overlooks. The facility will also provide improved access for local residents to homes in the area.

Alternatives under consideration include: (1) taking no action; and (2) construction of a new two-lane road as a parkway with several alternate schemes being considered which include various alignments both on new location and along the existing local service route.

Letters describing the proposed action and soliciting comments will be sent to appropriate federal, state, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. A public meeting followed by a public hearing will be held in the project area after completion of the Draft EIS. Public notice will be given of the time and place of the meeting and hearing. The Draft EIS will be available for public and agency review and comment prior to the public meeting and public hearing. No formal scoping meeting is planned at this time.

To ensure that the full range of issues related to this proposed action is addressed and all significant issues identified, comments and suggestion are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of federal programs and activities apply to this program)

Issued on March 3, 1989.

Billy R. Higginbotham,

Division Administrator.

[FR Doc. 89-5745 Filed 3-10-89; 8:45 am]

BILLING CODE 4910-22-M

Maritime Administration

[Docket S-846]

Mormac Marine Transport, Inc.; Application for Permission Under Section 805(a) of the Merchant Marine Act, 1936, as Amended

By letter dated March 9, 1989, Mormac Marine Transport, Inc. (formerly Moore McCormack Bulk Transport, Inc.), (Mormac) has requested pursuant to section 805 of the Merchant Marine Act, 1936, as amended (Act), and Article II-13 of Operating-Differential Subsidy Agreement (ODSA) No. MA/MSB-295, written permission for Mormac to be affiliated with a company that will provide domestic coastwise Great Lakes service and whose officers and directors hold positions with and own a pecuniary interest in Mormac Marine Group, Inc. (Mormac Marine), the parent company of Mormac.

On March 23, 1987, the Maritime Administrator granted written permission for Mr. James R. Barker to own a pecuniary interest in, and to control Interlake Holding Company (Interlake Holding) and Mormac Marine and through them, the Interlake Steamship Company (Interlake), Interlake Leasing II, Inc. (Leasing) and Mormac for the same scope of domestic ownership and operations by Interlake and Leasing as is contained in Article I-11 of Mormac's ODSA. On July 14, 1988, the Maritime Administrator modified that permission in order to permit common ownership and control of the companies by both Mr. Barker and Mr. Paul R. Tregurtha. Mormac is now requesting permission to amend Mormac's section 805(a) permission in order to permit a company owned by Mr. Barker and Mr. Tregurtha to acquire three Great Lakes vessels currently owned and operated by Rouge Steel Company (Rouge).

Pursuant to a Purchase and Sale Agreement to be entered into by and between Rouge and Lakes Shipping Company, Inc., Lakes Shipping Company, Inc. will be purchasing three self-unloading cargo vessels from Rouge, the SS BENSON FORD, the SS WILLIAM CLAY FORD, and the MS HENRY FORD II. These vessels will be used exclusively in service to the Great Lakes in a manner similar to their current service as Rouge-owned vessels. The vessels will be used primarily to carry iron ore, limestone, and coal for Rouge, in accordance with the terms of a ten-year contract of affreightment between Rouge and Lakes Shipping Company, Inc.

Mormac indicates that since the vessels will essentially continue in service as they have been used by Rouge, the acquisition of these vessels by Lakes Shipping Company, Inc. will not result in any change in competitive conditions for U.S.-flag vessels providing service on the Great Lakes. In addition, Lakes Shipping Company, Inc. and Mormac are entirely separate corporate entities that will maintain separate and discrete accounts.

Mormac believes that no U.S.-flag competitor of the Rouge vessels will be subject to unfair competition nor will the operation of these vessels by an affiliate of Mormac be prejudicial to the purposes and policies of the Act.

Mormac is requesting that the scope of domestic operations permitted under ODSA MA/MSB-295 be modified to incorporate the operations of Lakes Shipping Company, Inc. and that Mormac's permission granted on July 14, 1988, with respect to the common ownership of Mormac Marine and Interlake Holding be modified to permit common ownership, officers and directors by and among Interlake Holding, Mormac Marine, and Lakes Shipping Company, Inc.

Any person, firm, or corporation having any interest in the application for section 805(a) permission and desiring to submit comments concerning the application must file written comments in triplicate, to the Secretary, Maritime Administration, Room 7300, Nassif Building, 400 Seventh Street SW., Washington, DC 20590, by the close of business 5:00 p.m. on March 17, 1989. If such comments deal with section 805(a) issues, they should be accompanied by a petition for leave to intervene. The petition should state clearly and concisely the grounds of interest and the alleged facts relied on for relief.

If no petitions for leave to intervene on section 805(a) issues are received within the specified time, or if it is determined that petitions filed do not demonstrate sufficient interest to warrant a hearing, the Maritime Administration will take such action as may be deemed appropriate.

In the event petitions regarding the relevant section 805(a) issues are received from parties with standing to be heard, a hearing will be held, the purpose of which will be to receive evidence under section 805(a) relative to whether the proposed operations (a) could result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or international service, or (b) would be prejudicial to the objects and policy of the Act relative to domestic operations.

(Catalog of Federal Domestic Assistance Program Nos. 20.804 Operating-Differential Subsidies (ODS))

By Order of the Maritime Administrator.

Date: March 9, 1989.

James E. Saari,

Secretary.

[FR Doc. 89-5898 Filed 3-10-89; 8:45 am]

BILLING CODE 4910-81-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: March 7, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545–1045.

Form Numbers: None.

Type of Review: Revision.

Title: Conducting 1989 Focus Group Interviews and Laboratory Test Sessions on Federal Tax Forms.

Description: Focus group interview and lab testing sessions are necessary to obtain public input on some major tax forms that have been revised or are new for 1989. The results will be used to further simplify and improve the forms so that taxpayers will more easily understand them.

Respondents: Individuals or households, Farms, Businesses or other for-profit.

Estimated Number of Respondents: 990.

Estimated Burden Hours Per Response: 2 hours.

Frequency of Response: One-time interviews/lab test sessions.

Estimated Total Reporting Burden: 1,980 hours.

Clearance Officer: Garrick Shear (202) 535–4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 89–5665 Filed 3–10–89; 8:45 am]

BILLING CODE 4810–25–M

Public Information Collection Requirements Submitted to OMB for Review

March 7, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545–0946

Form Numbers: 8554 and 8498

Type of Review: Revision

Title: Application for Renewal of Enrollment to Practice Before the Internal Revenue Service; Program Sponsor Agreement for Continuing Education for Enrolled Agents.

Description: This information relates to the approval of continuing professional education programs and the renewal of enrollment status for those individuals admitted (enrolled) by the Internal Revenue Service.

Respondents: Individuals or households.

Estimated Number of Respondents: 25,500.

Estimated Burden Hours Per Response/Recordkeeping:

Form 8498: 36 minutes

Form 8554: 1 hour 12 minutes.

Frequency of Response: One-time filing.

Estimated Total Recordkeeping/ Reporting Burden: 30,300 hours.

Clearance Officer: Garrick Shear (202) 535–4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 89–5666 Filed 3–10–89; 8:45 am]

BILLING CODE 4810–25–M

Customs Service

[T.D. 89–36]

Tuna Fish; Tariff-Rate Quota for the Calender Year 1989

AGENCY: Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for Calendar Year 1989.

SUMMARY: Each year the tariff-rate quota for tuna fish described in item 1604.14.20, HTSUS, is based on the United States canned tuna production for the preceding calendar year.

EFFECTIVE DATES: The 1989 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1 through December 31, 1989.

FOR FURTHER INFORMATION CONTACT: Karen L. Cooper, Chief, Quota Branch, Regulatory Trade Programs Division, Office of Trade Operations, Office of Commercial Operations, U.S. Customs Service, Washington, DC 20229, (202/ 566–8592).

It has now been determined that 34,806,335 kilograms of tuna may be entered for consumption or withdrawn from warehouse for consumption during the Calendar Year 1989, at the rate of 6 percent ad valorem under item 1604.14.20, HTSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent ad valorem under item 1604.14.30 HTSUS.

Dated: February 28, 1989.

William von Raab,

Commissioner of Customs.

[FR Doc. 89–5680 Filed 3–10–89; 8:45 am]

BILLING CODE 4820–02–M

VETERANS ADMINISTRATION

Establishment of Department of Veterans Affairs

AGENCY: Veterans Administration.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs Act redesignates the Veterans Administration as the Department of Veterans Affairs, an executive department in the executive branch of the Government.

EFFECTIVE DATE: March 15, 1989.

ADDRESS: The Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

FOR FURTHER INFORMATION CONTACT: Linda M. Combs, Acting Associate Deputy Administrator for Management (004), (202) 233–5458.

SUPPLEMENTARY INFORMATION: The Department of Veterans Affairs Act (Pub. L. 100–527) redesignates the Veterans Administration as the Department of Veterans Affairs, an executive department in the executive branch of the Government.

I. Organization

The statute provides that the Department of Veterans Affairs be headed by the Secretary of Veterans Affairs. Other principal officials are a Deputy Secretary, a Chief Medical Director, a Chief Benefits Director, a Director of the National Cemetery System, a General Counsel, an Inspector General, and no more than six Assistant Secretaries. Each of these officials will be appointed by the President with the advice and consent of the Senate.

II. Redesignations

The Department of Medicine and Surgery of the Veterans Administration shall be redesignated as the Veterans Health Services and Research Administration of the Department of Veterans Affairs; the Department of Veterans Benefits of the Veterans Administration shall be redesignated as the Veterans Benefits Administration of the Department of Veterans Affairs; and the Office of Inspector General of the Veterans Administration, established in accordance with the Inspector General Act of 1978, is redesignated as the Office of Inspector General of the Department of Veterans Affairs.

III. References

References in any Federal law, Executive Order, rule, regulation, or delegation of authority, or any document of or pertaining to the Veterans Administration shall be deemed to refer as follows:

(a) The Administrator of Veterans Affairs is the Secretary of Veterans Affairs;

(b) The Veterans Administration is the Department of Veterans Affairs;

(c) The Deputy Administrator of Veterans Affairs is the Deputy Secretary of Veterans Affairs;

(d) The Chief Medical Director of the Veterans Administration is the Chief Medical Director of the Department of Veterans Affairs;

(e) The Department of Medicine and Surgery of the Veterans Administration is the Veterans Health Services and Research Administration of the Department of Veterans Affairs;

(f) The Chief Benefits Director of the Veterans Administration is the Chief Benefits Director of the Department of Veterans Affairs;

(g) The Department of Veterans Benefits of the Veterans Administration is the Veterans Benefits Administration of the Department of Veterans Affairs;

(h) The Chief Memorial Affairs Director of the Veterans Administration is the Director of the National Cemetery System of the Department of Veterans Affairs; and

(i) The Department of Memorial Affairs of the Veterans Administraiton is the National Cemetery System of the Department of Veterans Affairs.

IV. Continuing Effect of Legal Documents

All orders, determinations, rules, regulations, permits, grants, contracts, certificates, licenses, and privileges which have been issued, made, granted, or allowed to become effective by the President, by the Administrator of Veterans Affairs, or by a court of competent jurisdiction, in the performance of functions of the Administrator or the Veterans Adminstration and which are in effect on March 15, 1989, continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, the Secretary, or other authorized official, by a court of competent jurisdiction, or by operation of law.

V. Proceedings Not Affected

The provisions of the Act shall not affect any proceedings or any application for any benefits, service, license, permit, certificate, or financial assistance pending before the Veterans Administration at the time this Act takes effect, but such proceedings and applications shall continue. Orders shall be issued in such proceeding, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted, and orders issued in any such proceedings shall continue in effect, until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law.

VI. Suits Not Affected

The Act shall not affect suits commenced before March 15, 1989, and in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if the Act has not been enacted.

VII. Nonabatement of Actions

No suit, action, or other proceeding commenced by or against the Veterans Administration, or by or aganist any individual in the official capacity of such individual as an officer of the Veterans Administration, shall abate by reason of enactment of the Act.

VIII. Property and Resources

The contracts, liabilities, records, property, and other assets and intererts of the Veterans Administration shall, after the effective date of this Act, be considered, to be the contracts, liabilities, records, property, and other assets and interests of the Department of Veterans Affairs.

Dated: March 8, 1989.

Edward J. Derwinski,

Administrator.

[FR Doc. 89–5755 Filed 3–10–89; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 47
Monday, March 13, 1989

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 2:06 p.m. on Tuesday, March 7, 1989, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to: (1) The possible closing of certain insured banks; and (2) an assistance agreement pursuant to section 13(c) of the Federal Deposit Insurance Act.

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)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 500–17th Street, NW., Washington, DC.

Dated: March 8, 1989.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 89-5754 Filed 3-8-89; 4:58 p.m.]

BILLING CODE 6714-01-M

FEDERAL ENERGY REGULATORY COMMISSION

March 8, 1989.

The following notice of meeting is published pusuant to section 3(a) of the Government in the Sunshine Act (Pub. L. No. 94–409), 5 U.S.C. 552B:

TIME AND PLACE: March 15, 1989, 10:00 a.m.

PLACE: 825 North Capitol Street, NE., Room 9306, Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

*Note.—Item listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Lois D. Cashell, Secretary, Telephone (202) 357–8400.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Public Reference Room.

Consent Power Agenda, 892nd Meeting—March 15, 1989, Regular Meeting (10:00 a.m.)

CAP–1.
Project No. 10668–001, Barbara K. Londergan
CAP–2.
Docket No. UL88–30–001, David Zinkie
CAP–3.
Project No. 10631–001, James River Hydro Associates
Project No. 10645–001, City of Richmond, Virginia
CAP–4.
Project No. 2574–007, Merimil Limited Partnership
Project No. 2322–006, Central Maine Power Company
Project No. 2325–003, Central Maine Power Company
Project No. 2552–003, Central Maine Power Company
Project No. 2611–009, Scott Paper Company and UAH-HYdro Kennebec Limited Partnership
Project No. 5073–016, Benton Falls Associates
CAP–5.
Project No. 9260–003, Adirondack Hydro Development Corporation
CAP–6.
Project No. 4282–003, Mountain Water Resources
CAP–7.
Project No. 4270–003, Mountain Rhythum Resources
CAP–8.
Project No. 2680–007, Consumers Power Company and the Detroit Edison Company
CAP–9.
Project Nos. 7802–006 and 10468–000, Natural Energy Resources Company
CAP–10.
Project No. 4435–007, Damnation Peak Power Company
CAP–11.
Project No. 7267–005, Joseph M. Keating
CAP–12.
Project No. 2832–000, and 005, New York Irrigation District, Nampa-Meridian Irrigation District, Boise-Kuna Irrigation District, Wilder Irrigation District, Big Bend Irrigation District
CAP–13.
Project No. 4656–002, Boise-Kuna Irrigation Distirct, New York Irrigation District, Nampa and Meridian Irrigation District, Wilder Irrigation District, and Big Ben Irrigation District
CAP–14.
Docket No. ER89–106–000, Duke Power Company
CAP–15.
Docket No. ER88–302–003, Pacific Gas and Electric Company
CAP–16.
Omitted
CAP–17.
Docket No. ER84–011, American Electric Power Service Corporation
CAP–18.
Docket No. ER89–48–001, Southern Company Services, Inc.
CAP–19.
Docket No. EL87–13–004, City of Holyoke Gas and Electric Department, City of Westfield Gas and Electric Light Department, Marblehead Municipal Light Department, Middleborough Municipal Gas and Electric Department, North Attleboro Electric Department, Peabody Municipal Light Plant, Shrewsbury Electric Light Department, Templeton Municipal Light Plant, Town of Boylston Municipal Light Department, Town of Hudson Light and Power Department, Town of Littleton Municipal Light and Water Department, Town of Wakefield Municipal Light Department and West Boylston Municipal Lighting Plant v. Boston Edison Company
CAP–20.
Docket Nos. ER88–553–000 and EL88–8–000, Allegheny Generating Company
CAP–21.
Docket Nos. QF86–149–004 and 005, Ultrapower Incorporated, Rio Bravo Jasmin
Incorporated Rio Bravo Poso

Consent Miscellaneous Agenda

CAM–1.
Docket No. GP88–26–000, Northern Pump Company, Danner No. A–1 Well
CAM–2.
Docket No. GP86–45–002, Placid Oil Company
CAM–3.
Docket No. GP87–001, DeNovo Oil & Gas, Inc.
CAM–4.
Docket No. GP87–76–001, Bettis, Boyle and Stovall
CAM–5.
Docket No. GP80–41–039, United Gas Pipe Line Company
CAM–6.
Docket No. RA85–3–000, Commonwealth Oil Refining Company (DOE Case Number DEE–1022)

CAM–7.
Docket No. RO85–21–000, Hudson Oil Co., Inc. and Hudson Refining Co., Inc.

Consent Gas Agenda

CAG–1.
Docket Nos. RP85–122–018 and RP87–30–022, Colorado Interstate Gas Company
CAG–2.
Docket No. RP89–67–000, West Texas Gathering Company
CAG–3.
Docket Nos. RP83–58–015, RP86–63–013, RP86–114–008, RP88–17–021, RP88–96–000, RP88–210–003 and RP88–229–003, Southern Natural Gas Company
CAG–4.
Docket Nos. TA89–1–20–000, 001, TM89–8–20–000 and TA89–1–20–003, Algonquin Gas Transmission Company
CAG–5.
Docket Nos. TQ89–1–46–004, RP86–165–004 and RP86–166–004, Kentucky West Virginia Gas Company
CAG–6.
Docket No. RP89–45–002, ANR Pipeline Company
CAG–7.
Docket No. RP89–40–001, Williams Natural Gas Company
CAG–8.
Docket Nos. RP88–68–006 and 009, Transcontinental Gas Pipe Line Corporation
CAG–9.
Docket Nos. RP89–1–001, 002, 005 and RP89–5–001, Northwest Pipeline Corporation
CAG–10.
Omitted
CAG–11.
Docket Nos. RP88–225–001, 002, 003, 004, TA89–1–45–001, 002 and 003, Inter-City Minnesota Pipelines, Ltd., Inc.
CAG–12.
Docket Nos. RP88–94–000 and 001, Natural Gas Pipeline Company of America
CAG–13.
Docket No. TA82–1–21–029, Columbia Gas Transmission Corporation
CAG–14.
Docket No. RP87–7–043, Transcontinental Gas Pipe Line Corporation
CAG–15.
Docket No. RP89–54–000, Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company
CAG–16.
Docket No. RP88–217–010, CNG Transmission Corporation
CAG–17.
Docket No. RP88–217–011, CNG Transmission Corporation
CAG–18.
Docket Nos. RP88–80–013 and RP88–251–006, Texas Eastern Transmission Corporation
CAG–19.
Docket No. RP88–187–015, Columbia Gas Transmission Corporation
CAG–20.
Docket No. RP88–45–015, Arkla Energy Resources, a division of Arkla, Inc.
CAG–21.
Docket No. RP88–106–002, Northern Natural Gas Company, Division of Enron Corp.
CAG–22.
Docket No. RP89–12–002, Mississippi River Transmission Corporation
CAG–23.
Docket No. RP88–187–013, Columbia Gas Transmission Corporation
CAG–24.
Docket No. RP88–191–006, Tennessee Gas Pipeline Company
CAG–25.
Docket No. RP88–239–006, Trunkline Gas Company
CAG–26.
Docket No. RP88–184–000, El Paso Natural Gas Company
CAG–27.
Docket No. RP87–33–001, Williams Natural Gas Company
CAG–28.
Docket No. RP85–206–042, Northern Natural Gas Company, Division of Enron Corp.
CAG–29.
Docket No. RP89–40–002, Williams Natural Gas Company
CAG–30.
Docket No. RP87–14–005, Algonguin Gas Transmission Company
CAG–31.
Docket Nos. RP88–68–008 and RP87–7–044, Transcontinental Gas Pipe Line Corporation
CAG–32.
Docket Nos. TA84–2–43–002 and TA85–1–43–002, Northwest Central Pipeline Corporation (now "Williams Natural Gas Company")
CAG–33.
Docket Nos. TA85–1–16–008 and TA85–2–16–008, National Fuel Gas Supply Corporation
CAG–34.
Docket Nos. TA81–1–21–029 and RP87–55–006, Columbia Gas Transmission Corporation
CAG–35.
Docket Nos. RP88–94–000, 010, 014 and 015, Natural Gas Pipeline Company of America
CAG–36.
Docket No. RP84–82–004, Tarpon Transmission Company
CAG–37.
Docket No. RP86–87–000, Questar Pipeline Inc. (formerly Mountain Fuel Resources Inc.)
CAG–38.
Docket No. RP86–41–000, Algonquin Gas Transmission Company
CAG–39.
Docket No. RP85–169–000, Consolidated Gas Transmission Corporation CAG–40.
Docket Nos. RP83–58–000, RP86–63–000, RP86–114–000, RP88–96–000, RP88–210–004, RP88–229–004 and RP88–17–020, Southern Natural Gas Company
CAG–41.
Docket No. CP85–711–001, Tennessee Gas Pipeline Company v. Columbia Gas Transmission Corporaion CAG 42.
Docket Nos. RP85–209–020, RP86–93–006, RP86–158–009, RP86–246–003, RP87–34–005, TC88–6–007, RP88–8–007, RP88–27–011, RP88–264–003, RP88–92–009, RP88–263–005, RP88–265–001, RP84–42–005, CP86–6–001, CP88–440–000, CP87–524–000, CP88–329–000, CP88–478–000 and IN86–5–001, United Gas Pipe Line Company
CAG–43.
Docket No. RP88–95–000, Canyon Creek Compression Company
CAG–44.
Docket Nos. RP82–137–000 and RP83–4–000, Texas Gas Transmission Corporation and Columbia Gas Transmission Corporation
CAG–45.
Docket No. RP88–66–000, Pacific Interstate Offshore Company
CAG–46.
Docket No. RP73–63–002, Natural Gas Pipeline Company of America
CAG–47.
Docket Nos. ST89–296–000, ST89–349–000, ST89–350–000, ST88–5892–000 and ST89–194–000, BP Gas Transmission Company
CAG–48.
Docket No. ST88–4224–000, Transco-Louisiana Intrastate Pipeline Company
CAG–49.
Docket Nos. ST88–5599–001, ST88–5761–001, ST88–5762–001, ST88–5763–001, ST88–5764–001, ST88–5765–001, ST88–5766–001, ST88–5767–001, ST88–5768–001, ST88–5769–001 and ST88–5770–001, Gulf South Pipeline Company
CAG–50.
Docket No. CI88–473–001, Southland Royalty Company
CAG–51.
Omitted
CAG–52.
Docket No. CI88–310–000, Consolidated Oil & Gas, Inc.
CAG–53.
Docket No. CI87–891–000, Lowry Exploration, Inc.
CAG–54.
Docket Nos. CI88–563–000 and CP88–400–000, Conoco Inc., Oxy USA, Inc., Texaco Producing Inc. and Atlantic Richfield Company
CAG–55.
Omitted
CAG–56.
Docket No. CP88–411–000, Manchester Pipeline Corporation
CAG–57.
Docket No. CP88–307–004, Great Lakes Gas Transmission Company
CAG–58.
Docket No. CP85–437–014, Mojave Pipeline Company
Docket No. CP85–552–003, Kern River Gas Transmission Company
Docket Nos. CP85–625–000 and 001, Northwest Pipeline Corporation
Docket Nos. CP86–197–000, 001, 002 and 003, El Paso Natural Gas Company
Docket No. CP86–212–000, Transwestern Pipeline Company
Docket Nos. CP87–479–011 and CP87–480–008, Wyoming-California Pipeline Company
CAG–59.
Docket No. CP88–286–003, Cascade Natural Gas Corporation v. Northwest Pipeline Corporation, Chevron Chemical Company, Intermountain Gas Company, Hadson Gas System, Inc., Llano, Inc.,

Corpus Christi Industrial Pipeline Company, and Transco Energy Marketing Company
CAG–60.
Docket No. CP89–138–001, Panhandle Eastern Pipe Line Company
CAG–61.
Docket No. CP88–699–001, Northern Natural Gas Company
CAG–62.
Docket Nos. CP88–6–002 and RP88–8–008, United Gas Pipe Line Company
CAG–63.
Docket No. CP87–474–004, Great Lakes Gas Transmission Company
CAG–64.
Docket Nos. CP87–479–003, 009, 010, CP87–480–005, 006 and 007, Wyoming-California Pipeline Company
CAG–65.
Docket No. CP83–140–005, K N Energy, Inc.
CAG–66.
Docket No. CP88–255–002, Transcontinental Gas Pipe Line Corporation
CAG–67.
Docket Nos. CP88–696–001 and 002, Midwestern Gas Transmission Company
CAG–68.
Docket Nos. CP86–725–001 and 002, United Gas Pipe Line Company and Trunkline Gas Company
CAG–69.
Docket No. CP84–348–006, Mississippi River Transmission Corporation
CAG–70.
Docket No. CP88–375–000, East Tennessee Natural Gas Company
CAG–71.
Docket No. CP88–154–000, Columbia Gas Transmission Corporation
CAG–72.
Docket No. CP88–137–000, ANR Pipeline Company
CAG–73.
Docket No. CP88–805–000, Great Lakes Gas Transmission Company
CAG–74.
Docket No. CP88–475–000, El Paso Natural Gas Company
CAG–75.
Docket No. CP88–643–000, Colorado Interstate Gas Company
CAG–76.
Docket No. CP88–272–000, United Gas Pipe Line Company
CAG–77.
Docket No. CP84–31–004, Texas Gas Transmission Corporation and CSX NGL Corporation
CAG–78.
Docket No. CP87–107–000, Midwestern Gas Transmission Company
CAG–79.
Docket No. RP88–174–001, *Dynasty Gas Marketing, Inc.* v. *Northern Border Pipeline Company*
Docket No. RP88–195–002, Northern Border Pipeline Company
CAG–80.
Docket No. RP86–14–017, Columbia Gulf Transmission Company
Docket No. RP86–15–017, Columbia Gas Transmission Corporation
CAG–81.
Docket No. TM89–3–28–000, Panhandle Eastern Pipe Line Company

I. Licensed Project Matters

P–1.
Project No. 9711–000, Inghams Corporation. Order regarding third-party permit application for existing project not required to be licensed.
P–2.
Project No. 9712–000, Beardslee Corporation. Order regarding third-party permit application for existing project not required to be licensed.

II. Electric Rate Matters

ER–1.
Docket Nos. EF87–2011–002, 006, 009, EF87–2021–001 and 004, United States Department of Energy—Bonneville Power Administration. Order concerning 1987 rate filings.
ER–2.
Docket Nos. EC88–2–000 and 003, Utah Power and Light Company, PacifiCorp and PC/UP&L Merging Corporation. Order on rehearing.
ER–3.
Docket No. ER79–97–002, Alamito Company. Order on reasonableness of fuel charges.
ER–4.
Docket Nos. EL86–26–002 and ER87–47–001, *San Diego Gas and Electric Company* v. *Alamito Company*. Opinion and order on initial decisions concerning capital structure and rate of return.

Miscellaneous Agenda

M–1.
Reserved
M–2.
Reserved
M–3.
(A) Docket No. RM87–5–001, Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines. Order on rehearing.
(B) Docket No. RM87–5–002, Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines. Order on clarification of Order No. 497.
M–4.
Docket No. RM89–2–000, Blanket Sales Certificates for First Sellers of Natural Gas Docket No. RM88–20–000, 5-Year Take-or-pay Make-up Provisions in Natural Gas Producer Pipeline Contracts. Notice of proposed rulemaking.

I. Pipeline Rate Matters

RP–1.
(A) Docket Nos. CP88–391–000 and RP88–167–000, Transcontinental Gas Pipe Line Corporation. Order concerning certificate application for gas inventory charge, standby service and firm storage authorization.
(B) Docket Nos. CP89–759–000, CP88–391–000 and RP88–167–000, Transcontinental Gas Pipe Line Corporation. Order concerning authorization for interruptible sales service.
RP–2.
Docket Nos. RP85–177–057 and CP88–136–002, Texas Eastern Transmission Corporation. Order on rehearing.
RP–3.
Docket Nos. RP84–94–000 and RP85–66–000, Trailblazer Pipeline Company. Opinion and order on intitial decision.

II. Producer Matters

CI–1.
Reserved

III. Pipeline Certificate Matters

CP–1.
Reserved

Lois D. Cashell,

Secretary.

[FR Doc. 89–5802 Filed 3–9–89; 2:47 pm]

BILLING CODE 6717–01–M

TENNESSEE VALLEY AUTHORITY

Meeting No. 1414

TIME AND DATE: 10 a.m. (c.s.t.), Wednesday, March 15, 1989.

PLACE: Andrew Johnson Theater, Tennessee Performing Arts Center, 505 Deaderick Street, Nashville, Tennessee.

STATUS: Open.

AGENDA

Approval of minutes of meeting held on February 15, 1989.

Discussion Item

1. TVA Staff will report on Regional Ozone—A Southern Perspective

Action Items

New Business

A—Budget and Financing

A1. Adoption of Supplemental Resolution Authorizing 1989 Series A Power Bonds.
A2. Resolution Authorizing the Chairman and Other Executive Officers to Take Further Action Relating to Issuance and Sale of 1989 Series A Power Bonds.
A3. Retention of Net Power Proceeds and Nonpower Proceeds and Payments to the U.S. Treasury in March 1989, Pursuant to Section 26 of the TVA Act.
A4. Board Adoption of the Tennessee Valley Authority Financial Statements, September 30, 1988.
A5. Modification to Fiscal Year 1989 Power Capital Budget—Wilson, Tennessee, 500-kV Substation to Replace High-Side Coils of 500-kV Spare Transformer.

C—Power Items

C1. Letter Agreement with Tallahatchie Valley EPA for Power Supply to Grenada and Hardy, Mississippi, Areas.
C2. Revision to 5 Percent Interruptible Power Arrangements.

E—Real Property Transactions

E1. Sale of Permanent Easement Affecting 0.73 Acres of Ocoee No. 1 Railroad Right-of-Way in Polk County, Tennessee.
E2. Abandonment of Easement Rights to Polk County Board of Education Affecting 294 Acres of Polk County Board of Education Property Located Near Apalachia Dam in Polk County, Tennessee.
E3. Grant of 30-Year Easement to Bluff City, Tennessee, Affecting Approximately 4

Acres of Boone Reservoir Land in Sullivan County, Tennessee.

E4. Proposed 19-Year Lease Agreement with Tennessee Wildlife Resources Agency Affecting Approximately 13.1 Acres of Norris Reservoir Land and 1.3 Acres of Melton Hill Reservoir Land in Anderson County, Tennessee.

E5. Sale of Term Easement for Marine Repair and Fabrication Facility Affecting Approximately 5.99 Acres of Pickwick Reservoir Land in Tishomingo County, Mississippi.

E6. Deed Modification to the Anderson County Sportsman's Club Affecting Approximately 2.3 Acres of Norris Reservoir Land in Anderson County, Tennessee.

E7. Proposed 30-Year Easement to Colbert County Commission Affecting Approximately 12.13 Acres of Pickwick Reservoir Land in Colbert County, Alabama.

E8. Proposal to Lease TVA Land for the Commercial Operation of Running Water Recreation Area on Nickajack Reservoir in Marion County, Tennessee.

F—Unclassified

F1. Supplement No. 15 to Personal Services Contract No. TV–61664A with Massachusetts Institute of Technology.

F2. Filing of Condemnation Cases.

F3. Supplement No. 12 to Personal Services Contract No. TV–53532A with Hartford Steam Boiler Inspection and Insurance Company.

F4. 1990 Corporate Environmental Agenda.

CONTACT PERSON FOR MORE INFORMATION: Alan Carmichael, Manager of Public Affairs, or a member of his staff can respond to requests for information about this meeting. Call (615) 632–8000, Knoxville, Tennessee. Information is also available at TVA's Washington Office (202) 479–4412.

Dated: March 8, 1989.

Edward S. Christenbury,

General Counsel and Secretary.

[FR Doc. 89–5781 Filed 3–9–89; 10:52 am]

BILLING CODE 8120–01–M

THE UNITED STATES INSTITUTE OF PEACE

DATE: Thursday, March 16, 1989.

TIME: Thursday 10:00 a.m. to 5:30 p.m.

PLACE: The United States Institute of Peace, 1550 M Street, NW ground floor (conference room).

STATUS: Open session—Thursday 10:00 a.m. to 5:30 p.m. (portions may be closed pursuant to subsection (c) of section 552(b) of title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Pub. L. (98–525).

AGENDA (Tentative):

Swearing-in ceremony for Dr. Alan Weinstein at 9:00 a.m. in the West Conference Room The United States Supreme Court (Open to the Public).

Meeting of the Board of Directors convened. Chairman's Report. President's Report. Committee Reports. Consideration of the minutes of the Thirtieth meeting. Consideration of grant application matters.

CONTACT: Ms. Olympia Diniak. Telephone (202) 457–1700.

Dated: March 8, 1989.

Bernice J. Carney,

Administrative Officer, The United States Institute of Peace.

[FR Doc. 89–5887 Filed 3–9–89; 3:24 pm]

BILLING CODE 3155–01–M

Corrections

Federal Register
Vol. 54, No. 47
Monday, March 13, 1989

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.

FEDERAL RESERVE SYSTEM

12 CFR Part 208

[Regulation H; Docket No. R-0660]

Membership of State Banking Institutions in the Federal Reserve System; Investment in Stock of Investment Companies

Correction

In rule document 89-3714 beginning on page 7180 in the issue of Friday, February 17, 1989, make the following corrections:

§ 208.124 [Corrected]

1. On page 7181, in the 2nd column, in § 208.124(b), in the 23rd line, before "12" remove the parenthesis.

2. On page 7182, in the first column, in § 208.124(c)(8)(ii), in the eighth line, "determined" was misspelled.

3. On the same page, in the second column, in footnote [1], in the last line, "SVC." should read "Svc.".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 184

[Docket No. 78N-0349]

Certain Glycerides; Affirmation of Gras Status

Correction

In rule document 89-3935 beginning on page 7401 in the issue of Tuesday, February 21, 1989, make the following correction:

§ 184.1903 [Corrected]

On page 7404, in the third column, in § 184.1903(c)(2), in the last line, "§ 170.3(n)(39)" should read "§ 170.3(n)(38)".

BILLING CODE 1505-01-D

VETERANS ADMINISTRATION

38 CFR Part 4

Systemic Diseases, Temporary Total Evaluations Based on Periods of Hospitalization or Surgery, Regular Schedular Assignment of a Total Evaluation Based on Total Industrial Impairment

Correction

In rule document 89-2003 beginning on page 4280 in the issue of Monday, January 30, 1989, make the following correction:

On page 4282, in § 4.88a, in the second column, under "6318 Melioidosis", in the fourth line, "military" should read "miliary".

BILLING CODE 1505-01-D

federal register

Monday
March 13, 1989

Part II

Department of Transportation

Federal Aviation Administration

14 CFR Parts 121 and 135
Exit Row Seating; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121 and 135

[Docket No. 25821; Notice No. 89-8]

RIN: 2120-AC75

Exit Row Seating

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to regulate exit row seating aircraft operated by U.S. air carrier and commercial operators (certificate holders). This is needed to ensure that only persons who are determined by the certificate holder to be able, without assistance, to activate an emergency exit and to take the additional actions needed to ensure safe use of that exit in an emergency are seated in exit rows. This action is intended to further safety for all passengers.

DATE: Comments must be received on or before June 12, 1989.

ADDRESSES: Comments on this notice may be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Docket No. 25821, 800 Independence Avenue, SW., Washington, DC 20591. Comments delivered must be marked Docket No. 25821. Comments may be examined in Room 915G weekdays between 8:30 a.m. and 5 p.m., except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Irene H. Mields or Mr. John Walsh, General Legal Services Division (AGC-100), Office of the Chief Counsel, 800 Independence Avenue, SW., Washington, DC 20591. Telephone: (202) 267-3473.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, or economic effects that might result from adoption of the proposals contained in this notice are invited. Communications should identify the regulatory docket or notice number and be submitted in duplicate 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 Docket No. ." The postcard will be dated and time stamped and returned to the commenter.

All communications received on or before the closing date for comments will be considered by the Administrator before taking action on the proposed rule. The proposal contained in the notice may be changed in light of comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must identify the notice number of this NPRM. Persons interested in being placed on the mailing list for future NPRM's also should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

In an effort to make this information available in an accessible format to individuals who are blind or visually impaired and to other individuals who are print handicapped, the FAA will make available for copying a number of audio cassette tapes of the entire NPRM (and the accompanying initial regulatory evaluation) in the FAA Rules Docket, Room 915G, FAA Headquarters, 800 Independence Avenue, SW., Washington, DC. In addition, single cassette tapes will be available in the Public Affairs Offices of the agency's nine regional headquarters; at the Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma; and at the FAA Technical Center, Atlantic City, New Jersey.

Summary of Proposed Rule

A passenger aircraft crashes. Inside the cabin, there are many survivors. A fire begins. If the passengers are to stay alive, they must get out of the aircraft as soon as they can. Seconds mean the difference between life and death. This is the scenario on which a crashworthiness standard is based. Many other FAA rules attempt to prevent a crash from ever happening. A crashworthiness rule assumes that a survivable crash has happened and then asks what can be done to maximize people's chances of getting out alive.

This proposed rule on exit row seating concerns a crashworthiness standard. Exit doors must be opened quickly and properly if an emergency evacuation is to succeed. Often, crewmembers are not in a position to lead this part of the evacuation. Passengers sitting near the doors must perform the functions on which their lives, and the lives of their fellow passengers, depend.

What are some of these functions? First, a passenger must be able to locate the door and quickly follow the instructions for using it. Door operations and instructions differ from airplane to airplane. A delay in figuring out how to operate the door can cost precious seconds; operating it improperly can injure or result in the deaths of passengers. Second, a passenger must be able physically to open the door. Doors are often heavy and clumsy to manipulate, and not every passenger can open them quickly.

Third, a person must be able to determine when to open the door. This involves being able to respond to shouted or hand-signalled instructions from flight attendants, as well as being able to tell when opening an exit would be too dangerous (e.g., because of fire on the adjacent wing). Fourth, a person must be able to go quickly through the open exit, so as not to cause a traffic jam at the door, and perhaps assist other passengers to leave the danger zone around the aircraft. Fifth, a passenger must devote full attention to his or her emergency task. A passenger who must care for small children, for example, may be unable to do so.

The proposed rule says simply that airlines should seat in exit rows only persons who appear able to perform these and other relevant functions in an emergency evacuation. Persons who cannot perform all the functions may sit in any other seat. Airlines also would have to take new steps to inform passengers sitting in exit rows about what they would have to do in an emergency evacuation. By following the proposed requirements, airlines would minimize the likelihood of passenger-caused evacuation delays that could cost lives.

The rule would result in some persons being seated in seats other than those in exit rows, based on the application of neutral, functional criteria. For example, young children, persons who were too large or too small, persons with some disabilities, and elderly persons who are physically frail would be seated in a location other than an exit row.

Background

The Air Carrier Access Act of 1986 ("the Act") (Pub. L. 99–435, October 2, 1986) prohibits discrimination in air transportation on the basis of handicap. The Act also requires that measures taken to eliminate such discrimination take into account the safety of all passengers. Specifically, it provides:

> (c) (1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.
>
> (2) For the purposes of paragraph (1) of this subsection the term "handicapped individual" means any individual 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.
>
> * * * * *
>
> Sec. 3. Within one hundred and twenty days after the date of enactment of this Act, the Secretary of Transportation shall promulgate regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with the safe carriage of all passengers on air carriers.

In order to formulate regulatory proposals implementing the Act, the Secretary of Transportation formed an advisory committee consisting of representatives from groups of persons with disabilities, the Government, and the air transportation industry (52 FR 19881; May 28, 1987). The Committee began meeting on June 3, 1987, under the guidance of the Federal Mediation and Conciliation Service and was scheduled to present its recommendations to the Secretary in December 1987.

The Committee was unable to reach a consensus regarding a recommendation on exit row seating, which had been an issue of some concern to the Committee. Consequently, the Department had the responsibility of proposing for its own provision on this subject, which it did in a notice of proposed rulemaking (NPRM) published June 22, 1988 (53 FR 23574). Concerning exit row seating, that NPRM proposed that carriers be prohibited from excluding persons from any seat on the basis of handicap, except in order to comply with an FAA safety rule. This FAA NPRM, amending 14 CFR Parts 121 and 135, proposes restrictions on exit row seating on the basis of neutral, nondiscriminatory criteria applicable to all passengers. The statutory authority for Part 121 is 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983). The statutory authority for Part 135 is 49 U.S.C. 1354(a), 1355(a), 1421–1431, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

Previous FAA Rulemaking Activity

Exit row seating has been the subject of FAA rulemaking in the past. In Notice 74–25 (July 2, 1974; 39 FR 24667), the FAA proposed a regulation, § 121.584, which would have provided that a handicapped person capable of traveling alone (e.g., a blind or a deaf person) could not be denied transportation so long as the person could be seated in any seat other than:

> The two seats nearest an exit, and any seat in a row immediately adjacent to an exit with the exception of the farthest seat from the exit in that row.

In other words, the two seats nearest an exit would have been unavailable to all handicapped persons in all cases, and other seats in an exit row would have been unavailable as well, depending on the length of the row, with the exception of the seat farthest from the exit.

That proposal was not adopted. The FAA chose instead to adopt in Amendment 121–133 a rule allowing each certificate holder to develop procedures appropriate to its own operations and aircraft (42 FR 18392; April 7, 1977). The FAA, however, issued an advisory circular (AC 120–31; March 25, 1977, the same date as Amendment 121–133) to assist certificate holders in developing their own procedures, which provided guidance on seating.

Paragraph 9 of the advisory circular states:

> 9. *SEATING HANDICAPPED PASSENGERS.* FAA's Civil Aeromedical Institute has conducted research to determine where handicapped passengers should be seated in an aircraft operated under Parts 121 and 135 so that, in the event of an emergency evacuation, they can leave the aircraft, either unassisted or assisted, by the safest and most expedient route while not slowing the evacuation.
>
> a. Those nonambulatory handicapped passengers should be seated in aisle seats where they would be near the end of lines of passengers being evacuated through floor-level, nonoverwing exits. Tests revealed that due to the narrow aisle width, an accompanying attendant trying to lift the handicapped person would temporarily block the aisle and hinder other passengers attempting to evacuate. Once the mainstream of evacuating passengers has passed, the attendant and the handicapped passenger can normally catch up to the flow since there is a bunching at the exit. Two nonambulatory passengers with attendants should not be seated directly across the aisle from each other because their attendants would interfere with each other while attempting to remove the nonambulatory passengers from their seats.
>
> b. To determine the amount of assistance nonambulatory passengers will require to evacuate the aircraft, an agent should first ask the passengers what their capabilities are. If there is some question as to whether an individual is ambulatory or nonambulatory, the agent may ask him to perform a simple test such as transferring from a wheelchair, unaided, to another seat. Additionally, the passenger may furnish evidence of his capability, such as a driver's license or a statement signed by a qualified professional person (e.g. a physician or physical therapist).
>
> c. Ambulatory handicapped passengers should be seated in areas in which evacuation would normally occur through a floor-level, nonoverwing exit.

The FAA's intent, in issuing this rule and advisory circular, was that carriers would adopt reasonable seating policies consistent with the FAA's advice and consequently, to a significant extent, consistent with other carriers' policies.

The FAA's experience, including a review of a large number of carrier policies carried out in connection with the work of the advisory committee, suggests that FAA's intent has not been realized fully. Some carriers have not established seating policies fully consistent with the advisory circular. Carrier policies appear to be inconsistent with one another in a number of cases. Further, information available to the Committee shows that certificate holder personnel, in excluding persons from those seats, may have done so in the mistaken notion that an existing FAA regulation required it or may have alluded to a non-existent regulation to "settle the argument." This, in turn, has led to increased pressure to remove restrictions on seating handicapped persons in exit rows. Under these circumstances, the FAA has determined that it is necessary to consider regulatory requirements concerning exit row seating.

The need to review and reconsider the FAA position is heightened by the provision of the Air Carrier Access Act NPRM, referred to above. Concerning seat assignments, proposed § 382.31 states:

> Carriers shall not exclude any person from a seat in an exit row or other location or require that a person sit in a particular seat, on the basis of handicap, except in order to comply with the requirements of an FAA safety regulation.

This formulation contemplates consideration of an FAA proposal on this subject. Unless the FAA promulgates a safety regulation on exit row seating, the proposed provision of the rule implementing the Air Carrier Access Act would abolish all air carrier seating policies in effect, and it would prohibit the institution of new ones, regardless of valid safety considerations. For all the foregoing

reasons, the FAA has determined to reexamine the issue of exit row seating.

Findings of Civil Aeromedical Institute Studies

The FAA reviewed in detail the results of research conducted by the FAA's Civil Aeromedical Institute (CAMI) to assess the effects of handicapped passengers aboard an aircraft during an emergency evacuation. CAMI's project was undertaken in response to the Civil Aeronautics Board's (CAB) request for clear safety standards in this area. Basically, the position of the CAB in 1972 was similar to that of the FAA today. It recognized that handicapped persons were encountering inconsistent practices and policies in the provision of air carriage. The CAB recommended that appropriate actions be taken, looking towards the issuance of safety regulations on this pressing problem. "Flight Standards Technical Division Report on Air Transportation of Handicapped Persons," June 1973, p. 3.

As discussed further herein, the FAA elected not to regulate directly, in regard to exit row seating or other issues relating to the carriage of handicapped persons. Instead, it issued § 121.586 of the Federal Aviation Regulations (FAR), "Authority to refuse transportation," which allows air carriers to establish their own procedures for persons who may need assistance in an emergency evacuation.

In light of the FAA's experience under the current regulation, FAA finds that the CAMI research supports restrictions on exit row seating. A CAMI report on the subject states that:

> The average ambulatory handicapped passenger appears to possess adequate mobility for escape. He could be seated anywhere in the cabin except in an exit row or a primary overwing exit route * * * "Emergency Escape of Handicapped Air Travelers," Report FAA–AM 77–11, July 1977, p. 36.

[A copy of this report has been entered in the Regulatory Docket].

This report was prepared for possible publication in scientific journals and, therefore, included certain observations and tests conducted by the researchers that were not contained in the 1973 report by the FAA's Flight Standards Service, "Air Transportation of Handicapped Persons," Project Report No. 73–740–120A. Although both reports are based on the tests conducted in 1973, only the 1973 report, which contains no direct conclusions on exit row seating, was available at the time Amendment 121–133 was adopted.

The research does make a number of findings relevant to the seating of persons with disabilities. The agency simply did not have available the full, considered opinions of the researchers at the time Amendment 121–133 was adopted. Among the research findings are the following:

> In proceeding to exit doors from given seats, handicapped persons exceeded the exit time of unimpaired people by 22 to 1,189 percent.

Id., Tables 1 and 2, at 6, 7.

> Persons with disabilities increased the exit time through floor-level exits in all cases, ranging from 3.9 seconds to 49.6 seconds. In the case of window exits, the increases ranged from 3.4 to 42.5 seconds.

Id., Tables 10 and 11, at 31 and 32.

> In general, evacuation times increased as the number of handicapped subjects was increased. Researchers found the increase to be most significant in the totally handicapped category, less significant in the lower limb and partial immobility category, and least significant in the upper limb and sensory handicap category. Increases occurred, however, in all categories.

Id., at 29.

> Although the time needed to evacuate anthropomorphic dummies was somewhat higher than would have been the case for most human beings, the times required by actual persons with disabilities also were greater than those of the able persons.

Id., at 29.

In regard to evacuation times, § 121.291(a) of the FAR requires all certificate holders to demonstrate that each type and model of airplane with a seating capacity of more than 44 passengers can be evacuated in 90 seconds or less. The evacuations must be conducted in accordance with Appendix D to Part 121 of the FAR, which calls for the tests to be conducted with a representative passenger load of persons in normal health. At least 30 percent must be females; at least 5 percent must be over 60 years of age with a proportionate number of females; at least 5 percent but not more than 10 percent must be children under 12 years of age, prorated through that age group. Three life-size dolls, not included as part of the normal passenger load, must be carried by passengers to simulate live infants 2 years old or younger. Crewmembers, mechanics, and training personnel, who maintain or operate the airplane in the normal course of their duties, may not be used as passengers. Other conditions also must be representative, such as the seating density and arrangements, carry-on baggage, etc., but only 50 percent of the emergency exits can be made available.

Rapid evacuation is necessary, of course, due to the hazards of fire, smoke, explosion, and flooding in the event of an inadvertent water landing. It is vital, therefore, to minimize delays in every possible way. In the CAMI study, the researchers concluded that seating location could be used to minimize the delays. Clearly, it would be neither desirable nor feasible to limit passenger loads to those "in normal health," as in the emergency evacuation demonstrations required for transport category airplane certification. On the other hand, persons with handicaps should not be exposed to injuries that can be avoided nor should they impede the evacuation of other passengers. Instead, they should be seated where these dangers are minimized.

In the CAMI studies, information for the study of seat location was drawn from a variety of tests. These included: (1) An evaluation of individuals with handicaps, where individuals moved from one of three designated seat locations to a specific exit; (2) evaluation of handicapped passengers who required assistance to move to an exit; (3) evaluation of the evacuation of totally incapacitated passengers; (4) evaluation of the evacuation of grouped handicapped passengers; (5) evaluation of mixed group evacuations; (6) evaluation of the effect of exit configuration on evacuation; and (7) a separate evaluation of the evacuation of a paraplegic subject. *Id.*, at 4 through 28.

Subjects were recruited from a variety of sources. Nonhandicapped subjects were FAA employees or were hired through the University of Oklahoma Office of Research Administration. Most handicapped subjects were recruited from participating organizations, such as the Oklahoma Foundation for the Disabled, the Oklahoma League for the Blind, the United Cerebral Palsy Rehabilitation Workshop of Greater Oklahoma City, and The Carver School. *Id.*, at 2.

One hundred sixty-two subjects, ranging in age from 15 to 84 years, participated. Eight had disabilities resulting from cerebral palsy; four from arthritis; three from polio; four from multiple sclerosis; two from muscular dystrophy; and five from birth defects. Eighteen were paraplegics; 2 were quadriplegics; and 15 were hemiplegics. Twelve were classified as elderly, either on the basis of age alone or on their physical condition. Their ages ranged from 55 to 84. Fifteen were blind; one was classified as legally blind; and eight were partially sighted. In addition, 22 normally-sighted persons performed as simulated blind passengers. Two were in casts and seven had fractures, amputations, or breaks that had mended

poorly and affected their mobility. Seventeen had mental deficiencies and 7 had mental illnesses (depression or schizophrenia). Two had no handicap and were capable of speed running. Four were obese, and four were deaf. *Id.*, Appendix B.

Especially relevant to this proposed rulemaking are the results of the CAMI tests on group evacuations. The research team found that seating of handicapped passengers in a normal passenger population during normal flight conditions results in, at most, an occasional minor inconvenience to other passengers. They found, however, that under circumstances where the passenger cabin must be speedily evacuated, placement of the handicapped passengers becomes important.

Information for the study of seat location was drawn from three test series: using an actual handicapped passenger in a passenger population of 24; using simulated handicapped passengers in a passenger population of 23; and using simulated handicapped passengers in a passenger population of 50. The simulated passengers were anthropomorphic dummies, to avoid injury to persons with actual disabilities.

Five tests involving the actual handicapped person, who required an assistant to carry him from the plane, showed that better evacuation times generally resulted when the handicapped passenger and his assistant were seated away from the exit. This enabled the assistant to position the handicapped person on his back properly, without delaying passengers behind him and without experiencing difficulties himself, due to crowding and shoving. *Id.*, at 19.

In tests involving subjects simulating total incapacitation, one man assisting a fairly light dummy worked skillfully into the flow of passengers without delay. Evacuation of a 200-pound dummy from a seat near the exit was more difficult, and a delay of about 3 seconds resulted. *Id.*, at 19.

Placing the dummies at the farthest point from the exit, the extreme end of the passenger population, allowed the cabin attendant to establish a good evacuation flow immediately. The total evacuation of 23 live passengers took only 25.04 seconds. There was little delay in this test because most passengers were not detained by the action required to move the dummies and because their assistants had ample time to position them for transport while the forward line of passengers was evacuating. *Id.*, at 23.

When the simulated handicapped persons were placed in forward positions, only 6 passengers (including 2 dummies) exited in the same time (20 seconds) that 17 passengers exited when the dummies were placed at the farthest point from the exit. *Id.*, at 23.

Passengers with upper limb and sensory handicaps had the least delaying effect on passenger flow times once their seatbelts were released. *Id.*, at 34. The tests, however, measured only their capacity to move from their seats to an exit under optimum conditions. To safeguard the subjects, none were asked to use evacuation slides. None were asked to open emergency exits and to perform the other tasks addressed herein, all of which are much more demanding than the relatively simple task of leaving a seat and moving forward to an exit without the dangers of flame, smoke, debris, and panic.

It has been suggested by some persons that there may be little or no relationship between a passenger's rate of movement from a seat to an emergency exit and his or her ability to open the exit and perform the other functions stated in the proposed rule. The FAA requests commenters to provide copies of any studies that support that thesis. The CAMI studies do not point to that conclusion.

Videotapes of the experiments, which are discussed further herein and copies of which have been placed in the docket, show the effect of various disabilities on movement from the seats to the doors. In many cases, it is readily apparent that the cause of slow progress, such as the immobilized arm of a stroke victim, also would affect the person's ability to open a door.

The videotapes also show that some passengers with a fairly good rate of movement down an aisle would have trouble, nevertheless, opening the door. A paraplegic with strong shoulders and arms, for example, could drag himself or herself toward the exit but would not have the stability to stand and remain upright to operate the door or window mechanisms.

The tests revealed that evacuation of the control group (persons with no handicaps) consistently was faster than that of groups with handicaps. Further, the evacuation time increase in all handicapped groups, when the evacuation test involved a window exit rather than a floor-level exit. It is significant that this rather modest increase in complexity, from a floor-level to a window exit test, resulted in increased evacuation times.

It is logical to conclude that additional complexity, such as finding and operating mechanisms, would impose additional burdens on persons with handicaps and cause delays.

Given the results of the tests, the researchers concluded that the average ambulatory handicapped passenger could be seated anywhere in the cabin except in an exit row or an overwing exit route, where he or she might impede the early stages of an evacuation or be injured by the rush of other passengers. This approach, which differs from that originally proposed in Notice 74–25 in 1974, serves as the basis for the present proposal. *Id.*, at 36.

Further, the researchers also found that "if nonambulatory passengers are seated in a group, the group should be seated in the cabin so that they, and their assistants, would be at the end of a line of evacuees so as not to interfere with the evacuation of other passengers and to avoid crowding by other passengers during their preparation for evacuation." *Id.*, at 36. Clearly, this preferred seating position for nonambulatory persons is incompatible with sitting in an exit row, which by nature is at the beginning of a line of evacuees.

It should be noted that seating "at the end of a line of evacuees" does not necessarily mean being seated at the back of the airplane or being the last person to evacuate. The location of the emergency exits determines the end of the line. Between a forward exit door and a window exit, for example, it is likely that two exit flows will develop—one toward the door and one toward the window. The break between the two flows will tend to come at midpoint between the two exits.

While it always is possible that one of the exits will become inoperable in an emergency, thereby changing the anticipated passenger flow, the FAA studies show that the seating proposed results in the expeditious evacuation of the greatest number of passengers.

The question has arisen as to whether certificate holders should ensure that at least one seat is occupied in each emergency exit row. The FAA does not believe that such a requirement is necessary. Nearby passengers who are able to perform the necessary functions could move into an empty row rapidly to perform the necessary functions.

It also has been suggested that the seats in all exit rows be removed or the aisles widened. The FAA does not believe that either approach would remove the need for positioning persons capable of performing the necessary functions near enough to the emergency exits to perform the evacuation functions that may be required.

Additional Research

In addition to reviewing the CAMI documents, FAA staff took part in recurrent flight attendant training during October 1987 to observe and experience first-hand an evacuation drill at a major certificate holder. The information available from this training program was instructive. In the training devices of this certificate holder alone, there were at least 11 types of doors or emergency exits, each of which required varying degrees of strength and agility to open and each of which operated somwhat differently from the others. It is reasonable to conclude that, given the differences in operating instructions and techniques, sight also would play a major role in successfully opening the door or exit in a timely fashion.

In addition, the FAA reviewed scenes from a videotape, made at the time of the 1973 CAMI study, which showed actual, as well as simulated, handicapped persons, in the process of evacuating a simulated transport category airplane fuselage section. While the study's statistics provide ample evidence of the difference between the evacuation times of passengers with and without disabilities, the film provides very graphic evidence of the difficulties of movement associated with certain types of disabilities. These tapes are also made part of the rulemaking docket.

The FAA also reviewed a study completed in October 1970, by the Office of Aviation Medicine of the FAA, entitled, "Survival in Emergency Escape from Passenger Aircraft." (Document No. AM 70-16). This document discusses human factors relating to survival in emergency escapes from passenger aircraft. Data was secured from three actual accidents, with a total of 261 passengers, 105 of whom lost their life.

The accidents involved a United Airlines DC-8, which crashed during a landing at Stapleton Field, Denver; a United Airlines Boeing 727, which crash-landed at Salt Lake City Municipal Airport; and a Trans World Airlines (TWA) Boeing 707-331, which crashed on takeoff from Fiumicino Airport in Rome, Italy. The study, a copy of which has been entered in the Regulatory Docket, deals in detail with the emergency evacuations; the behavior of the passengers; their seat locations, the age, sex, and other characteristics of the passengers; the causes of death or injury, and the effect of the crashes on the emergency exits.

This study concluded that:

> In aircraft accidents in which decelerative forces do not result in massive cabin destruction and overwhelming trauma to passengers, survival is determined largely by the ability of the uninjured passenger to make his way from a seat to an exit *within time limits imposed by the thermotoxic environment.*

(Emphasis added.) *Id.* at 57.

That is, it is crucial that people evacuate quickly before heat, flames, toxic fumes, or an explosion kill or injure them.

In addition, the FAA reviewed a "Protection and Survival Laboratory Memorandum," No. AAM-119-87-6, dated November 5, 1987, based on CAMI "Accident/Incident Bio-Medical Data Reports." This memorandum has been placed in the rulemaking docket. At the time of the November 5, 1987, memorandum, the CAMI Cabin Safety Date Bank contained 3,382 entries. Of these, 132 pertained to problems of persons with handicaps or with characteristics that are likely to affect their ability to activate an emergency exit and to take the additional actions needed to ensure safe use of that exit in an emergency. The memorandum focused on 50 of these entries. While information in such a document is subject to additional evaluation or change on review of the data, conduct of additional testing, or receipt of additional facts, the memorandum lends support to the CAMI conclusions regarding problems encountered by the disabled and others during evacuation. The FAA also reviewed the 50 entries individually. All included problems affecting persons with disabilities, handicaps, the aged, children, the obese, and others having characteristics which could affect the evacuation process.

While the memorandum included some reports of successful, rapid evacuation by persons with disabilities, the reports show rather dramatically that certain factors generally impede rapid evacuation—advanced age or extreme youth; parental responsibilities for minors; physical disabilities; obesity; injury or ill health, etc. Many of the persons impeded by these factors required the assistance of others to escape.

It should be noted that in seven of the above cases, this assistance was provided by certificate holder crewmembers, persons in related occupations, or persons especially trained for emergencies such as fire, police, and military personnel, while assistance by other passengers was observed in only four of the cases. While it is conceivable that there were more instances of such assistance, the figures are in line with data obtained by the FAA in its study of three major aircraft accidents. The FAA found that while still aboard, passengers usually did not attempt to help others unless they were members of their own family. "Survival in Emergency Escape from Passenger Aircraft, AM 70-16, October 1970," at 15 and 86.

In regard to assistance to handicapped passengers, the CAMI researchers found:

> Assisting handicapped passengers in an aircraft cabin is difficult because of space limitations generated by the seat configurations. Fixed armrests, restrictive seat pitch (distance between similar points on seats), and restrictive aisle widths made assistance difficult and interfered with movement. Passenger congestion also interfered with those assisting handicapped subjects. Assistance in operating the seat belt was necessary for most handicapped subjects, especially those who lacked strength or muscular coordination.
>
> Deaf subjects required visual demonstration or written notes describing what they were expected to do * * * It should be noted that although some deaf passengers could read lips, they missed oral announcements unless they knew to expect them.
>
> * * * * *
>
> Assisting passengers with partial or total paralysis * * * a special problem. The aisle did not provide enough space for an assistant to help directly from the side, and leading these subjects from the front only slightly improved movement rates * * * Carrying would have been necessary to move severely afflicted subjects at an acceptable rate in a survival situation * * *
>
> Cerebral palsy victims vary in degree of mobility limitations. Total or partial inability to coordinate muscular movements limits many of them to a slow, unsteady walk * * * Five of the eight cerebral palsy subjects, who normally used wheelchairs, moved less than 1 ft./s [one foot per second], a rate inadequate for emergency aircraft evacuations.

"Emergency Escape of Handicapped Air Travelers," 1977 document, at 14 through 16.

In regard to passengers who had to be carried, their rate of egress depended upon a number of factors, such as the skill with which their assistants positioned them for carrying, obstructions caused by other passengers, but most important, where they had been seated.

As previously discussed herein, five tests with a paraplegic and an assistant showed that better evacuation times (for evacuees as a whole) generally resulted when the handicapped passenger and his assistant were seated far from the exit since the assistant could position the paraplegic without obstruction and then stay with the flow of traffic.

In one test, a paraplegic passenger was allowed to evacuate the cabin without assistance. The study reports:

He positioned himself in the aisle so that a feet first scoot was possible. Although his movements were quick, he fell behind when traffic really began to move and delayed those behind him about 4 s. The obvious effort to avoid overrunning the paraplegic undoubtedly was a major reason that the total delay was more than 2 s.

Id. at 19.

The FAA notes in this connection that 2 seconds can mean the difference between life and death in the aftermath of a crash inasmuch as evacuation might be terminated abruptly by an explosion at any point. *See, e.g.*, "Survival In Emergency Escape From Passenger Aircraft," FAA Report AM 70–16, October 1970, at 35–36.

As a result of the studies and other available data and information, the FAA has concluded that it is more probable than not that persons with handicaps that prevent them from performing certain evacuation functions would be likely to impede emergency evacuation if seated in an exit row. This is especially true in an emergency where an exit row occupant is responsible for opening the exit. The data provide support for the FAA's conclusion that rulemaking is necessary to avoid the establishment or continuation of practices that are in derogation of the safety of all passengers.

Safety Under the Air Carrier Access Act

The Air Carrier Access Act protects the civil rights of handicapped persons and clearly mandates continued concern for safety. Further, safety constituted an important theme in the legislative history. The Senate Report focused on this issue at several points. It states that the statute "does not mandate any compromise of existing DOT or Federal Aviation (FAA) safety regulations." Sen. Rept. 99–400, August 13, 1986, p. 4. The FAA's existing rules allowing carriers to establish their own procedures for persons who may need assistance in an emergency evacuation (§ 121.586 of the FAR) does not cover specifically the role of exit row seating in air safety. Consequently, the FAA now must address the issue directly. In drafting this proposed rule to regulate exit row seating, the FAA has remained mindful of both the words of the Act and the expressed congressional intent regarding safety and civil rights.

The FAA notes, for example, that the Senate Report states that it was intended that the certificate holders will not "impose upon handicapped travelers any regulations or restrictions unrelated to safety and unrelated to the nature and extent of any individual's handicap." *Id.* at 4.

In a statement made on the Senate floor, Senator Robert Dole added:

> Our intent * * * is that so long as the procedures of each airline [concerning the transportation of handicapped passengers] are safe as determined by the FAA, there should be no restrictions placed upon air travel by handicapped persons. Any restrictions that the procedures may impose must be only for safety reasons found necessary by the FAA. * * *

Congressional Record, August 15, 1986, at S11785.

This proposed rule follows both the letter and the spirit of the Act and the expressed congressional intent.

It is clear that the principles enunciated by the courts with respect to discrimination under Section 504 of the Rehabilitation Act apply to the Air Carrier Access Act. The legislative history shows that the Congress passed the Air Carrier Access bill specifically to close a gap in the Rehabilitation Act. During consideration of the Senate bill, S. 2703, Senator Dole stated specifically that the purpose of the legislation is to "overturn the recent Supreme Court decision in the case of Paralyzed Veterans of America versus the Department of Transportation. This case, which was handed down by the high court in the closing days of its spring term, held that section 504 of the Rehabilitation Act of 1973 'is not applicable' to U.S. carriers, except for those few small regional carriers who receive direct Federal subsidies." Congressional Record, August 15, 1986, at S11784. Senator Alan Cranston and Senator Howard M. Metzenbaum also addressed this point. *Id.* at S11787.

Similarly, in discussing the House version of the bill, H.R. 5274, Congressman John Paul Hammerschmidt stated:

> Unfortunately, our efforts on behalf of the handicapped were set back by the recent Supreme Court decision in the case of Paralyzed Veterans of America versus DOT. In that case, the Court decided that the Rehabilitation Act, which prohibits discrimination against the handicapped, did not apply to [unsubsidized] air travel * * *

Congressional Record, September 18, 1986, at H7193.

Congressman Gary L. Ackerman expressed similar intent:

> As you know, Mr. Speaker, last summer I introduced similar legislation to amend the Federal Aviation Act immediately following the Supreme Court ruling that major airlines cannot be forced to comply with the Rehabilitation Act because they do not receive direct Federal assistance.

Id., at H7194.

Given this recognition of the interrelationship and the Congressional history of the Air Carrier Access Act, logic requires that the standards set by the Supreme Court in *Southeastern Community College (Davis)* and in *Alexander*, regarding "reasonable accommodation" and "meaningful access," apply to the Air Carrier Access Act as well as to section 504 of the Rehabilitation Act. The seating restriction is narrowly defined, and this proposed regulation would not constitute a barrier to meaningful access to air carrier transportation.

In addition, the proposed rule is in accord with governing judicial decisions. The Supreme Court has held that nondiscrimination on the basis of handicap does not require the imposition of undue financial and administrative burdens, nor does it require modifications that would result in a fundamental alteration of the nature of a program. *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979); *American Public Transit* v. *Lewis*, 665 F.2d 1272 (D.C. Cir. 1981). Various courts have decided that *either* an undue financial or administrative burden may be used as the basis for refusing to accommodate in a particular manner. *Majors* v. *Housing Authority of DeKalb County*, 652 F.2d 454, 457 (5th Cir. 1981); *Rhode Island Handicapped Action Committee* v. *Rhode Island Public Transit Authority*, 549 F. Supp. 592, 610 (D.R.I. 1982), reversed in part, vacated in part, and remanded on other grounds, 718 F.2d 490, (1st Cir. 1983).

In *Alexander* v. *Choate*, 469 U.S. 287, 105 S.Ct. 712 (1985), the Supreme Court again examined the extent of accommodation required for persons with disabilities, finding that in *Southeastern* a balance was struck between "two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep section 504 [of the Rehabilitation Act] within manageable bounds." *Alexander*, at 299.

The Supreme Court concluded in *Alexander* that "The balance struck in *Davis* [*Southeastern*] requires that an otherwise qualified handicapped individual must be provided with *meaningful access* to the benefit that the grantee offers * * * to assure meaningful access, *reasonable accommodations* in the grantee's program or benefit may have to be made." (Emphasis supplied.) *Alexander*, at 301.

These principles and section 3 of the Act require carriers to ensure meaningful access to air transportation while considering the potential safety impact of seating policies that are necessary to transporting passengers

with the maximum degree of safety. Banning all persons with disabilities from particular seats, or requiring all disabled persons to sit in particular seats, would be unlawful discrimination; but the exclusion of persons with certain disabilities from the seats covered by the rule for legitimate safety reasons does not deprive them of "meaningful access" to air carrier transportation. Exit rows provide only a small fraction of the available seating in the air carrier fleet. The FAA does not propose to bar any persons from seating that does not adversely affect their safety or that of other passengers. Furthermore, the rule specifically provides that a person with a disability cannot be denied transportation as a result of the safety restrictions.

Emergency Evacuations—Exit Row Passenger Functions

From a safety standpoint, a person who sits in an exit row or, in cases where there is no aisle, in any seat that has direct access to an exit must be able to accomplish a number of tasks under a variety of conditions without assistance. These include:

Locating the Exit

In order to be able to locate the exit in an emergency, the passenger in an exit row must be able to comprehend and identify that he/she is in such a row. The primary means of such comprehension and identification is seeing the exit, as well as its placards, and recognizing their significance. Although a person familiar with one or more aircraft seating configurations might be able to recognize that he/she is in an exit row by counting seat rows, that method is not reliable. Seating configurations vary from certificate holder to certificate holder and even from aircraft to aircraft in the same fleet. Further, the ability to remember seating configurations is not something that can be discerned by ordinary means of observation. It would not be practical to expect that a certificate holder assigning seats could identify a person with that ability, or be sure that one who claims such ability actually has it. It has been suggested that special briefings could be given to blind persons to inform them of their exit row occupancy and to familiarize them with the door or window mechanism. During an actual evacuation, however, there is no guarantee that the nearest exit will be operable or should be used. The FAA's study of three major accidents (Report AM–70–16), described previously herein, includes data on this point. In the Denver accident, the left window exits became unusable due to fire on the wing. Debris blocked the main, rear boarding door. Fire destroyed the slide at the aft galley door after about 20 persons used it. Other passengers then had to jump—a situation with special hazards for blind and other handicapped passengers. In the Salt Lake City accident, fire on the left side of the fuselage drove persons away from the window exits there to the right side instead. In the Rome crash, fire spread to the left side of the aircraft, hampering the escape of passengers from that side. Further, the forward galley door was not used due to fire. "Survival in Emergency Escape from Passenger Aircraft," at 11, 12, 22, 31, and 33. Clearly all passengers benefit if the persons seated in an exit row can determine quickly whether its door or window remains operable or conditions outside allow its use.

Recognizing, Comprehending the Instructions for Use, and Operating the Exit Opening Mechanism

These tasks call for the ability to locate and identify the mechanism and the range and direction of motion required to use the mechanism effectively. They require the ability to perceive and understand the normally available directions pertaining to use of the mechanism. Ascertaining the complete directions for opening an exit often requires observation of both the exit itself, which may have on it a graphic illustration regarding the direction of motion of the mechanism required to open the exit, and a passenger information card and/or video tape presentation. These contain further graphic illustrations of the complete set of actions required for use of the opening mechanism.

It should be emphasized that these presentations rely on graphic displays as well as on words. Reliable oral interpretation of the graphics for the benefit of a blind person by another passenger depends on the ability of the person attempting to convey the information. There would be no practical way to test this in advance. Similarly, relying on another passenger to translate instructions would be impractical in the case of persons who do not speak the same language. In addition, other passengers have no legal duty to convey such information to a handicapped, non-English speaking, or illiterate passenger, and it would not be feasible to require them to demonstrate such an ability.

Further, many passenger information cards focus on main handles of the exit, on the assumption that passengers will be able to see or read further instructions or find adjunct mechanisms. To illustrate, at the Flight Attendants Recurrent Training Course, the following were noted:

An overwing window exit generally will have a handle marked "Pull" or "Pull Down," but no placard or information concering the other hand grip which must be located and grasped at the same time as the movable handle. Both must be grasped to enable the person opening the exit window to move it out of the way to prevent blockage of the exit.

Certain operating mechanisms are not integral parts of the exit doors but may be located adjacent to the exit door. Still others have covers, labeled with words indicating they should be removed to allow use of the mechanism in an emergency.

On power-assisted exit doors, in addition to the mechanism for opening it, there often is an arming device located near the opening handle. If activated by mistake, it will prevent the door from opening. Sighted persons can differentiate this handle from the door mechanisms, which are fully labelled. No instructions are provided to passengers in connection with the arming devices because they are intended for crew use only. Yet, their proximity to the opening handles presents a chance that a person, who cannot discern the difference between the two mechanisms, inadvertently could render the exit useless. Once this occurs, it is not reversible without the assistance of trained mechanics.

Several persons have suggested that the locations and types of mechanisms may pose problems for persons other than those with disabilities. They recommend more detailed instructions on both the passenger evacuation cards and near the emergency exits. The FAA invites further comment on this issue.

Assessing Conditions

This requirement includes both sensory and cognitive abilities. The primary sense involved is sight. Cognitive abilities include the capacity to judge danger. Young children, for example, may lack the ability to make the required judgments. Opening an exit in an emergency may increase the danger to which all passengers are exposed, if doing so allows an external fire or even its smoke to enter the cabin. Danger to passengers also can be increased if they are encouraged to use an exit which might open onto dangerous conditions, such as jagged metal, ice, water, unexpected distance to the ground or some condition which might be avoided by using another exit.

It has been suggested that a blind person could be advised orally of a sighted person's assessment without derogating the safety of others. The FAA does not agree that this offers a practical alternative to excluding blind people from exit rows. Emergencies are more likely than not to foster confusion. To add a requirement for one person to assess conditions and relay that assessment to another before an emergency exit can be opened, solely to provide that other with the right to sit in an exit row, would be to increase danger unnecessarily.

It also has been suggested that a blind person can assess the danger presented by external fire through the sense of touch. The argument is that a blind person could sense an external fire by feeling the inside of the door. While that may be true in some cases, this argument is not valid in the case of fire that is not yet near enough to the airplane or of sufficient intensity to cause the inside of the door to be warm enough to warn against opening the door. Large, modern aircraft are extremely well-insulated. At 30,000 feet, a passenger cannot feel the intense cold (as low as –70 degrees centigrade) by placing a hand on the fuselage.

In addition, this assertion does not deal with the dangers presented by smoke, jagged metal, and other hazards such as those mentioned above. The certificate holders train crewmembers to "feel" the door while looking out the window to assess conditions, but this action is designed to cause a pause for assessment of viewed conditions before reaching for the exit operating mechanism. It is not considered an independent means of assessment.

In some doors, prism windows now allow visual assessment along the full length of the aircraft all the way to the ground to determine whether fire or obstacles are present. Clearly, blind persons cannot make such an assessment.

Automatic slides fail from time to time. When this happens, the person nearest the exit must recognize that manual deployment will be necessary, find the manual deployment handle, and operate it. If this fails, it may be necessary to find and communicate the need for a totally different means of escape. Sighting flashing door lights, following floor lights, or seeing the hand signals of others may be necessary for effective escape leadership. While this leadership may fall to a passenger outside the exit row, it will do so more rapidly if those in the exit row can quickly and accurately assess the state of that exit.

Finally, it has been suggested that blind persons are better able to function in the dark and actually may be more useful than sighted persons in an emergency evacuation. It is not certain, however, that in any given crash scenario darkness will be so complete as to render sight useless. Crashes involving fire and smoke may lead ultimately to total darkness in the cabin, but data available to the FAA at this time indicate that light cues usually are available. These may come from the fire itself, airport or other lighting, red emergency lights near the doors, and floor track lights. Even in dense smoke, an open door may appear shades lighter than the balance of the surroundings and draw passengers to safety.

Assessing Whether a Slide Can Be Used Safely

This includes judging whether the slide has extended, whether it terminates in a safe area, whether the physical integrity of the slide is adequate for its use, and whether passengers are accumulating on the slide in such numbers as to threaten its integrity.

Stowing or Securing the Exit Door

The action needed to stow or secure the exit door expeditiously and safely varies widely. On power-assisted doors, no separate action beyond turning the handle may be required. Removal of an exit window, however, will require maneuvering a 40- to 80-pound, approximately 2- x 3-foot window over the adjacent seat back into the row behind the exit or onto seats in the balance of the exit row. This requires strength, sight to ensure that others are out of harm's way of the detached window, and speaking ability to issue the appropriate orders or warnings to passengers in the way.

In stowing doors that swing outward, such as those on some Boeing 727 models, care must be taken to avoid falling out of the airplane. A handle near the door is provided for just this purpose, and its purpose is obvious to a sighted person attempting to open the door. In the passenger information cards of one major certificate holder, this handle is visible in pictures of the door, but its use is not discussed. This makes it unlikely that it would be revealed to a blind person being apprised of the exit operating instructions by a sighted companion. Such communication was suggested by at least one witness appearing before the advisory committee as being all a blind person would need to function as effectively as a sighted person in regard to opening an emergency exit safely and expeditiously.

A similar argument could be made with respect to passengers who cannot read the languages in which the instructions are presented. It is the FAA's position that such instruction or explanation by another person constitutes an unnecessary delay factor and simply points to the need for placing sighted persons in exit rows.

Safely Using the Exit

This includes passing expeditiously through the exit and assessing, selecting, and following a safe path away from the exit. A person leading the way out of an exit in an emergency should have the agility to exit quickly, the strength to assist other passengers, and the ability to avoid hazards such as water, jagged metal, unexpected heights (such as might be caused by failed or damaged slides), and rescue vehicles and associated equipment.

Following Oral Directions or Hand Signals From a Crewmember

During an anticipated evacuation, survival may depend on the ability of persons in exit rows to see, hear, and understand the instructions issued by crewmembers. As discussed previously herein, exits may become inoperable or unavailable due to fire, structural damage, or damage to slides. In some situations, opening an exit may exacerbate the danger by allowing flames or smoke to rush into the cabin. The potential for such danger is increased if persons in these exit rows cannot see it or hear and understand shouted directions and warnings from crewmembers.

Other Options for Exit Row Seating

In addition to the proposal in this NPRM, the FAA considered a number of other options in regard to exit row seating.

The first of these was the approach originally proposed in Notice 74–25 in 1974. Basically, this would have prohibited handicapped passengers from sitting in all exit row seats except the seat farthest from the exit. The FAA did not select this approach for the following reasons. (1) In the event the remaining seats in the exit row were not assigned, the sole passenger in that row could be a handicapped person; (2) similarly, if the other passengers became incapacitated, the sole passenger in that row could be a handicapped person; and (3) even if the other passengers were able-bodied, a handicapped person in the exit row would be more likely than an able-bodied person to cause some delay in establishing the evacuation

flow, as demonstrated in the CAMI studies.

The second approach was suggested by a representative of one of the groups of persons with disabilities. This called for only the seat adjacent to a window exit to be reserved for only persons capable of performing the necessary functions. Again, this approach presupposed the survival or undiminished capacity of the able-bodied person during an accident or emergency landing. Further, it would have allowed handicapped persons to sit in floor-level exit rows. This approach is not viable, given the available data on evacuation flow.

The FAA's objective in this proposal is to maximize the likelihood for survival. In order to do so, it is necessary that only persons capable of performing the necessary functions be seated in exit rows, to enhance the ability of all passengers to evacuate safely. Persons in exit rows may have to work as a team. In the window exit rows, for example, the task of removing the window hatch ordinarily would fall to the person next to the window hatch. The window hatches weigh 45 to 80 pounds and must be manuevered either over the back of the seat to the next row or placed on the seat next to the window exit seat. In either case, nearby passengers must have the capacity to recognize the need for moving out of the way rapidly and have the capacity to do so. In addition, the whole row of passengers must be capable of performing the necessary functions because the seat adjacent to the emergency exit may be unoccupied.

The initial evacuees also may have to work as a team on the ground. In a high wind, it may be necessary for several persons to hold down a slide and to catch passengers (especially disabled ones) and assist them away from the slide. The FAA invites comments, however, on the other options considered as well as any other options the agency may not have considered.

Other Issues

One issue that has been raised concerning exit row seating is whether there should be restrictions on seating persons who have been consuming alcohol in exit rows or on serving alcohol to persons seated in exit rows. Section 121.575 of the FAR prohibits a certificate holder from boarding, or serving alcohol to, a passenger who appears intoxicated. In any event, this proposed rule would apply to inebriated persons just as it applies to any other person who could not be expected to perform the functions described herein in an emergency exit row during an evacuation. The FAA seeks comment on whether more specific requirements are needed on this subject.

Another concern that has been expressed relates to the questionable need for exit row seating restrictions, in light of the allegedly negligible probability that a crash would occur with a handicapped person sitting in an exit row. The suggestion is that this limited chance should be balanced against the inconvenience to persons who are removed from exit row seats assigned by mistake or inadvertence.

This suggestion overlooks the purpose of crashworthiness rules such as proposed herein. Crashworthiness rules are designed to deal with the post-crash environment by creating the greatest possible chance for survivors to escape the aircraft. Another example of a crashworthiness measure is the use of seatbelts. Very rarly do passengers encounter turbulence that requires fastened seatbelts during flight. It is well-established, however, that a fastened seatbelt may be the difference between saving and losing a life.

The FAA's goal in this matter is safety for the maximum number of people possible. It is clear from the studies discussed herein that any delay in beginning the flow of persons through an exit works to the detriment of all those trying to use the exit. The FAA studies show that persons without handicaps are less likely to cause such delays than are persons with handicaps. The studies also show that a handicapped person, who might cause a substantial delay at the head of an exit queue, can be accommodated once the queue is established and moving without detriment to the flow rate or to his or her own escape through an exit.

The FAA seeks any additional studies or data concerning the issues raised by this rulemaking. For example, FAA has heard references to an evacuation exercise the National Federation of the Blind conducted in conjunction with World Airways in 1985. However, FAA has been unable to obtain tapes or other reports relating to that exercise.

Requirements for Compliance With the Rule

In order to comply with the proposed regulations, certificate holders would have to develop procedures and revise their pertinent handbooks, for review and approval by the principal operations inspectors (POI's) at the FAA Flight Standards District Offices that hold their certificates. The procedures would not become effective until final approval is granted by the Director, Flight Standards Service in Washington.

To ensure that the procedures of all certificate holders are consistent with the regulations, explicit criteria for the selection of exit row occupants have been included in the proposed rule. To be approved, a certificate holder's procedures would have to include the criteria and address all of the functions enumerated in the proposed regulations as ones that may fall to a person in an exit row.

The procedures also would have to include provisions by each certificate holder to make available at each airport it serves and at each seat affected by the proposed regulations the information advising the occupying passenger that he or she may be called upon to perform the enumerated functions.

Certificate holders also would have to include provisions for verifying the appropriateness of exit row seating assignments prior to takeoff and for briefing passengers on the need to identify themselves and to move out of the exit row if they cannot meet the criteria or do not wish to be responsible for performing the required functions. For example, a procedure might consist of a flight attendant asking questions to ensure that a person seated in an exit row can hear and understand English. The flight attendant would then instruct the passenger briefly as to the responsibilities of sitting in that seat, and the person would indicate whether he or she felt capable of performing those functions. Any procedure that ensures that the criteria are applied in a non-discriminatory manner would be acceptable. The FAA invites comments on the best way to accomplish this.

Approval will be based solely upon the safety aspects of the certificate holders' procedures. The FAA's approval of procedures will not insulate the certificate holder, therefore, from challenges based upon discrimination or other matters not related to safety.

As with any changes to Part 121 or 135, certificate holders' procedures would have to provide for training, as already required by FAA regulations in 14 CFR Part 121, specifically, §§ 121.415, "Crewmember and dispatcher training requirements"; 121.417, "Crewmember emergency training"; 135.295, "Initial and recurrent flight attendant crewmember testing requirements"; and 135.319, "Crewmember training requirements". Accordingly, proposed §§ 121.585 and 135.127 contain no separate requirement for training.

In developing the foregoing proposed compliance procedures, the FAA considered eliminating the requirement for submission of the procedures to the FAA for approval. The rationale

presented for nonsubmission include: (1) The proposed rule is very explicit and could be implemented with minimal written procedures; (2) passengers with complaints based either on safety or discrimination have adequate recourse to the FAA or the Office of the Secretary of Transportation, whether or not written procedures have been submitted for approval; and (3) since the rule could be implemented with minimal written procedures, there would be little to review and approve, and the cost of submission would not be warranted.

On the other hand, the FAA considered the following factors: (1) Representatives of handicapped groups have expressed strong disapproval of the fact that the procedures developed by certificate holders under § 121.586, "Authority to refuse transportation", were submitted solely for review and not for approval by the FAA. A compliance mechanism that eliminates even the submission of the procedures may be considered a step in the wrong direction, regardless of the proposed rule's increased level of detail; (2) if the procedures are not submitted for approval, the FAA will have to rely solely on complaints to determine the compliance of the certificate holders; (3) without ready access to the procedures, the FAA will be in a less informed position, when attempting to resolve a problem informally; and (4) there is no guarantee that each certificate holder will interpret the proposed rule in exactly the same way.

The FAA welcomes comments on this matter.

The requirements would be applicable to all part 135 air taxi operators and commercial operators, as well as to Part 121 domestic, flag, and supplemental air carriers and commercial operators of large aircraft. The FAA considered limiting the applicability of § 135.127, however, to aircraft having a passenger seating configuration of more than 19 passengers.

Many small aircraft do not have complicated assist mechanisms, such as evacuation slides, and have fewer types of doors and fewer passengers to evacuate in an emergency. It is conceivable that these factors may make it less necessary to restrict exit row seating. On the other hand, damage to an aircraft that precludes the use of even one evacuation route may have a greater impact in a small aircraft than in a large one. Further, the limited space for movement actually may increase the need for seating restrictions. The FAA invites comments on the extent to which the proposed rule should apply to Part 135 commuter and on-demand air carriers and commercial operators.

Compliance Dates

As previously discussed herein, the Department of Transportation has proposed a rule to implement the Air Carrier Access Act, to which the FAA's proposed exit row rule relates. It is the intention of the Department that both proposed rules, if adopted, become effective simultaneously to the extent possible, to avoid a hiatus between the existing procedures of certificate holders, concerning exit row seating, and the requirements established through amending Parts 121 and 135.

While the Department recognizes that the existing procedures of certificate holders may have many shortcomings, they presently constitute the only available mechanism for monitoring emergency exit row seating from the standpoint of safety. The FAA believes that a hiatus would not be in the best interests of safety and that the present procedures must be used until proposed §§ 121.585 and 135.127, if adopted, become effective.

The Department also recognizes that both the certificate holders and the handicapped groups have concerns regarding the timing of the implementation. The certificate holders' concerns relate to the length of time that it would take to train their personnel before the provisions of both rules become fully effective. The handicapped groups, particularly with respect to Part 382, are concerned that there be no needless delays in the implementation of the provisions. The issue of the timing of the effective dates for both rules will be resolved on the basis of comments received on this proposal.

Regulatory Evaluation Summary

Analysis of Benefits and Costs

The FAA has estimated the costs and benefits associated with this proposed rule by analyzing it section by section.

This proposal would replace the industry's inconsistent policies and inconstant practices with a uniformly applicable rule. The proposed rule provides a comprehensive set of procedures, based on explicit criteria, that can be carried out with only minimal training cost. Changes to the appropriate parts of the crewmembers' manuals and appropriate segments of airlines' training programs are made periodically as a matter of routine. The provisions of this proposal would be incorporated routinely into those manuals and training programs at little additional cost. Factors such as an accelerated training schedule, if used, could result, however, in some additional training costs. Presently, the FAA does not anticipate this will be necessary.

The requirement for passengers to comply with instructions, or be subject to denial of transportation at the discretion of the certificate holder, would impose no cost because such a requirement is presently industry practice reflecting section 902(j) of the Federal Aviation Act of 1958 (49 U.S.C. 1472(j)).

The requirement that certificate holders make available, at each seat affected, information advising the occupant of the functions he or she might be called upon to perform in an emergency and the requirement that passenger information cards be presented in multiple languages would cost, at maximum, approximately $310,000 for all potentially affected seats under the proposed applicability in both Part 121 and Part 135. The maximum approximate cost per aircraft would range from $20 to $60 for Part 135 commuters with more than 19 seats and airplanes operating under Part 121. The maximum approximate cost per aircraft for Part 135 commuters with 19 or fewer seats and for air taxis would average $5.

The cost of making copies of the criteria available at airports would be negligible. The incremental cost of printing the procedures and making them available at each airport would range from less than $100 to probably no more than $1,000 per year for each Part 121 operator and Part 135 commuter operator, depending on the number of airports each operator serves. Air taxi operators likely would incur only the negligible costs of using a copying machine to copy the criteria.

The requirement for verification of appropriately occupied affected seats prior to closing all passenger entry doors preparatory to taxi or pushback would be accomplished during the currently-required baggage stowage check with no delay of flight or incremental cost.

The required inclusions in the passenger briefings are minimal expansions and would be accomplished at no cost.

Accommodating a passenger being relocated from an exit row seat when non-exit row seats are fully booked would involve no cost. That person would not be denied transportation, nor would any cost result from moving another passenger, who is willing and able to assume the evacuation functions that may be required, into an exit row seat.

The certificate holder's submission of procedures to the FAA would involve a negligible administrative cost for the transaction.

Since no passenger would be denied transportation, there would be no loss of revenue.

The potential benefits that would be derived from this proposed rule are substantial. The FAA estimates the potential benefits based on a broad body of information which is discussed in detail elsewhere in this NPRM. Of particular import is the information contained in a study completed in October 1970 by the FAA's Office of Aviation Medicine, entitled "Survival in Emergency Escape from Passenger Aircraft" (Report No. AM-70-16), which concluded that in aircraft accidents in which decelerative forces do not result in massive cabin destruction and overwhelming trauma to passengers, survival is determined largely by the ability of the uninjured passenger to make his or her way from a seat to an exit within time limits imposed by the thermotoxic environment. Seconds can mean the difference between life and death in the aftermath of a crash inasmuch as evacuation might be terminated abruptly by an explosion at any point.

The reason for this proposed rulemaking is a concern for potential derogation of safety. Any effort to calculate monetary values for expected saved lives would be speculative, since there is no historical base from which to derive valid estimates. Nevertheless, the FAA estimates that the proposed rules would account for a benefit of substantial numbers of lives saved as contrasted with potential loss of life in the absence of such regulations.

It is obvious that the prevention of only one life lost in an accident would alone more than pay for the cost of this proposed rule. The data clearly indicate that the proposed rule would be justified on a benefit-to-cost basis. Each proposed section in Part 121 and Part 135 is identified and explained in the detailed section-by-section analysis contained in the full Regulatory Evaluation placed in the docket.

Regulatory Flexibility Determination

Since there would be only negligible cost associated with this rule for an operator, the FAA has determined that the proposal would not have a significant economic impact, positive or negative, on a substantial number of small entities.

Trade Impact Statement

Since this proposed rule would affect only Part 121 and Part 135 certificate holders regarding seating of passengers in exit rows, the FAA has determined that the proposed regulation would not have an impact on international trade.

Federalism Implications

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 12612, it is determined that such a regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed in the preamble and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this proposed regulation is not major under Executive Order 12291 and certifies that this rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This proposal is considered significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). An initial regulatory evaluation of the proposal, including a Regulatory Flexibility Determination and Trade Impact Analysis, has been placed in the regulatory docket. A copy may be obtained by contacting the person identified under "FOR FURTHER INFORMATION CONTACT."

List of Subjects

14 CFR Part 121

Transportation, Air safety, Safety, Aviation safety, Air transportation, Air carriers, Airplanes, Aircraft, Handicapped.

14 CFR Part 135

Transportation, Air safety, Safety, Aviation safety, Air transportation, Air carriers, Airplanes, Aircraft, Handicapped.

The Proposal

Accordingly, the FAA proposes to amend Parts 121 and 135 of the Federal Aviation Regulations (14 CFR Parts 121 and 135) as follows:

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. The authority citation for 14 CFR Part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

2. New § 121.585 is added to read as follows:

§ 121.585 Exit row seating.

(a) Each certificate holder shall determine, to the extent necessary to perform the applicable functions of paragraph (d) of this section, the suitability of each person it permits to occupy a seat in a row of seats that provides the most direct access to an exit (including all of the seats in the row from the fuselage to the first aisle inboard of the exit or, in cases where there is no aisle, in any seat that has direct access to an exit), in accordance with this section. These determinations shall be made in a non-discriminatory manner consistent with the requirements of this section, by persons designated in the certificate holder's required operations manual.

(b) No certificate holder may seat a person in a seat covered by this section if the certificate holder determines that the person would likely be unable to perform one or more of the applicable functions in paragraph (d) of this section because—

(1) The person lacks sufficient mobility, strength, or dexterity in both arms and hands, and both legs, to reach upward, sideways, and downward to the location of door and exit-slide operating mechanisms; to grasp and push, pull, turn, or otherwise manipulate those mechanisms; to push, shove, pull, or otherwise open doors; to lift out, hold, deposit on nearby seats, or maneuver over the seatbacks to the next row objects the size and weight of over-wing window exit doors; to remove obstructions of similar size and weight; to reach the exit expeditiously; to maintain balance while removing obstructions; to exit expeditiously; to stabilize an escape slide after deployment; and to assist others in getting off an escape slide;

(2) The person lacks sufficient cognitive capacity to perform one or more of those functions without the assistance of an adult companion, parent, or other relative;

(3) The person lacks the ability to read and understand instructions related to emergency evacuation provided by the certificate holder in printed, handwritten, or graphic form;

(4) The person lacks sufficient visual capacity to perform one or more of the applicable functions in paragraph (d) of this section without the assistance of

visual aids beyond contact lenses or eyeglasses;

(5) The person lacks sufficient aural capacity to hear and understand instructions shouted by flight attendants, without assistance beyond a hearing aid, and the ability to understand the language spoken by the flight attendants;

(6) The person lacks the ability adequately to impart information orally to other passengers; or

(7) The person has:

(i) A condition or responsibilities, such as caring for small children, that might be likely to prevent the person from performing one or more of the applicable functions listed in paragraph (d) of this section; or

(ii) A condition that might be likely to cause the person harm if he or she performs one or more of the applicable functions or result in harm that would prevent the person from performing one or more of the applicable functions listed in paragraph (d) of this section.

(c) Each passenger shall comply with instructions given by a crewmember or other authorized employee of the certificate holder, implementing exit row seating restrictions established in accordance with this section.

(d) Each certificate holder shall include on passenger information cards, presented in the languages used by the certificate holder for passenger information cards, at each seat affected by this section, the following information: In the event of an emergency in which a crewmember is not available to assist, passengers occupying an exit row seat (or any seat that has direct access to an exit) may be called upon to perform the following functions:

(1) Locate the exit;

(2) Recognize the exit opening mechanism;

(3) Comprehend the instructions for operating the exit;

(4) Operate the exit;

(5) Assess whether opening the exit will increase the hazards to which passengers may be exposed;

(6) Followed oral directions and hand signals given by a crewmember;

(7) Stow or secure the exit door so that it will not impede use of the exit;

(8) Assess the condition of an escape slide, activate the slide, and stabilize the slide after deployment to assist others in getting off the slide;

(9) Pass expeditiously through the exit; and

(10) Assess, select, and follow a safe path away from the exit.

(e) Each certificate holder shall include, on passenger information cards at all seats affected by this section, the criteria set forth in paragraph (b) of this section, presented in the languages used by the certificate holder for passenger information cards.

(f) Each certificate holder shall make available for inspection by the public at all passenger loading gates and ticket counters at each airport where it conducts passenger operations, written procedures established for making determinations in regard to exit row seating.

(g) No certificate holder shall allow all passenger entry doors to be closed in preparation for taxi or pushback unless at least one required crewmember has verified that each occupied seat affected by this section is occupied by a person the crewmember determines is likely to be able to perform the applicable functions in paragraph (d) of this section.

(h) Each certificate holder shall include in its passenger briefings a reference to the passenger information cards, required by paragraphs (d) and (e), the criteria set forth in paragraph (b), and the functions set forth in paragraph (d) of this section.

(i) Each certificate holder shall include in the briefings and in the written criteria a request that a passenger identify himself or herself to allow reseating if he or she—

(1) Cannot meet the criteria set forth in paragraph (b) of this section;

(2) Has a nondiscernible condition that will prevent him or her from performing the applicable functions listed in paragraph (d) of this section;

(3) May suffer bodily harm as the result of performing one or more of those functions; or,

(4) Does not wish to perform those functions. A certificate holder shall not require the passenger to disclose his or her reason for needing reseating.

(j) Each certificate holder shall expeditiously honor a passenger's request to be relocated to a seat not affected by this section.

(k) In the event a certificate holder determines in accordance with this section that a passenger assigned to an exit row seat is not likely to be able to perform the functions described in paragraph (d) of this section, or a passenger requests a non-exit row seat, the certificate holder shall relocate the passenger to a non-exit row seat.

(l) In the event of full booking in the non-exit row seats, the certificate holder shall move a passenger, if necessary to accommodate a passenger being relocated from an exit row seat, who is willing and able to assume the evacuation functions that may be required, to an emergency exit row seat. Persons being moved out of an emergency exit row seat shall not be denied transportation.

(m) A certificate holder may deny transportation or exit row seating to any passenger who refuses to comply with instructions given by a crewmember or other authorized employee of the certificate holder, implementing exit row seating restrictions established in accordance with this section.

(n) In order to comply with this section,

(1) Certificate holders shall develop procedures that:

(i) Include the criteria enumerated in paragraph (b) of this section;

(ii) Address all of the functions enumerated in paragraph (d) of this section;

(iii) Provide for airport information, passenger information cards, crewmember verification of appropriate seating in exit rows, passenger briefings, seat assignments, and denial of transportation as set forth in paragraphs (e) through (i) and (o) of this section;

(2) Certificate holders shall submit their procedures for preliminary review and approval to the principal operations inspectors assigned to them at the FAA Flight Standards District Offices that hold their certificates.

(o) Certicate holders shall:

(1) Deny transportation only on the basis of refusal to comply with instructions as set forth in paragraph (c) of this section; and

(2) Assign seats prior to boarding consistent with the criteria in paragraph (b) and the functions in paragraph (d) of this section, to the maximum extent feasible.

(p) The procedures required by paragraph (m) of this section will not become effective until final approval is granted by the Director, Flight Standards Service, Washington, DC. Approval will be based solely upon the safety aspects of the certificate holders' procedures.

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

3. The authority citation for Part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983)

4. New § 135.127 is added to read as follows:

§ 135.127 Exit row seating.

(a) Each certificate holder shall determine, to the extent necessary to perform the applicable functions of paragraph (d) of this section, the suitability of each person it permits to

occupy a seat in a row of seats that provides the most direct access to an exit (including all of the seats in the row from the fuselage to the first aisle inboard of the exit or, in cases where there is no aisle, in any seat that has direct access to an exit), in accordance with this section. These determinations shall be made in a non-discriminatory manner consistent with the requirements of this section, by persons designated in the certificate holder's required operational manual.

(b) No certificate holder may seat a person in a seat covered by this section if the certificate holder determines that the person would likely be unable to perform one or more of the applicable functions in paragraph (d) of this section because—

(1) The person lacks sufficient mobility, strength, or dexterity in both arms and hands, and both legs, to reach upward, sideways, and downward to the location of door and exit-slide operating mechanisms; to grasp and push, pull, turn, or otherwise manipulate those mechanisms; to push, shove, pull, or otherwise open doors; to lift out, hold, deposit on nearby seats, or maneuver over the seatbacks to the next row objects the size and weight of over-wing window exit doors; to remove obstructions of similar size and weight; to reach the exit expeditiously; to maintain balance while removing obstructions; to exit expeditiously; to stabilize an escape slide after deployment; and to assist others in getting off an escape slide;

(2) The person lacks sufficient cognitive capacity to perform one or more of those functions without the assistance of an adult companion, parent, or other relative;

(3) The person lacks the ability to read and understand instructions related to emergency evacuation provided by the certificate holder in printed, handwritten, or graphic form;

(4) The person lacks sufficient visual capacity to perform one or more of the applicable functions in paragraph (d) of this section without the assistance of visual aids beyond contact lenses or eyeglasses;

(5) The person lacks sufficient aural capacity to hear and understand instructions shouted by flight attendants, without assistance beyond a hearing aid, and the ability to understand the language spoken by the flight attendants;

(6) The person lacks the ability adequately to impart information orally to other passengers; or,

(7) The person has:

(i) A condition or responsibilities, such as caring for small children, that might be likely to prevent the person from performing one or more of the applicable functions listed in paragraph (d) of this section; or

(ii) A condition that might be likely to cause the person harm if he or she performs one or more of the applicable functions or result in harm that would prevent the person from performing one or more of the applicable functions listed in paragraph (d) of this section.

(c) Each passenger shall comply with instructions given by a crewmember or other authorized employee of the certificate holder, implementing exit row seating restrictions established in accordance with this section.

(d) Each certificate holder shall include on passenger information cards, presented in the languages used by the certificate holder for passenger information cards, at each seat affected by this section, the following information: In the event of an emergency in which a crewmember is not available to assist, passengers occupying an exit row seat (or any seat that has direct access to an exit) may be called upon to perform the following functions:

(1) Locate the exit;

(2) Recognize the exit opening mechanism;

(3) Comprehend the instructions for operating the exit;

(4) Operate the exit;

(5) Assess whether opening the exit will increase the hazards to which passengers may be exposed;

(6) Follow oral directions and hand signals given by a crewmember;

(7) Stow or secure the exit door so that it will not impede use of the exit;

(8) Assess the condition of an escape slide, activate the slide, and stabilize the slide after deployment to assist others in getting off the slide;

(9) Pass expeditiously through the exit; and

(10) Assess, select, and follow a safe path away from the exit.

(e) Each certificate holder shall include, on passenger information cards at all seats affected by this section, the criteria set forth in paragraph (b) of this section, presented in the languages used by the certificate holder for passenger information cards.

(f) Each certificate holder shall make available for inspection by the public at all passenger loading gates and ticket counters at each airport where it conducts passenger operations, written procedures established for making determinations in regard to exit row seating.

(g) No certificate holder shall allow all passenger entry doors to be closed in preparation for taxi or pushback unless at least one required crewmember has verified that each occupied seat affected by this section is occupied by a person the crewmember determines is likely to be able to perform the applicable functions in paragraph (d) of this section.

(h) Each certificate holder shall include in its passenger briefings a reference to the passenger information cards required by paragraphs (d) and (e), the criteria set forth in paragraph (b), and the functions set forth in paragraph (d) of this section.

(i) Each certificate holder shall include in the briefings and in the written criteria a request that a passenger identify himself or herself to allow reseating if he or she—

(1) Cannot meet the criteria set forth in paragraph (b) of this section;

(2) Has a nondiscernible condition that will prevent him or her from performing the applicable functions listed in paragraph (d) of this section;

(3) May suffer bodily harm as the result of performing one or more of those functions; or

(4) Does not wish to perform those functions. A certificate holder shall not require the passenger to disclose his or her reason for needing reseating.

(j) Each certificate holder shall expeditiously honor a passenger's request to be relocated to a seat not affected by this section.

(k) In the event a certificate holder determines in accordance with this section that a passenger assigned to an exit row seat is not likely to be able to perform the functions described in paragraph (d) of this section, or a passenger requests a non-exit row seat, the certificate holder shall relocate the passenger to a non-exit row seat.

(l) In the event of full booking in the non-exit row seats, the certificate holder shall move a passenger, if necessary to accommodate a passenger being relocated from an exit row seat, who is willing and able to assume the evacuation functions that may be required, to an emergency exit row seat. Persons being moved out of an emergency exit row seat shall not be denied transportation.

(m) A certificate holder may deny transportation or exit row seating to any passenger who refuses to comply with instructions given by a crewmember or other authorized employee of the certificate holder, implementing exit row seating restrictions established in accordance with this section.

(n) In order to comply with this section,

(1) Certificate holders shall develop procedures that:

(i) Include the criteria enumerated in paragraph (b) of this section;

(ii) Address all of the functions enumerated in paragraph (d) of this section;

(iii) Provide for airport information, passenger information cards, crewmember verification of appropriate seating in exit rows, passenger briefings, seat assignments, and denial of transportation as set forth in paragraphs (e) through (i) and (o) of this section;

(2) Certificate holders shall submit their procedures for preliminary review and approval to the principal operations inspectors assigned to them at the FAA Flight Standards District Offices that hold their certificates.

(o) Certificate holders shall:

(1) Deny transportation only on the basis of refusal to comply with instructions as set forth in paragraph (c) of this section; and

(2) Assign seats prior to boarding consistent with the criteria in paragraph (b) and the functions in paragraph (d) of this section, to the maximum extent feasible.

(p) The procedures required by paragraph (m) of this section will not become effective until final approval is granted by the Director, Flight Standards Service, Washington, DC. Approval will be based solely upon the safety aspects of the certificate holders' procedures.

Issued in Washington, DC, on March 7, 1989.

D.C. Beaudette,

Acting Director, Flight Standards Service.

[FR Doc. 89-5631 Filed 3-8-89; 11:21 am]

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Monday
March 13, 1989

Part III

Department of Education

34 CFR Part 250 et al.

Intergovernmental Review of Department of Education Programs and Activities; Notice of Proposed Rulemaking

DEPARTMENT OF EDUCATION

34 CFR Parts 250, 300, 315, 324, 332, 366, 369, 385, 396, 400, 607, 608, 609, 624, 628, 629, 630, 631, 637, 639, 643, 644, 645, 646, 649, 656, 657, 658, 692, 745, 755, and 773

Intergovernmental Review of Department of Education Programs and Activities

AGENCY: Department of Education.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Secretary proposes to issue regulations implementing changes in coverage for Department of Education programs subject to Executive Order 12372 (Intergovernmental Review of Federal Programs). These changes are required in order to comply with an Office of Management and Budget (OMB) memorandum, issued March 14, 1985, amending the criteria for inclusion and exclusion of State review under the Executive Order. This notice is also required in order to provide an opportunity for public comment on proposed revisions to the lists of included and excluded programs, and selection by each State of the programs to be subject to that State's review process.

DATE: Comments must be received on or before June 12, 1989.

ADDRESSES: All comments concerning these proposed rules should be addressed to F. LeRoy Walser, Office of Intergovernmental and Interagency Affairs, Department of Education, 400 Maryland Avenue, SW. FOB–6, Room 3059, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: F. LeRoy Walser, Telephone: (202) 732–3669.

SUPPLEMENTARY INFORMATION: Executive Order 12372 provides an opportunity for States to review applications for Federal assistance programs which directly affect State and local governments. The Executive Order, signed July 14, 1982, is designed "to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for the State and local government coordination and review of proposed Federal financial assistance and direct Federal development."

On June 24, 1983 (at 48 FR 29158), the Department published regulations at 34 CFR Part 79 implementing the Executive Order. The Department published amendments to these regulations (at 51 FR 20823, June 9, 1986) to implement changes in criteria for program coverage issued in OMB's March 14, 1985, memorandum entitled "Procedural Changes in Agency Implementation of Executive Order 12372."

The Department has reviewed all of its current programs for coverage under the Executive Order according to the revised OMB criteria. Under these criteria, a Federal assistance program or activity is included for State review unless the program or activity does not directly affect State or local governments, is proposed Federal legislation, regulation, or budget formulation, or involves one of the following: (1) National security, (2) procurement, (3) direct payments to individuals, (4) financial transfers for which Federal agencies have no funding discretion or direct authority to approve specific sites or projects (*e.g.*, Chapter 2 of the Education Consolidation and Improvement Act of 1981), (5) research and development that is national in scope, and (6) assistance to federally-recognized Indian tribes).

The Department proposes two new appendices which would supersede those previously published. These appendices would implement the new OMB criteria for coverage and add certain programs that were enacted or amended prior to passage of Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100–297. Any changes in coverage or new coverage required by Pub. L. 100–297 will be made in the regulations developed to implement the Act. At Appendix A are programs proposed for inclusion for State review under Executive Order 12372; at Appendix B are programs proposed for exclusion from State review and the justification for the proposed exclusion.

Executive Order 12291

These proposd regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Regulatory Flexibility Act Certification

Since these proposed regulations would implement the opportunity for review of existing programs by State and local governments, would simplify consultation with Department, and would allow State and local governments to establish cost effective consultation procedures, the Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1980

These proposed regulations have been examined under the Paperwork Reductioin Act of 1980 and have been found to contain no information collection requirements.

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3059, FOB–6, 400 Maryland Avenue, SW., Washington, DC 20202, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week, except Federal holidays.

To assist the Department in complying with specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce regulatory burdens found in these proposed regulations.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

38 CFR Part 250

Administrative practice and procedure, Education, Indian education.

34 CFR Part 300

Administrative practice and procedure, Education, Education of handicapped, Equal educational opportunity, Privacy, Private schools.

34 CFR Part 315

Education, Education of handicapped, Education—research, Government contracts, Student aid, Teachers.

34 CFR Part 324

Education, Education of handicapped, Education—research, Local edcational agency, School, State educational agency.

34 CFR Part 332

Education, Education of handicapped.

34 CFR Part 366

Education, Grant programs—social programs, Vocational rehabilitation.

34 CFR Part 369

Education, Grant programs—social programs, Vocational rehabilitation.

34 CFR Part 385

Education, Vocational rehabilitation.

34 CFR Part 396

Education, Vocational rehabilitation.

34 CFR Part 400

Adult education, Education, Education of disadvantaged, Equal educational opportunity, Private schools, Schools, School construction, Vocational education, Women.

34 CFR Part 607

Colleges and universities, Education.

34 CFR Part 608

Colleges and universities, Education.

34 CFR Part 609

Colleges and universities, Education.

34 CFR Part 624

Colleges and universities, Education.

34 CFR Part 628

Colleges and universities, Education.

34 CFR Part 629

Adult education, Colleges and universities, Education, Veterans.

34 CFR Part 630

Colleges and universities, Education, Government contracts.

34 CFR Part 631

Colleges and universities, Education, Educational research, Employment, Manpower training programs, Student aid.

34 CFR Part 637

Colleges and universities, Education, Education of disadvantaged, Educational study programs, Equal educational opportunity, Science and technology.

34 CFR Part 639

Colleges and universities, Education, Educational study programs, Law.

34 CFR Part 643

Colleges and universities, Education, Education of disadvantaged, Education of handicapped.

34 CFR Part 644

Colleges and universities, Education of disadvantaged, Education, Education of handicapped.

34 CFR Part 645

Colleges and universities, Education, Education of disadvantaged, Education of handicapped.

34 CFR Part 646

Bilingual education, Education, Education of disadvantaged, Education of handicapped, Government contracts.

34 CFR Part 649

Colleges and universities, Education, Energy, Mineral resources, Mines, Scholarships and fellowships.

34 CFR Part 656

Colleges and universities, Cultural exchange programs, Education, Educational study programs, Foreign languages, Fellowships, Resource center.

34 CFR Part 657

Education, Educational study programs, Fellowships.

34 CFR Part 658

Colleges and universities, Education, International education.

34 CFR Part 692

Education, State-administered-education, Student aid.

34 CFR Part 745

Education, Government contracts, Sex discrimination.

34 CFR Part 755

Colleges and universities, Education, Local educational agency, State educational agency.

34 CFR Part 773

Colleges and universities, Education, Libraries.

Dated: December 19, 1988.

Lauro F. Cavazos,

Secretary of Education.

The Secretary proposes to amend Parts 250, 300, 324, 332, 366, 369, 385, 396, 400, 607, 608, 609, 624, 628, 629, 630, 631, 637, 639, 643, 644, 645, 646, 649, 656, 657, 658, 692, 706, 745, 755, and 773 of Title 34 of the Code of Federal Regulations as follows:

PART 250—INDIAN EDUCATION ACT—GENERAL PROVISIONS

1. The authority citation for Part 250 is revised to read as follows:

Authority: 20 U.S.C. 241aa–241ff, 1211a, 1221h, 3385, 3385a, unless otherwise noted.

2. Section 250.3 is amended by revising paragraph (e) to read as follows.

§ 250.3 What regulations apply to these programs?

* * * * *

(e) 34 CFR Part 79 (Intergovernmental Review of Department of Education programs and Activities), except that applications for assistance submitted by Federally recognized Indian tribes are not subject to review under Part 79, and Part 79 does not apply to 34 CFR Parts 252, 253, and 256.

(Authority: 20 U.S.C. 241aa–241ff, 1211a, 3385, 3385a)

PART 300—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

3. The authority citation for Part 300 continues to read as follows:

Authority: 20 U.S.C. 1411–1420, unless otherwise noted.

§ 300.3 [Amended]

4. Section 300.3(a)(1) is amended by removing "Programs) and Part 77 (Definitions)." and adding, in their place, "Programs) Part 77 (Definitions), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)."

PART 315—PROGRAM FOR SEVERELY HANDICAPPED CHILDREN

5. The authority citation for Part 315 continues to read as follows:

Authority: 20 U.S.C. 1424, unless otherwise noted.

6–8. In § 315.3, paragraphs (b)(3), and (4) are revised and a new paragraph (b)(5) is added to read as follows:

§ 315.3 What regulations apply to this program?

* * * * *

(b) * * *

(3) Part 77 (Definitions that Apply to Department Regulations);

(4) Part 78 (Education Appeal Board); and

(5) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(Authority: 20 U.S.C. 1424, 20 U.S.C. 3474(a))

PART 324—RESEARCH IN EDUCATION OF THE HANDICAPPED PROGRAM

9. The authority citation for Part 324 continues to read as follows:

Authority: 20 U.S.C. 1441–1444, unless otherwise noted.

10. In § 324.3, paragraphs (b)(3) and (4) are revised and a new paragraph (b)(5) is added to read as follows:

§324.3 What regulations apply to this program?

* * * * *

(b) * * *

(3) Part 77 (Definitions that Apply to Department Regulations);

(4) Part 78 (Education Appeal Board); and

(5) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(Authority: 20 U.S.C. 1441–1444)

PART 332—EDUCATIONAL MEDIA RESEARCH, PRODUCTION, DISTRIBUTION, AND TRAINING

11. The authority citation for Part 332 is revised to read as follows:

Authority: 20 U.S.C. 1451–1452, unless otherwise noted.

§ 332.3 [Amended]

12. Section 332.3 is amended by removing "77 and" and adding, in their place, the words "77, 78, and 79, and".

PART 366—CENTERS FOR INDEPENDENT LIVING

13. The authority citation for Part 366 is revised to read as follows:

Authority: 29 U.S.C. 711(c) and 796(e), unless otherwise noted.

§ 366.3 [Amended]

14. Section 366.3(a) is amended by removing the word "and" each place it appears, and by adding the words "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," before the period at the end of the sentence.

PART 369—VOCATIONAL REHABILITATION SERVICE PROJECTS

15. The authority citation for Part 369 is revised to read as follows:

Authority: 29 U.S.C. 711(c), 732, 750, 775, 777a (a)(1) and (a)(3), 777b, 777f and 795g, unless otherwise noted.

§ 369.3 [Amended]

16. Section 369.3(a) is amended by removing the word "and", and by adding "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities), except that Part 79 does not apply to the Handicapped American Indian Vocational Rehabilitation Service Projects (34 CFR Part 371)" before the period at the end of the sentence.

PART 385—REHABILITATION TRAINING

17. The authority citation for Part 385 is revised to read as follows:

Authority: 29 U.S.C. 711(c), 744, and 776, unless otherwise noted.

§ 385.3 [Amended]

18. Section 385.3(a) is amended by removing the word "and", and by adding "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," before the period at the end of the sentence.

PART 396—TRAINING OF INTERPRETERS FOR DEAF INDIVIDUALS

19. The authority citation for Part 396 is revised to read as follows:

Authority: 29 U.S.C. 744(d), unless otherwise noted.

20. In § 396.3, paragraphs (a) (3) and (4) are revised and a new paragraph (b)(5) is added to read as follows:

§ 396.3 What regulations apply to this program?

* * * * *

(a) * * *

(3) Part 77 (Definitions that Apply to Department Regulations);

(4) Part 78 (Education Appeal Board); and

(5) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

* * * * *

(Authority: 29 U.S.C. 774(d))

PART 400—VOCATIONAL EDUCATION PROGRAMS—GENERAL PROVISIONS

21. The authority citation for Part 400 continues to read as follows:

Authority: 20 U.S.C. *et seq.*, unless otherwise noted.

§ 400.3 [Amended]

22. Section 400.3(f) is amended by adding "except that Part 79 does not apply to any applications submitted by an Indian tribal organization that is eligible under 34 CFR 410.2(a)(1) of the Indian and Hawaiian Natives Program (34 CFR Part 410)" before the period at the end of the sentence.

PART 607—STRENGTHENING INSTITUTIONS PROGRAMS

23. The authority citation for Part 607 continues to read as follows:

Authority: 20 U.S.C. 1057–1059, 1066–1069f, unless otherwise noted.

§ 607.6 [Amended]

24. Section 607.6(a) is amended by removing "Regulations; and Part 78 (Education Appeal Board)." and adding in their place "Regulations); Part 78 (Education Appeal Board); and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)."

PART 608—STRENGTHENING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES PROGRAM

25. The authority citation for Part 608 continues to read as follows:

Authority: 20 U.S.C. 1060 through 1063a, 1063c and 1069c, unless otherwise noted.

§ 608.3 [Amended]

26. Section 608.3(a) is amended by removing the word "and", and adding "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," before the period at the end of the sentence.

PART 609—STRENGTHENING HISTORICALLY BLACK GRADUATE INSTITUTIONS PROGRAM

27. The authority citation for Part 609 continues to read as follows:

Authority: 20 U.S.C. 1063b and 1069c, unless otherwise noted.

§ 609.3 [Amended]

28. Section 609.3(a) is amended by removing the word "and" and adding "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," before the period at the end of the sentence.

PART 624—INSTITUTIONAL AID PROGRAMS—GENERAL PROVISIONS

29. The authority citation for Part 624 continues to read as follows:

Authority: 20 U.S.C. 1051–1069c, unless otherwise noted.

§ 624.5 [Amended]

30. Section 624.5(a) introductory text is amended by removing "and", and adding in its palce a comma after "(Direct Grant Programs)" and adding "34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," after "(Definitions)".

PART 628—ENDOWMENT CHALLENGE GRANT PROGRAM

31. The authority citation for Part 628 continues to read as follows:

Authority: 20 U.S.C. 1065a, unless otherwise noted.

32. In § 628.5, paragraph (b)(1)(v) is added and paragraph (b)(2) is revised to read as follows:

§ 628.5 What regulations apply to the Endowment Challenge Grant Program?

* * * * *

(b)(1) * * *

(v) The regulations in 34 CFR Part 79.

(2) Except as specifically indicated in paragraph (b)(1) of this section, the Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 74 through 77 do not apply.

(Authority: 20 U.S.C. 1065a)

PART 629—VETERANS EDUCATION OUTREACH PROGRAM

33. The authority citation for Part 629 continues to read as follows:

Authority: 20 U.S.C. 1070e–1, unless otherwise noted.

34. In § 629.4, paragraph (a)(5) is added to read as follows:

§ 629.4 What regulations apply?

* * * * *

(a) * * *

(5) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

* * * * *

(Authority: 20 U.S.C. 1070e–1, 1088)

PART 630—FUND FOR THE IMPROVEMENT OF POSTSECONDARY EDUCATION

35. The authority citation for Part 630 continues to read as follows:

Authority: 20 U.S.C. 1135–1135a–2, 1135e–1135e–1, unless otherwise noted.

§ 630.4 [Amended]

36. Section 630.4(a)(1) is amended by removing the word "and" and by adding before the period at the end of the sentence "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 631—COOPERATIVE EDUCATION PROGRAM—GENERAL

37. The authority citation for Part 631 continues to read as follows:

Authority: 20 U.S.C. 1133–1133b, unless otherwise noted.

§ 631.4 [Amended]

38. Section 631.4(a)(1) is amended by removing the word "and", and by adding before the period at the end of the sentence "and 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 637—MINORITY SCIENCE IMPROVEMENT PROGRAM

39. The authority citation for Part 637 continues to read as follows:

Authority: 20 U.S.C. 1135b–1135b–3, 1135d–1135d–6, unless otherwise noted.

§ 637.3 [Amended]

40. Section 637.3(a) is amended by removing the word "and", and by adding before the period at the end of the sentence, "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 639—LAW SCHOOL CLINICAL EXPERIENCE PROGRAM

41. The authority citation for Part 639 continues to read as follows:

Authority: 20 U.S.C. 1134s–1134t, unless otherwise noted.

§ 639.3 [Amended]

42. Section 639.3(a) is amended by removing the word "and" after the words "(Direct Grant Programs)" and adding, in its place, a comma, and by removing the word "(Definitions)" and adding, in its place, the words "(Definitions that Apply to Department Regulations), and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 643—TALENT SEARCH PROGRAM

43. The authority citation for Part 643 continues to read as follows:

Authority: 20 U.S.C. 1070d–1, unless otherwise noted.

§ 643.5 [Amended]

44. Section 643.5(a) is amended by removing the word "and" and adding, in its place, a comma and by adding before the period at the end of the sentence, "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 644—EDUCATIONAL OPPORTUNITY CENTERS PROGRAM

45. The authority citation for Part 644 continues to read as follows:

Authority: 20 U.S.C. 1070d–1c, unless otherwise noted.

§ 644.5 [Amended]

46. Section 644.5(a) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 645—UPWARD BOUND PROGRAM

47. The authority citation for Part 645 continues to read as follows:

Authority: 20 U.S.C. 1070d, 1070d–1a, unless otherwise noted.

§ 645.5 [Amended]

48. Section 645.5(a) is amended by removing the word "and" and adding, in its place, a comma and by adding before the period at the end of the sentence ", and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 646—STUDENT SUPPORT SERVICES PROGRAM

49. The authority citation for Part 646 continues to read as follows:

Authority: 20 U.S.C. 1070d, 1070d–1b, unless otherwise noted.

§ 646.5 [Amended]

50. Section 646.5(a) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 649—PATRICIA ROBERTS HARRIS FELLOWSHIPS PROGRAM

51. The authority citation for Part 649 continues to read as follows:

Authority: 20 U.S.C. 1134d–1134f, unless otherwise noted.

§ 649.3 [Amended]

52. Section 649.3(a) is amended by removing the word "and" after the words "Department Regulations)," and by adding after the words "Appeal Board)," "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities),".

PART 656—NATIONAL RESOURCE CENTERS PROGRAM FOR LANGUAGE AND AREA OR LANGUAGE AND INTERNATIONAL STUDIES

53. The authority citation for Part 656 is revised to read as follows:

Authority: 20 U.S.C. 1122, unless otherwise noted.

§ 656.6 [Amended]

54. Section 656.6(c) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 657—FOREIGN LANGUAGE AND AREA STUDIES FELLOWSHIPS PROGRAM

55. The authority citation for Part 657 is revised to read as follows:

Authority: 20 U.S.C. 1122, unless otherwise noted.

56. Section 657.4(c) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 658—UNDERGRADUATE INTERNATIONAL STUDIES AND FOREIGN LANGUAGE PROGRAM

57. The authority citation for Part 658 is revised to read as follows:

Authority: 20 U.S.C. 1124, unless otherwise noted.

§ 658.3 [Amended]

58. Section 658.3(c) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 692—STATE STUDENT INCENTIVE GRANT PROGRAM

59. The authority citation for Part 629 is revised to read as follows:

Authority: 20 U.S.C. 1070c–1070c–4, unless otherwise noted.

§ 692.3 [Amended]

60. Section 692.3(b) is amended by removing the word "and", and by adding before the period at the end of the sentence ", and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 745—WOMEN'S EDUCATIONAL EQUITY ACT PROGRAM

63. The authority citation for Part 745 continues to read as follows:

Authority: 20 U.S.C. 3341–3348, unless otherwise noted.

§ 745.3 [Amended]

64. Section 745.3(a)(1) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 755—SECRETARY'S DISCRETIONARY PROGRAM FOR MATHEMATICS, SCIENCE, COMPUTER LEARNING, AND CRITICAL FOREIGN LANGUAGES

65. The authority citation for Part 755 is revised to read as follows:

Authority: 20 U.S.C. 2992, unless otherwise noted.

§ 755.3 [Amended]

66. Section 755.3(a)(1) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 773—COLLEGE LIBRARY RESOURCES PROGRAM

67. The authority citation for Part 773 is revised to read as follows:

Authority: 20 U.S.C. 1021 *et seq.*, unless otherwise noted.

§ 773.4 [Amended]

68. Section 773.4(a) is amended by removing "and" after "(Direct Grant Programs)" and adding, in its place, a comma, and by removing "(Definitions);" and adding, in its place, "(Definitions that Apply to Department Regulations), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities);".

[Editorial Note: The following Appendices will not appear in the Code of Federal Regulations.]

Appendix A—Programs Proposed for Inclusion for State Review Under Executive Order 12372

Program Name	CFDA #
Adult education—state administered program.	84.002.
Bilingual education	84.003.
Desegregation of public education	84.004.
College library resources	84.005.
Supplemental educational opportunity grants.	84.007.
Follow through	84.014.
National resource centers and fellowship program for language and area or language and international studies.	84.015.
Undergraduate international studies and foreign language program.	84.016.
Research in education of the handicapped.	84.023.
Handicapped children's early education program.	84.024.
Services for deaf-blind children and youth.	84.025N.
Handicapped media services and captioned films.	84.026.
Assistance to states for education of handicapped children.	84.027.
Regional resource and federal centers.	84.028.
Training personnel for the education of the handicapped.	84.029.
Clearinghouse for the handicapped program.	84.030.
Strengthening institutions program	84.031A.
Strengthening historically black colleges and universities.	84.031B.
Endowment challenge grant program	84.031G.
Public library services	84.034.
Interlibrary cooperation	84.035.
Library career training-fellowships	84.036.
Library research and demonstration	84.039.
School assistance in federally affected areas—construction.	84.040.
Student support services program	84.042.
Talent search	84.044.
Upward bound	84.047.
Vocational education—basic grants to states.	84.048.
Vocational education—consumer and homemaking education.	84.049.
Vocational education—state advisory councils.	84.053.
Cooperative education	84.055.
*Indian education—formula grants to local education agencies and tribal schools.	84.060.
*Indian education—special programs and projects.	84.061.
*Indian education—adult indian education.	84.062.
Veterans education outreach program.	84.064.
Educational opportunity centers	84.066.
State student incentive grant program.	84.069.
*Indian education—grants to indian controlled schools.	84.072.
National diffusion network	84.073.
Patricia Roberts Harris program (fellowships for graduate and professional studies program).	84.075.
Bilingual vocational training	84.077.
Postsecondary education programs for handicapped persons.	84.078.
Women's educational equity	84.083.
Program for severely handicapped children.	84.086.
Strengthening research library resources.	84.091.
Graduate and professional study	84.094.
Law school clinical experience	84.097.
Bilingual vocational instructor training	84.099.
Bilingual vocational instructional materials, methods, and techniques.	84.100.
Vocational education Hawaiian native program.	84.101C.
Training program for special program staff and leadership personnel.	84.103.
Fund for the improvement of postsecondary education.	84.116.
Minority science improvement program.	84.120.
Law-related education program	84.123.
Territorial teacher training assistance program.	84.124.
State vocational rehabilitation services program.	84.126.
Rehabilitation service projects	84.128.
Rehabilitation training	84.129.
Centers for independent living	84.132.
Migrant education high school equivalency program.	84.141.
College facilities loan program	84.142.
Migrant education—interstate and intrastate coordination program.	84.144.
Federal real property assistance program.	84.145.
Transition program for refugee children.	84.146.

Program Name	CFDA #
College assistance migrant program	84.149.
Neglected or delinquent transition services.	84.152.
Business and international education	84.153.
Library services and construction act—construction.	84.154.
Removal of architectural barriers to the handicapped.	84.155.
Secondary education and transitional services for handicapped youth.	84.158.
Training interpreters for deaf individuals.	84.160.
Client assistance for handicapped individuals.	84.161.
Emergency immigrant education assistance act.	84.162.
Library services and construction act, title IV—basic grants to Indian tribes and Hawaiian native (Indian tribes excluded from coverage).	84.163B.
Strengthening teacher skills and instruction in mathematics and science.	84.164.
Magnet schools assistance	84.165.
Library literacy program	84.167.
Secretary's discretionary program for mathematics, science, computer learning, and critical foreign languages.	84.168.
Construction, reconstruction, and renovation of academic facilities program.	84.172.
Preschool grants for handicapped children program.	84.173.
State assistance for vocational education-support programs by community based organizations.	84.174.
Paul T. Douglas teacher scholarship program.	84.176.
Independent living for older blind adults.	84.177.
Leadership in educational administration development.	84.178.
Technology, media and materials program.	84.180.
Early intervention programs for infants and toddlers with handicaps.	84.181.
Drug-free schools and communities program-training and demonstration grants to institutions of higher education, and federal activities program.	84.184.
Drug-free schools and communities—state and local programs.	84.186.
The state supported employment services program.	84.187.
Drug-free schools and communities—regional centers programs.	84.188.
Adult education for the homeless program.	84.192.
Vocational education-national programs: demonstration centers for the retraining of dislocated workers.	84.193.
Education of the homeless	84.196.
College library technology and cooperation program.	84.197.
Workplace literacy partnerships program.	84.198.
Vocational education-national cooperative demonstration program.	84.199.
School dropout demonstration assistance program.	84.201.
Star schools program	84.203.
State vocational education comprehensive career guidance and counseling program.	No CFDA #.
State vocational education industry-education partnerships.	No CFDA #.
Vocational education-state equipment pools.	No CFDA #.
Vocational education-national programs: model centers for vocational education for older individuals.	No CFDA #.

*Except applicants that are Federally recognized Indian tribes

Appendix B.—Programs Proposed For Exclusion From Review Under Executive Order 12372 With Exclusion Justifications

Program	CFDA No.
Interest subsidy grants for academic facilities loans.	84.001
Exclusion Justification:	
Funds under this program were determined by prior action and the government's commitment is for the life of the loan. Since no application to the Federal government is involved, States do not review this program..	
Education of handicapped children in State operated schools.	84.009
Exclusion Justification:	84.009
Funds under this program are determined by a statutory formula. Therefore, the Department has no discretion in approving specific sites or in determining the amount of allocations.	
Educationally deprived children: local educational agencies.	84.010
Exclusion Justification:	
Funds under this program are determined by a statutory formula and distributed to participating local education agencies. Therefore, the Department has no discretion in approving specific sites or in determining the amount of allocations.	
Migrant education: State formula grant program.	84.011
Exclusion Justification:	
Funds under this program are determined by a statutory formula and distributed to State education agencies. Therefore, the Department has no discretion in approving specific sites or projects or in determining the amount of allocations.	
Educationally deprived children State administration.	84.012
Exclusion Justification:	
Funds under this program are determined by a statutory formula and distributed to State education agencies. Therefore, the Department has no discretion in approving specific sites or projects or in determining the amount of allocations.	
Neglected and delinquent children	84.013
Exclusion Justification:	
Funds under this program are determined by a statutory formula and distributed to State education agencies. Therefore, the Department has no discretion in approving specific sites or projects or in determining the amount of allocations.	
International research and studies	84.017

Program	CFDA No.
Exclusion Justification:	
This program provides assistance for the conduct of research, studies and surveys and the development of instructional materials for modern languages and area and international studies. Research is national in scope and is conducted by individual scholars.	
Fulbright-Hays training grants—faculty research abroad.	84.019
Exclusion Justification:	
This program supports research projects conducted abroad by individual research scholars in cooperation with bi-national commissions, U.S. embassies, foreign ministries of education, and institutions of higher education abroad. Research is of national and international scope.	
Fulbright-Hays training centers—foreign curriculum consultants.	84.020
Exclusion Justification:	
This program awards grants to institutions of higher education for the selection of curriculum specialists from abroad to assist U.S. institutions or groups of institutions in the development of programs of research and study in the United States. This program does not affect State or local governments bcause the recruitment of individual candidates is made by U.S. embassies, Fulbright Commissions abroad, or foreign ministries of education.	
Fulbright-Hays training grants, group projects abroad.	84.021
Exclusion Justification:	84.021
This program awards grants to individuals through eligible institutions in the United States and abroad in cooperation with Fulbright Commissions, U.S. Embassies, and foreign ministries of education for the purpose of engaging in group projects in research, training, and curriculum development. Projects conducted abroad and at institutions in the United States are national in scope and do not directly affect State or local governments.	
Fulbright-Hays training grants—doctoral dissertation research abroad.	84.022
Exclusion Justification:	
This fellowship program provides payments to individuals who have been advanced to doctoral degree candidacy in foreign languages and area studies. Individual projects are conducted abroad and therefore the research has no impact on States or local governments.	
Guaranteed student loan program and plus (auxiliary) loan program.	84.032
Exclusion Justification:	
These programs authorize low interest loans available from lenders such as banks and credit unions to help defray costs of education at participating institutions. The loans are provided directly to the student or to parents of the student.	
College work-study program	84.033
Exclusion Justification:	
This program provides jobs for undergraduate and graduate students. Participating institutions receive direct allocations of Federal funds according to national and State funding formulas. Funds are ultimately paid directly to students.	

Program	CFDA No.
Perkins loan program to schools	84.037
Exclusion Justification:	
Funds for this program provide reimbursement for the value of loan cancellations as prescribed by statute. The Department has no discretion in determining the amount of these reimbursements.	
Perkins direct student loan program	84.038
Exclusion Justification:	
This program provides low-interest loans to both undergraduate and graduate students. This is a matching funds program with the institution contributing one-ninth of the project award. The annual allocation is distributed to participating institutions according to national and state funding formulas.	
School assistance in federally affected areas: Maintenance and operations.	84.041
Exclusion Justification:	
This program makes financial payments to school districts. Funds under this program are distributed to participating local educational agencies that are affected by the presence of Federal activity or property, or by Presidentially-declared disasters. Once eligibility is established, the Department of Education has no discretion in approving sites or projects, or in determining allocation amounts.	
National vocational education research program.	84.051
Exclusion Justification:	
This program is designed to provide support to the National Center for Research in Vocational Education for which a location is chosen every five years: six curriculum development and demonstration centers; and several other contractors to engage in research and curriculum development and demonstration. Contracts may only be awarded to projects of national significance in vocational education and to develop and provide information to facilitate national planning and policy development.	
Pell grant program	84.063
Exclusion Justification:	
This program is a student financial assistance program based on a formula. Payments are made directly to individual students to pursue college or other postsecondary education goals.	
Indian education—grants to Indian controlled schools.	84.072
Exclusion Justification:	
This program is designed to meet the special needs of Indian children. Single Points of Contact may not review applications submitted by Federally recognized Indian tribes. Other applicants under this program must submit applications to Single Points Of Contact for review as required by this Order.	
Arts in Education	84.084
Exclusion Justification:	
Legislation for this program identifies the two grantees: The Kennedy Center and the National Committee on Arts for the Handicapped and therefore, the Department has no funding discretion.	
Indian education fellowship for Indian students.	84.087
Exclusion Justification:	
This program provides fellowships to individual Indian students to enable them to pursue studies at accredited colleges or institutions of higher education.	
Vocational education Indian and Hawaiian Native Program.	84.101A
Exclusion Justification:	
This program provides grants and contracts to federally recognized Indian tribal governments that are eligible to contract with the Secretary of the Interior for the administration of programs under the Indian Self-Determination Act or under the Act of April 16, 1934.	
Educational research and development.	84.117
Exclusion Justification:	
This program is designed to provide grants and contracts to institutions of higher education, public and private non-profit organizations, and local and State educational agencies to support the conduct of educational research and development that is of national scope.	
Handicapped American Indian vocational rehabilitation service projects.	84.128
Exclusion Justification:	
This program is designed to provide vocational rehabilitation services solely to handicapped American Indians who reside on Federal or State reservations in order to prepare for suitable employment.	
National institute on disability and rehabilitation research.	
Exclusion Justification:	
The Institute provides financial support for research conducted by over 200 organizations throughout the United States and internationally and for scholarly exchange. Research priorities are based on areas of national scope such as spinal cord injury; physical restoration and psycosocial rehabilitation; and telecommunications. Therefore, they do not directly affect local areas or governments.	
Allen J. Ellender fellowship program	84.133
Exclusion Justification:	
As directed by Congress, the Close Up Foundation is the recipient of this contract which purpose is to enable economically disadvanataged students and their teachers to participate in a week long government studies program to increase their understanding of the Federal Government.	
Consolidation of Federal programs for elementary and secondary education.	84.151
Funds under this program are distributed as block grants which are determined by a statutory formula and distributed to State educational agencies. The Department has no discretion in approving specific sites or in determining the amount of allocations.	
Handicapped special studies—State evaluation studies.	84.159
This program funds projects for data collection activities and studies; investigations; evaluations (to assess the impact and effectiveness of programs assisted under the Education of the Handicapped Act); and for the development, publication and dissemination of the Annual Report to Congress required under the Act. The projects address issues and research of national scope and the findings are used by national audiences, such as researchers, policy makers and Congress.	
Library services and construction act—title IV—basic grants to Indian tribes.	84.163A
Exclusion Justification:	
This program provides assistance to Federally recognized Indian tribes.	
Jacob Javits fellowship program	84.170
Exclusion Justification:	
This program provides fellowships to students of superior ability selected on the basis of demonstrated achievement and exceptional promise, for study at the doctoral level in selected fields of the arts, humanities, and the social sciences. Individuals apply directly to the Department and the calculated stipend is directly awarded to the fellow through the institution.	
Robert C. Byrd honors scholarship program.	84.185
Exclusion Justification:	
This program provides financial assistance to States to award scholarships to individuals who have demonstrated outstanding academic achievement and who show promise of continued academic achievement. Funds are determined by a statutory formula and the Department has no discretion on amount of allocations.	
Adult education—national adult education discretionary program.	84.191
Projects funded under this program will be research based and national in scope. No specific state or region will be targeted.	
Drug-free schools and communities—Hawaiian natives.	84.999c
Exclusion Justification:	
Funds under this program are awarded only to Hawaiian natives and the Department has no discretion in selecting recipients.	
General assistance to the Virgin Islands.	No CFDA No.
Exclusion Justification:	
This grant is specifically mandated for the Virgin Islands by Section 1524 of PL 95-561.	
Inexpensive book distribution	No CFDA No.
Exclusion Justification:	
Grant recipient is designated in legislation.	

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federal register

Monday
March 13, 1989

Part IV

Department of Health and Human Services

National Institutes of Health

Recombinant DNA Research; Actions Under Guidelines; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Recombinant DNA Research: Actions Under Guidelines

AGENCY: National Institutes of Health, PHS, DHHS.

ACTION: Notice of actions under NIH guidelines for research involving recombinant DNA molecules.

SUMMARY: This notice sets forth three actions to be taken by the Director, National Institutes of Health (NIH), under the May 7, 1986, NIH Guidelines for Research Involving Recombinant DNA Molecules (51 FR 16958).

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Additional information can be obtained from Ms. Rachel E. Levinson, Office of Recombinant DNA Activities, Office of Science Policy and Legislation, National Institutes of Health, Building 31, Room B1C34, 9000 Rockville Pike, Bethesda, Maryland 20892, (301) 496–9838.

SUPPLEMENTARY INFORMATION: Today three actions are being promulgated under the NIH Guidelines for Research Involving Recombinant DNA Molecules. These three proposed actions were published for comment in the **Federal Register** of September 2, 1988 (53 FR 34246), and reviewed and recommended for approval by the NIH Recombinant DNA Advisory Committee (RAC) at its meeting on October 3, 1988. A transcript of that meeting is available from the Office of Recombinant DNA Activities at the address given above.

In accordance with Section IV–C–1–b of the NIH Guidelines, these actions have been found to comply with the NIH Guidelines and to present no significant risk to health or to the environment.

Part I of this announcement provides background information and decisions on the actions under the NIH Guidelines. Part II provides a summary of the actions. Part III provides a correction to a notice published in the **Federal Register** on October 26, 1988 (53 FR 43410).

I. Background Information and Decisions on Actions Under the NIH Guidelines

A. Human Gene Transfer Proposal

Three National Institutes of Health (NIH) intramural scientists, Dr. W. French Anderson, National Heart, Lung, and Blood Institute, and Drs. R. Michael Blaese and Steven A. Rosenberg, National Cancer Institute, have submitted a proposal involving transfer of a bacterial gene coding for neomycin phosphotransferase into the cells of human patients. The gene is to be used as a marker to trace the path of "tumor infiltrating lymphocytes," or TIL, administered as part of an ongoing experimental cancer treatment.

The proposal was first received in June and July 1988, by a number of internal NIH review committees charged with oversight of the safety of proposed experiments. Concern for safety extends from the patients to the health care personnel and the researchers. The institutional review boards of the two sponsoring institutes and the NIH Institutional Biosafety Committee (IBC) all gave "conditional approval" with certain stipulations. Among these stipulations was a requirement that the Recombinant DNA Advisory Committee (RAC) grant its approval of the same procedure.

On July 29, 1988, the Human Gene Therapy Subcommittee of the Recombinant DNA Advisory Committee met to consider the gene transfer proposal and deferred approval pending receipt of additional data. This public meeting was announced in the **Federal Register** on June 24, 1988 (53 FR 23805). The Subcommittee provided specific questions to be answered by the investigators prior to the October 3, 1988, RAC meeting.

During a telephone conference on September 29, 1988, the Subcommittee members and consultants participating in the conference decided unanimously to defer approval of the proposal because the questions posed at the July 29, 1988, meeting had not yet been answered by the additional data which had been provided.

The October 3, 1988, public meeting of the RAC was announced in the September 2, 1988, **Federal Register** (53 FR 34246). At this meeting, the RAC received and discussed data not made available previously to the Human Gene Therapy Subcommittee. Based on these data, the RAC recommended that NIH approve this protocol by a vote of 16 in favor, 5 opposed, and no abstentions. In addition to the RAC review, I requested that the entire protocol, including data presented at the October 3, 1988, meeting and any additional data obtained since that date, be reviewed by the Subcommittee at its December 9, 1988, public meeting (53 FR 45591).

This request was duly carried out, and the Human Gene Therapy Subcommittee voted unanimously to approve the protocol by a vote of 12 in favor, none opposed, and no abstentions.

Following that meeting, the Office of Recombinant DNA Activities sent a mail ballot to RAC members, including the motion approved by the Subcommittee and the minutes of the December 9, 1988, meeting of the Human Gene Therapy Subcommittee. The results of the ballot were 21 in favor, none opposed, 3 abstentions.

The motion approved by the Subcommittee and the RAC is as follows:

> To approve the human gene transfer proposal submitted by Drs. Anderson, Blaese, and Rosenberg with the following stipulations:
>
> 1. There will be no more than 10 patients in the initial trial;
>
> 2. The patients selected will have a life expectancy of about 90 days;
>
> 3. The patients give fully informed consent to participate in the trial; and
>
> 4. The investigators will provide additional data before expanding the trial by adding patients or by inserting a gene for therapeutic purposes.

Points 1 through 3 of the motion were adopted by the RAC at the October 3, 1988, meeting. Point 4 of the motion was added by the Subcommittee on December 9, 1988, making explicit a policy that had been agreed upon at the October 3, 1988, RAC meeting.

Approval to implement this proposal has now been recommended by: The Clinical Research Subpanels of both sponsoring institutes, the NIH Institutional Biosafety Committee, the NIH Recombinant DNA Advisory Committee (RAC), the Human Gene Therapy Subcommittee of the RAC, and the Food and Drug Administration Vaccines and Related Biologic Products Advisory Committee.

Through data obtained in animal experiments, the investigators have demonstrated to the satisfaction of the above review committees that the use of amphotropically packaged retroviral vectors does not pose a public health risk to patients or to health care personnel, even in the event of accidential exposure to experimental material. Therefore, I have determined that this protocol does not present a risk to public health or to the environment.

After reviewing the relevent records and documentation, I accepted this recommendation, and approval to conduct this experiment has been given to Drs. Anderson, Blaese, and Roseberg.

B. Amendment of Section I–C of the NIH Guidelines

Section I–C of the NIH Guidelines currently reads as follows:

> The Guidelines are applicable to all recombinant DNA research within the United States or its territories which is conducted at or sponsored by an institution that receives any support for recombinant DNA research from the National Institutes of Health (NIH).

This includes research performed by the NIH directly.

An individual receiving support for research involving recombinant DNA must be associated with or sponsored by an institution that can and does assume the responsibilities assigned in these Guidelines.

The Guidelines are also applicable to projects done abroad if they are suported by NIH funds. If the host counrty, however, has established rules for the conduct of recombinant DNA projects, then a certificate of compliance with those rules may be submitted to NIH in lieu of compliance with the NIH Guidelines. The NIH reserves the right to withhold funding if the safety practices to be employed abroad are not reasonably consistent with the NIH Guidelines.

In a letter date January 9, 1987, Mr. Edward Lee Rogers, Counsel for the Foundation on Economic Trends, and Mr. Jeremy Rifkin, Foundation on Economic Trends, Washington, DC, proposed that the following text be inserted after the first sentence of the third paragraph of section I–C:

For purposes of the preceding sentence, the term 'project' includes any research or development of the recombinant organism or other product or process in question, including all such work that is reasonably foreseeable when the NIH support is received. NIH support includes both money grants and any type of in-kind support, including research conducted directly by NIH, supplies, equipment, the use of facilities, and biological research materials. NIH support has been given where the source of funds or in-kind support is, directly or indirectly, the NIH.

This proposed amendment of section I–C was initially published for comment in the **Federal Register** of March 11, 1987 (52 FR 7525), prior to a scheduled RAC meeting on June 15, 1987. The June 15, 1987, meeting was postponed and rescheduled on September 21, 1987. Accordingly, this proposed amendment was published again for comment in the **Federal Register** of August 11, 1987 (52 FR 29800).

After extensive discussion at its meeting on September 21, 1987, the RAC voted to establish a working group to make recommendations regarding international projects and to report back to the full RAC.

A Working Group on International Projects met at the NIH on February 1, 1988 (53 FR 808). After much discussion, the working group voted seven in favor, none opposed, and no abstentions that the following proposed revision of the last paragraph of Section I–C be published for comment:

The NIH Guidelines are also applicable: (1) To projects done abroad if they are supported by NIH funds, or (2) to research done abroad if it involves deliberate release into the environment or testing in humans of materials containing recombinant DNA developed with NIH funds and the research is a direct extension of the development process. If the host country, however, has established rules for the conduct of recombinant DNA projects, then a written assurance of compliance with those rules may be submitted to NIH in lieu of compliance with the NIH Guidelines. Alternatively, if the host country does not have such rules, written acceptance by an appropriate government office of the host country is necessary in lieu of compliance with the NIH Guidelines. The NIH reserves the right to withhold funding if the safety practices to be employed abroad are not reasonably consistent with the NIH Guidelines.

After extensive discussion of this proposed amendment of Section I–C and attempts to draft revised language, the RAC recommended that the many issues raised be referred back to the working group for further consideration.

A Working Group on International Projects met at the NIH on August 15, 1988 (53 FR 27570). The working group recommended that the following proposed revision of the last paragraph of Section I–C be published for comment:

The NIH Guidelines are also applicable to recombinant DNA projects done abroad:

1. If they are supported by NIH funds; or
2. If they involve deliberate release into the environment or testing in humans of materials containing recombinant DNA developed with NIH funds, and if the institution that developed those materials sponsors or participates in those projects. Participation includes research collaboration or contractural agreements, but not mere provison of research materials.

If the host country has established rules for the conduct of recombinant DNA projects, then the project must be in compliance with those rules. If the host country does not have such rules, the proposed project must be reviewed by an NIH-approved IBC or equivalent review body and accepted in writing by an appropriate national governmental authority. The safety practices to be employed abroad must be reasonably consistent with the NIH Guidelines.

The proposed language was published for public comment in the **Federal Register** on September 2, 1988 (53 FR 34246). No comments were received in response to the notice. This language was reviewed at the October 3, 1988, RAC meeting and accepted with one modification. After the word "authority" in the final paragraph, the phrase "of the host country" was added. This motion passed unanimously by a vote of 20 in favor, none opposed, and no abstentions.

I accept these recommendations, and Section I–C has been amended accordingly.

C. Proposed Amendment of Section I–B

RAC member, Dr. Anne Vidaver of the University of Nebraska, proposed that the following paragraph regarding transposons be added to Section I–B, Definition of Recombinant DNA Molecules:

Unmodified transposons (wild-type) that become inserted into a genome, even if carried by a recombinant vector or plasmid, are not subject to these guidelines. For example, it is common to use vectors that either are naturally unstable (suicide vector) in a desired host or that can be rendered unstable by manipulating physiological conditions. In the process of suicide (inability of the vector to replicate), transposon transfer may occur. This process is not considered recombinant DNA.

Transposable genetic elements or transposons are mobile DNA segments that can insert into a few or several sites in a genome. Such insertions, unlike classical recombination events, do not require DNA sequence homology and are independent of recombination systems. Many transposons have been discovered in microorganisms and other organisms. They may be insertion sequences that do not carry genes related to a phenotype such as drug resistance, lactose or raffinose utilization, arginine biosynthesis, mercury resistance, or enterotoxin production. Transposable elements also include self-replicating elements such as the entire bacteriophage genomes of Mu and Psi.

This proposal appeared in the **Federal Register** on September 2, 1988 (53 FR 34246), for public comment. Two suggestions for modifying the proposed language were received and discussed at the October 3, 1988, RAC meeting.

A substitute motion was developed as follows:

Genomic DNA of plants and bacteria that has acquired a transposable element, even if the latter was donated from a recombinant vector no longer present, is not subject to these Guidelines unless the transposon itself contains recombinant DNA.

The motion to recommend approval of this modification to Section I–B of the Guidelines was passed by a vote of 18 in favor, none opposed, and no abstentions.

I accept this recommendation, and Section I–B of the Guidelines is amended accordingly.

II. Summary of Actions

A. Human Gene Transfer Proposal

The following section is added to Appendix D:

Appendix D–XIII

Drs. W. French Anderson, R. Michael Blaese, and Steven Rosenberg of the National Institutes of Health, Bethesda, Maryland, can conduct experiments in which a bacterial gene coding for neomycin phosphotransferase will be inserted into a portion of the tumor infiltrating lymphocytes (TIL) of cancer patients using a retroviral vector, N2. The marked TIL then will be combined with unmarked TIL, and reinfused into the patients. This experiment is an addition to an ongoing adoptive immunotherapy protocol in which TIL are isolated from a patient's tumor, grown in culture in the presence of interleukin-2, and reinfused into the patient. The marker gene will be used to detect TIL at various time intervals following reinfusion.

Approval is based on the following four stipulations:

1. There will be no more than 10 patients in the initial trial;
2. The patients selected will have a life expectancy of about 90 days;
3. The patients give fully informed consent to participate in the trial; and
4. The investigators will provide additional data before expanding the trial by adding patients or by inserting a gene for therapeutic purposes.

B. Amendment of Section I–C of the NIH Guidelines

Section I–C of the Guidelines is modified to read as follows:

The Guidelines are applicable to all recombinant DNA research within the United States or its territories which is conducted at or sponsored by an institution that receives any support for recombinant DNA research from the National Institutes of Health (NIH). This includes research performed by NIH directly.

An individual receiving support for research involving recombinant DNA must be associated with or sponsored by an institution that can and does assume the responsibilities assigned in these Guidelines.

The NIH Guidelines are also applicable to recombinant DNA projects done abroad:

1. If they are supported by NIH funds; or
2. If they involve deliberate release into the environment or testing in humans of materials containing recombinant DNA developed with NIH funds, and if the institution that developed those materials sponsors or participates in those projects. Participation includes research collaboration or contractual agreements, but not mere provision of research materials.

If the host country has established rules for the conduct of recombinant DNA projects, then the project must be in compliance with those rules. If the host country does not have such rules, the proposed project must be reviewed by an NIH-approved IBC or equivalent review body and accepted in writing by an appropriate national governmental authority of the host country. The safety practices to be employed abroad must be reasonably consistent with the NIH Guidelines.

C. Proposed Amendment of Section I–B

Section I–B is modified to read as follows:

In the context of these Guidelines recombinant DNA molecules are defined as either (i) molecules which are constructed outside living cells by joining natural or synthetic DNA segments to DNA molecules that can replicate in a living cell, or (ii) DNA molecules that result from the replication of those described in (i) above.

Synthetic DNA segments likely to yield a potentially harmful polynucleotide or polypeptide (e.g., a toxin or a pharmacologically active agent) shall be considered as equivalent to their natural DNA counterpart. If the synthetic DNA segment is not expressed in vivo as a biologically active polynucleotide or polypeptide product, it is exempt from the Guidelines.

Genomic DNA of plants and bacteria that has acquired a transposable element, even if the latter was donated from a recombinant vector no longer present, is not subject to these Guidelines unless the transposon itself contains recombinant DNA.

III. Correction to Notice of Actions Published in the Federal Register on October 26, 1988 (53 FR 43410)

Two phrases were inadvertently dropped from *Part II., D. Revision of Appendix C–IV.* Appendix C–IV should read as follows:

Any asporogenic Bacillus subtilis or asporogenic Bacillus licheniformis strain which does not revert to a sporeformer with a frequency greater than 10, can be used for cloning DNA with the exception of those experiments listed below.

For these exempt laboratory experiments, BL1 physical containment conditions are recommended.

For large-scale (LS) fermentation experiments, the appropriate physical containment conditions need be no greater than those for the host organism unmodified by recombinant DNA techniques; the IBC can specify higher containment if it deems necessary.

OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements"(45 FR 39592) requires a statement concerning the official government programs contained in the *Catalog of Federal Domestic Assistance.* Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers not only virtually every NIH program but also essentially every Federal research program in which DNA recombinant molecule techniques could be used, it has been determined to be not cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the *Catalog of Federal Domestic Assistance* are affected.

Dated: March 2, 1989.

James B. Wyngaarden,

Director, National Institutes of Health.

[FR Doc. 89–5674 Filed 3–10–89; 8:45 am]

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federal register

Monday
March 13, 1989

Part V

Environmental Protection Agency

40 CFR Part 300

National Priorities List for Uncontrolled Hazardous Sites; Final Federal Facility Site Update; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3533-8]

National Priorities List for Uncontrolled Hazardous Waste Sites; Final Federal Facility Site Update

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency ("EPA") is amending the National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, which was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")) and Executive Order 12580 (52 FR 2923, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list and is being revised today by the addition of eight Federal facility sites to the Federal section of the NPL, the expansion of two Federal facilty sites already on the NPL, and the reclassification of one site already on the NPL to a Federal facility site. EPA has reviewed public comments on the listing of these sites and has decided that they meet the eligibility requirements and listing policies of the NPL. Information supporting these actions is contained in the Superfund Public Dockets. Elsewhere in today's **Federal Register** is a notice describing the policy under which some of these Federal facility sites are being added to the NPL. This rule results in a final NPL of 799 sites, 41 of them in the Federal section; 370 sites are proposed to the NPL, 22 of them in the Federal section. Final and proposed sites now total 1,169.

EFFECTIVE DATE: The effective date for this amendment to the NCP shall be April 12, 1989. CERCLA section 305 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, the Agency will publish a notice of clarification in the **Federal Register.**

ADDRESSES: Addresses for the Headquarters and Regional dockets follows. For further details on what these dockets contain, see section I of the "Supplementary Information" portion of this preamble.

Tina Maragousis, Headquarters, U.S. EPA CERCLA Docket Office, Waterside Mall, 401 M Street SW., Washington, DC 20460, 202/382-3046.

Evo Cunha, Region 1, U.S. EPA Waste Management Records Center, HES-CAN 6, J.F. Kennedy Federal Building, Boston, MA 02203, 617/565-3300.

U.S. EPA, Region 2, Document Control Center, Superfund Docket, 26 Federal Plaza, 7th Floor, Room 740, New York, NY 10278, Latchmin Serrano, 212/264-5540, Ophelia Brown, 212/264-1154.

Diane McCreary, Region 3, U.S. EPA Library, 5th Floor, 841 Chestnut Building, 9th & Chestnut Streets, Philadelphia, PA 19107, 215/597-0580.

Gayle Alston, Region 4, U.S. EPA Library, Room G-6, 345 Courtland Street NE., Atlanta, GA 30365, 404/347-4216.

Cathy Freeman, Region 5, U.S. EPA, 5 HS-12, 230 South Dearborn Street, Chicago, IL 60604, 312/886-6214.

Deborah Vaughn-Wright, Region 6, U.S. EPA, 1445 Ross Avenue, Mail Code 6H-MA, Dallas, TX 75202-2733, 214/655-6740.

Connie McKenzie, Region 7, U.S. EPA Library, 726 Minnesota Avenue, Kansas City, KS 66101, 913/236-2828.

Dolores Eddy, Region 8, U.S. EPA Library, 999 18th Street, Suite 500, Denver, CO 80202-2405, 303/293-1444.

Linda Sunnen, Region 9, U.S. EPA Library, 6th Floor, 215 Fremont Street, San Francisco, CA 94105, 415/974-8082.

David Bennett, Region 10, U.S. EPA, 9th Floor, 1200 6th Avenue, Mail Stop HW-093, Seattle, WA 98101, 206/442-2103.

FOR FURTHER INFORMATION CONTACT: Joseph Kruger, Hazardous Site Evaluation Division, Office of Emergency and Remedial Response (OS-230), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460, or the Superfund Hotline, Phone (800) 424-9346 (382-3000 in the Washington, DC, metropolitan area).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

Background

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. sections 9601-9657 ("CERCLA" or the "Act"), in response to the dangers of uncontrolled or abandoned hazardous waste sites. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, stat. 1613 *et seq.* To implement CERCLA, the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, on July 16, 1982 (47 FR 31180) pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP, further revised by EPA on September 16, 1985 (50 FR 37624) and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases or threatened releases of hazardous substances, pollutants, or contaminants. On December 21, 1988 (53 FR 51394), EPA proposed revisions to the NCP in response to SARA.

Section 105(a)(8)(A) of CERCLA, as amended by SARA, requires that the NCP include criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, take into account the potential urgency of such action for the purpose of taking removal action. In response to that mandate, EPA developed a model for assessing the relative risk posed by sites (the "Hazard Ranking System" or "HRS").

Section 105(a)(8)(B) of CERCLA, as amended by SARA, requires that the statutory criteria provided by the HRS be used to prepare a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List ("NPL"). Section 105(a)(8)(B) also requires that the NPL be revised at least annually.

An original NPL of 406 sites was promulgated on September 8, 1983 (48 FR 40658). The NPL has been expanded since then, most recently on July 22, 1987 (52 FR 27620). The Agency has also

published a number of proposed rulemakings to add sites to the NPL, most recently Update #7 on June 24, 1988 (53 FR 23988). EPA announced on June 10, 1986 (51 FR 21056), that it would list Federal facility sites in a separate section of the NPL, using the same technical criteria that qualify non-Federal sites.

EPA may delete sites from the NPL when no further response is appropriate, as provided in the NCP at 40 CFR 300.66(c)(7). To date, the Agency has deleted 24 sites from the NPL, 8 of them since the June 1988 proposed rule. They are:

- September 1, 1988 (53 FR 33811)
  —Tri-City Oil Conservationist, Inc., Tampa, Florida
  —Varsol Spill (once listed as part of Biscayne aquifer), Miami, Florida
- December 23, 1988 (53 FR 51780)
  —Toftdahl Drums, Brush Prairie, Washington
- January 19, 1989 (54 FR 2124)
  —Matthews Electroplating, Roanoke County, Virginia
- February 13, 1989 (54 FR 6521)
  —Presque Isle, Erie, Pennsylvania
- February 21, 1989 (54 FR 7424)
  —Parramore Surplus, Mount Pleasant, Florida
- February 22, 1989 (54 FR 7548)
  —Cooper Road, Voorhees Township, New Jersey
- February 22, 1989 (54 FR 7549)
  —Krysowaty Farm, Hillsborough, New Jersey.

EPA has also published several notices of intent to delete sites.

This rule adds eight Federal facility sites to the NPL, expands two Federal facility sites, and reclassifies one private site to a Federal facilitiy site. EPA has carefully considered public comments submitted for the sites in today's final rule. This rule results in a final NPL of 799 sites, 41 of them in the Federal section; 370 sites are in proposed status, 22 of them in the Federal section. With these changes, final and proposed sites now total 1,169.

EPA includes on the NPL sites at which there are or have been releases or threatened releases of hazardous substances, pollutants, or contaminants. The discussion below may refer to "releases or threatened releases" simply as "releases", "facilities", or "sites".

Information Available to the Public

The Headquarters and Regional public dockets for the NPL (see **ADDRESSES** portion of this notice) contain documents relating to the scoring of sites in this final rule. The dockets are available for viewing "by appointment only" after the appearance of this notice. The hours of operation for the Headquarters dockets are from 9:00 a.m. to 4:00 p.m., Monday through Friday excluding Federal holidays. Please contact individual Regional dockets for hours.

The Headquarters docket contains HRS score sheets for each final site, a Documentation Record for each site describing the information used to compute the score, pertinent information for any site affected by special study waste, information for sites affected by the policy for listing sites subject to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), a list of documents referenced in the Documentation Record, comments received, and the Agency's response to those comments. The Agency's responses are contained in the "Support Document for the Revised National Priorities List—Final Federal Facility Site Update, March 1989."

Each Regional docket includes all information available in the Headquarters docket for sites in that Region, as well as the actual reference documents, which contain the data EPA relied upon in calculating or evaluating the HRS scores for sites in the Region. These reference documents are available only in the Regional dockets. They may be viewed "by appointment only" in the appropriate Regional Docket or Superfund Branch office. Requests for copies may be directed to the appropriate Regional docket or Superfund Branch.

An informal written request, rather than a formal request, should be the ordinary procedure for obtaining copies of any of these documents.

EPA has published a statement describing what background information (resulting from the initial investigation of potential CERCLA sites) the Agency discloses in response to Freedom of Information Act requests (52 FR 5578, February 25, 1987).

II. Purpose and Implementation of the NPL

Purpose

The primary purpose of the NPL is stated in the legislative history of CERCLA (Report of the Committee on Environment and Public Works, Senate Report No. 96-848, 96th Cong., 2d Sess. 60 (1980)):

> The priority lists serve primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial actions. Inclusion of a facility or site on the list does not in itself reflect a judgment of the activities of its owner or operator, it does not require those persons to undertake any action, nor does it assign liability to any person. Subsequent government action in the form of remedial actions or enforcement actions will be necessary in order to do so, and these actions will be attended by all appropriate procedural safeguards.

The purpose of the NPL, therefore, is primarily to serve as an informational and management tool. The initial identification of a site for the NPL is intended primarily to guide EPA in determining which sites warrant further investigation to assess the nature and extent of the public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. The NPL also serves to notify the public of sites EPA believes warrant further investigation.

Federal facility sites are eligible for the NPL pursuant to the NCP at 40 CFR 300.66(c)(2). However, section 111(e)(3) of CERCLA, as amended by SARA, limits the expenditure of CERCLA monies at Federally-owned facilities. Federal facility sites are also subject to the requirements of CERCLA section 120, added by SARA.

Placing Sites on the NPL

There are three mechanisms for placing sites on the NPL. The principal mechanism is the application of the HRS. The HRS serves as a screening device to evaluate the relative potential of uncontrolled hazardous substances to cause human health or safety problems, or ecological or environmental damage. The HRS score is calculated by estimating risks presented in three potential "pathways" of human or environmental exposure: Ground water, surface water, and air. Within each pathway of exposure, the HRS considers three categories of factors "that are designed to encompass most aspects of the likelihood of exposure to a hazardous substance through a release and the magnitude or degree of harm from such exposure": (1) Factors that indicate the presence or likelihood of a release to the environment; (2) factors that indicate the nature and quantity of the substances presenting the potential threat; and (3) factors that indicate the human or environmental "targets" potentially at risk from the site. Factors within each of these three categories are assigned a numerical value according to a set scale. Once numerical values are computed for each factor, the HRS uses mathematical formulas that reflect the relative importance and interrelationships of the various factors to arrive at a final site score on a scale of 0 to 100. The resultant HRS score represents an estimate of the relative "probability and magnitude of harm to

the human population or sensitive environment from exposure to hazardous substances as a result of the contamination of ground water, surface water, or air" (47 FR 31180, July 16, 1982). Those sites that score 28.50 or greater on the HRS are eligible for the NPL.

Under the second mechanism for adding sites to the NPL, each State may designate a single site as its top priority, regardless of the HRS score. This mechanism is provided by section 105(a)(8)(B) of CERCLA, as amended by SARA, which requires that, to the extent practicable, the NPL include within the 100 highest priorities, one facility designated by each State representing the greatest danger to public health, welfare, or the environment among known facilities in the State.

The third mechanism for listing, included in the NCP at 40 CFR 300.66(b)(4) (50 FR 37624, September 16, 1985), has been used only in rare instances. It allows certain sites with HRS scores below 28.50 to be eligible for the NPL if all of the following occur:

- The Agency for toxic Substances and Disease Registry of the U.S. Department of Health and Human Services has issued a health advisory which recommends dissociation of individuals from the release.
- EPA determines that the release poses a significant threat to public health.
- EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

All sites in this update are being included on the NPL based on HRS scores.

Federal agencies have the primary responsibility under CERCLA section 120(c) for identifying Federal facility sites. In conjunction with EPA Regional Offices, the Federal agencies perform investigations, sampling, monitoring, and scoring of sites. Regional Offices then conduct a quality control review of the candidate sites. EPA Headquarters conducts further quality assurance audits to ensure accuracy and consistency among the various offices participating in the scoring. The Agency then proposes the sites that meet one of the three eligibility criteria for listing (and EPA's listing policies) and solicits public comment on the proposal. Based on these comments and further review by EPA, the Agency determines final HRS scores and lists those sites that still qualify for the final NPL.

In response to CERCLA section 105(c), as amended by SARA, EPA has proposed revisions to the HRS (53 FR 51962, December 23, 1988). EPA intends to issue the revised HRS as soon as possible. However, until the proposed revisions have been subject to public comment and put into effect, EPA will continue to propose and promulgate sites using the current HRS, in accordance with CERCLA section 105(c)(1) and Congressional intent, *see*, e.g., S. Rep. No. 11, 99th Cong., 1st Sess. 41 (1985); 131 *Cong. Rec.* S–11681 (daily ed., Sept. 18, 1985) (statement of Sen. Baucus).

III. Statutory Requirements and Listing Policies

CERCLA restricts EPA's authority to respond to certain categories of releases of hazardous substances, pollutants, or contaminants by expressly excluding some substances, such as petroleum, from the response program. In addition, CERCLA section 105(a)(8)(B) directs EPA to list priority sites "among" the known releases or threatened releases of hazardous substances, pollutants, or contaminants, and section 105(a)(8)(A) directs EPA to consider certain enumerated and "other appropriate" factors in doing so. Thus, as a matter of policy, EPA has the discretion not to use CERCLA to respond to certain types of releases. For example, EPA has chosen not to list sites that result from contamination associated with facilities licensed by the Nuclear Regulatory Commission (NRC), on the grounds that NRC has the authority and expertise to clean up releases from those facilities (48 FR 40661, September 8, 1983). Where other authorities exist, placing the site on the NPL for possible remedial action under CERCLA may not be appropriate. Therefore, EPA has chosen to defer certain types of sites from the NPL even though CERCLA may provide authority to respond. If, however, the Agency later determines that sites not listed as a matter of policy are not being properly responded to, the Agency may place them on the NPL.

In the proposed revisions to the NCP (53 FR 51394, December 21, 1988), the Agency is considering extending the deferral policy, under certain circumstances, to include other Federal authorities and States that have corrective action authority. The Agency is also considering extending the policy to sites where the potentially responsible parties enter into enforcement agreements for site cleanup under CERCLA. EPA notes that even if another authority is applicable to Federal facilities, the cleanup of such sites will not be deferred, and Federal Facilities will continue to be included in the NPL, consistent with CERCLA section 120(d)(2).

Releases from Federal Facility Sites

On June 10, 1986 (51 FR 21054), the Agency announced a decision on components of a policy for generally deferring from listing those non-Federal sites that are subject to Subtitle C of the Resource Conservation and Recovery Act (RCRA). The policy was intended to reflect RCRA's broadened corrective action authorities as a result of the Hazardous and Solid Waste Amendments of 1984 (HSWA). In announcing the RCRA policy, the Agency reserved for a later date the question of whether this or another policy would be applied to Federal facility sites that include one or more RCRA hazardous waste management units, and thus are subject to RCRA Subtitle C corrective action authorities.

On May 13, 1987 (52 FR 17991), the Agency announced its intent to adopt a policy that would allow Federal facility sites to be placed on the NPL regardless of whether RCRA Subtitle C corrective action authorities are applicable.

Elsewhere in today's **Federal Register** is a notice describing the policy for placing on the NPL those sites located on Federally-owned or -operated facilities that meet the eligibility criteria (e.g., HRS score of 28.50 or greater) set out in the NCP for listing on the NPL, even if the Federal facility is also subject to the corrective action authorities of RCRA Subtitle C. Thus the June 10, 1986 RCRA deferral policy (51 Fr 21057), applicable to private sites, will not be applied to Federal facility sites.

The Agency believes that placing Federal facility sites with or without RCRA-regulated hazardous waste management units on the NPL is consistent with the intent of section 120 of SARA and will serve the purposes originally intended by the NCP at 40 CFR 300.66(e)(2)—to advise the public of the status of Federal Government cleanup efforts (50 FR 47931, November 20, 1985). In addition, listing will help other Federal agencies set priorities and focus cleanup efforts on those sites presenting the most serious problems.

Releases from Special Study Wastes and Mining Sites

Section 105(g) of CERCLA, as amended by SARA, requires additional information before sites involving RCRA "special study wastes" can be added to the NPL (53 FR 23992, June 24, 1988). One of the sites being expended in this rule (Weldon Spring Quarry/Plant/Pits) involves such wastes. The same site also involves mining wastes, which are addressed under a SMCRA applicability

policy also explained on June 24, 1988 (53 FR 23993). A memorandum has been placed in the docket addressing the application of the special study waste and SMCRA policies to this site.

IV. Disposition of Sites in Today's Final Rule

This final rule adds eight Federal facility sites to the Federal facility section of the NPL (Table I), finalizes the expansion of two Federal facility sites already on the NPL, and reclassifies one site already on the NPL to a Federal facility site.

TABLE I.—NATIONAL PRIORITIES LIST, FEDERAL FACILITY SITES, NEW FINAL (BY GROUP) MARCH 1989

NPL Gr[1]	St	Site Name	City/County	Response category [2]	Cleanup status [3]
1	NM	Cal West Metals (USSBA)	Lemitar	D	
4	AL	Anniston Army Depot (SE Ind Area)	Anniston	R	I
7	IL	Savanna Army Depot Activity	Savanna	R	
9	PA	Letterkenny Army Depot (PDO Area)	Franklin County	R	
10	DE	Dover Air Force Base	Dover	R	I
11	IL	Joliet Army Ammu Plant (LAP Area)	Joliet	R	
13	WA	Fairchild Air Force Base (4 Areas)	Spokane County	R	
15	LA	Louisiana Army Ammunition Plant	Doyline	R	

Number of New Final Federal Facility Sites: 8.

[1] Sites are placed in groups (Gr) corresponding to groups of 50 on the final NPL.
[2] V=Voluntary or negotiated response; R=Federal and State response; F=Federal enforcement; S=State enforcement; D=Category to be determined.
[3] I=Implementation activity underway, one or more operable units; O=One or more operable units completed; others may be underway; C=Implementation activity completed for all operable units.

New Final Sites

The eight new Federal facility sites in today's final rule are subject to the corrective action authorities of RCRA Subtitle C. EPA is placing these sites on the NPL consistent with the listing policy for Federal facilities, described elsewhere in today's **Federal Register**. They include six sites reproposed for the NPL on July 22, 1987 (52 FR 27643), and two sites proposed on June 24, 1988 (53 FR 23988). The Agency received comments on two of the sites reproposed on July 22, 1987; no comments were received on the remaining six sites.

The Agency received technical comments on the proposal to list the Letterkenny Army Depot (Property Disposal Office Area), Franklin County, Pennsylvania, and the Anniston Army Depot (Southeast Industrial Area), Anniston, Alabama. EPA's response to these comments is discussed in the "Support Document for the Revised National Priorities List—Final Federal Facility Site Update, March 1989" which is available in the appropriate Superfund Dockets.

Site Expansions

The Agency is finalizing two site expansions in this rule, the expansion of the Rocky Mountain Arsenal (RMA) site in Denver, Colorado, to include Basin F, a 93-acre lagoon on the site, and the expansion of the Weldon Spring Quarry (USDOE/Army) site in St. Charles County, Missouri, to include the Weldon Spring Feed Materials plant and Raffinate Pits.

The approach of expanding a site to include a contiguous area that is contributing to a contamination problem, rather than proposing a second separate site, is within the Agency's authority and is consistent with past practice. For instance, in the first NPL proposal on December 30, 1982 (47 FR 58476), EPA proposed to list a 28-mile stream bed (the "Silver Bow Creek site"), and finalized that site on September 8, 1983 (48 FR 40658). The Agency then proposed on June 10, 1986 (51 FR 21101) to expand the site to include an additional area which EPA determined to be significantly contributing to the contamination; the Silver Bow Creek expansion was finalized on July 22, 1987 (52 FR 27627). EPA has broad authority to address contamination, as reflected in CERCLA section 104(d)(4), which allows the Agency to treat related, noncontiguous facilities as one for the purpose of remedial action, and in CERCLA section 101(9), which defines a "facility" under CERCLA to include any site or area where a hazardous substance has been placed or "come to be located."

The Agency received comments from one party opposing the proposal to expand the RMA site; EPA had proposed this expansion on July 22, 1987 (52 FR 27643) when the RMA site was added to the final NPL. EPA believes that it is appropriate to include Basin F in the RMA listing.

Basin F is located on section 36 of the approximately 40 designated land sections at the RMA property. The RMA/NPL site, as originally listed, includes the bulk of the Arsenal property, and indeed physically surrounds the Basin F area. EPA has identified Basin F as a major source of ground water contamination which mixes with ground water contamination from other sources at the Arsenal, making coordinated response necessary. Basin F also represents a major source of surface contamination, although that situation is being addressed by a CERCLA interim response action at Basin F. The Agency believes that the site definition for RMA should be expanded to include Basin F so that EPA will have the option of seeking a comprehensive remedy under CERCLA for contamination at the contiguous areas of Basin F and the original RMA/NPL site.[1]

Basin F was excluded from the RMA site (as initially proposed and promulgated) because EPA believed that Basin F might be subject to RCRA Subtitle C corrective action authorities, and thus might be appropriate for deferral under the Agency's September 8, 1983 NPL/RCRA policy (48 FR 40662 and further discussed at 49 FR 40323–40324, 40336 (October 15, 1984)). EPA subsequently learned that Basin F should not, in fact, have been deferred to RCRA based on the policy in effect when RMA was proposed for lising.[2]

[1] In the case of the Basin F expansion, a non-contiguous site expansion analysis is not technically required. Information developed during the course of the remedial investigation/feasibility study confirms that contamination extends from the original RMA/NPL site to the Basin F area. This provides an additional basis for including Basin F within the original NPL site at RMA, because the statute provides that a CERCLA "facility" includes the site or area where hazardous substances have "come to be located" (CERCLA section 101(9)). The definition of a "site," reflected by the original HRS listing package, is continually refined as the CERCLA process progresses and more information on the extent of contamination is developed.

[2] Basin F stopped receiving RCRA hazardous wastes prior to July 26, 1982 (the effective date of the land disposal regulations) and did not certify closure prior to January 26, 1983; thus, it was not

Continued

Rather, it should have been included in the original RMA site under the 1983 policy.

Basin F also qualifies for listing under the current policy. Passage of HSWA in 1984 gave the Agency additional authorities under RCRA to order corrective action at all units at a RCRA facility, including those that were known as "non-regulated" units; thus, on June 10, 1986 (51 FR 21057), the Agency announced a revised NPL/RCRA policy which provided for the deferral from listing of certain RCRA sites where corrective action authorities are available (again, including sites with non-regulated units). However, that revised policy applied only to *non-*Federal facility sites, and thus not to Basin F. Thus, the June 1986 revised policy did not supersede the September 1983 RCRA listing policy *with respect to* Federal facilities. On May 13, 1987 (52 FR 17991–17993), the Agency asked for comment on a policy for listing Federal sites regardless of RCRA applicability, and on July 22, 1987 (52 FR 27645–27646), the Agency discussed that policy with specific application to Basin F. Elsewhere in today's **Federal Register**, the Agency formally announced its policy of listing Federal facility sites on the NPL, even if they are also subject to RCRA authorities, as generally discussed in the May and July 1987 notices. Thus, Basin F is appropriate for inclusion in the NPL site under current Agency policy.

Further specific comments concerning the expansion of the RMA site are discussed in the Support Document for this rule, which is available in the Superfund docket.

The second Federal facility site being expanded in this rule is the Weldon Spring Quarry (USDOE/Army), St. Charles County, Missouri. It was placed on the final NPL on July 22, 1987 (52 FR 27620). On June 24, 1988, EPA proposed to expand the site to include the Weldon Spring Feed Materials Plant and Raffinate Pits, which are located less than 3 miles from the Quarry and are linked to the contamination at the original site. The site contains mining wastes from uranium ore processing; an addendum discussing special study wastes at the site is included in the Superfund dockets. In addition, the site was abandoned prior to the August 3, 1977 enactment of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). Consistent with the policy for listing SMCRA sites on the NPL, a statement covering SMCRA applicability at the site is included in the dockets. No comments were received on the proposed expansion of this site, or on the special study waste and SMCRA addenda. The expanded site is now being placed on the final NPL under the name "Weldon Spring Quarry/Plant/Pits (USDOE/Army)".

Site Reclassification

Finally, this rule reclassifies one site—W. R. Grace Co., Inc. (Wayne Plant), Wayne, New Jersey—as a Federal facility site; that site had been proposed for the NPL on September 8, 1983 (48 FR 40674). W.R. Grace Co., Inc., bought the facility in 1957 and owned it until September 18, 1984, when the facility was acquired by the U.S. Department of Energy (USDOE). USDOE changed the name of the site to the Wayne Interim Storage Site (WISS). On September 21, 1984 (49 FR 37070), the site was placed on the final NPL under its original name. The site will now be included in the Federal facility section of the NPL. The site name is being changed to "W. R. Grace & Co., Inc./Wayne Interim Storage Site (USDOE)" to more accurately reflect the ownership and status of the site.

V. Contents of the NPL

The eight new sites added to the NPL in today's rule (Table 1) and the one reclassified site have been incorporated into the Federal section of the NPL by their group number. Sites on the NPL are arranged according to their HRS scores and presented in groups of 50 sites to emphasize that minor differences in HRS scores do not necessarily represent significantly different levels of risk. EPA considers the sites within a group to have approximately the same priority for response actions. The Federal facility section appears at the end of this final rule, and will be codified as part of Appendix B to the NCP.

Each entry on the NPL contains the name of the facility and the State and city or county in which it is located. For informational purposes, each entry is accompanied by one or more notations reflecting the status of response and cleanup activities at these sites at the time this list was prepared. Because this information may change periodically, these notations may become outdated.

VI. Regulatory Impact Analysis

The costs of cleanup actions that may be taken at sites are not directly attributable to placement on the NPL, as explained below. Therefore, the Agency has determined that this rulemaking is not a "major" regulation under Executive Order 12291. EPA has conducted a preliminary analysis of economic implications of today's amendment to the NCP. EPA believes that the kinds of economic effects associated with this revision are generally similar to those effects identified in the regulatory impact analysis (RIA) prepared in 1982 for the revisions to the NCP pursuant to section 105 of CERCLA and the economic analysis prepared when amendments to the NCP were proposed (50 FR 5882, February 12, 1985). The Agency believes the anticipated economic effects related to adding eight sites to the NPL can be characterized in terms of the conclusions of the earlier RIA and the most recent economic analysis. This rule was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

Costs

EPA has determined that this rulemaking is not a "major" regulation under Executive Order 12291 because inclusion of a site on the NPL does not itself impose any costs. It does not establish that EPA will necessarily undertake remedial action, nor does it require any action by a private party or determine its liability for site response costs. Costs that arise out of site responses result from site-by-site decisions about what actions to take, not directly from the act of listing itself. In addition, all sites in this final rule are Federally-owned or -operated, and CERCLA section 111(e)(3) prohibits use of the Trust Fund for remedial actions at Federal facilities.

Benefits

The real benefits associated with today's amendment placing additional sites on the NPL are increased health and environmental protection as a result of increased public awareness of potential hazards.

As a result of the additional CERCLA remedies, there will be lower human exposure to high-risk chemicals, and higher-quality surface water, ground water, soil, and air. These benefits are expected to be significant, although difficult to estimate in advance of the remedial investigation/feasibility study of each site. Associated with the costs are significant potential benefits and cost offsets. The distributional costs of carrying out remedies at sites on the NPL have corresponding "benefits" in that funds expended for a response generate employment, directly or indirectly (through purchased materials).

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subject to RCRA corrective action requirements available at that time, and qualified as a "non-regulated unit." It was not appropriate for deferral to RCRA under the September 1983 policy.

VII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act of 1980 requires EPA to review the impacts of this action on small entities, or certify that the action will not have a significant impact on a substantial number of small entities. By small entities, the Act refers to small businesses, small government jurisdictions, and nonprofit organizations.

While modifications to the NPL are considered revisions to the NCP, they are not typical regulatory changes since the revisions do not automatically impose costs. The placing of sites on the NPL does not in itself require any action of any party, (e.g., contractors operating government-owned facilities), nor does it determine the liability of any party for the cost of cleanup at the site. Further, because this final rule involves Federally-owned or -operated facilities, the number of small entities that could be affected will be small.

The impacts (from cost recovery) on small governments and nonprofit organizations would be determined on a similar case-by-case basis.

List of Subjects in 40 CFR Part 300

Air pollution control, Chemicals, Hazardous materials, Intergovernmental relations, Natural resources, Oil pollution, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Date: March 6, 1989.

Jonathan Z. Cannon,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

40 CFR Part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for Part 300 is revised to read as follows:

Authority: 42 U.S.C. 9605; 42 U.S.C. 9620; 33 U.S.C. 1321 (c)(2); E.O. 11735 (38 FR 21243); E.O. 12580, (52 FR 2923).

2. In Appendix B of Part 300, the Federal Section (by group) table is revised to read as set forth below.

Appendix B

* * * * *

NATIONAL PRIORITIES LIST, FEDERAL SECTION (BY GROUP)

March 1989

NPL Gr[1]	St	Site Name	City/County	Response category[2]	Cleanup status[3]
1	NM	Cal West Metals (USSBA)	Lemitar	D	
1	MO	Weldon Spring (USDOE/Army)	St. Charles County	R	
2	CO	Rocky Mountain Arsenal	Adams County	R	O
2	TN	Milan Army Ammunition Plant	Milan	R	I
2	CA	McClellan AFB (Ground Water Cont)	Sacramento	R	O
4	AL	Anniston Army Depot (SE Ind Area)	Anniston	R	I
4	GA	Robins AFB (Lndfll #4/Sludge Lag)	Houston County	R	
4	NE	Cornhusker Army Ammunition Plant	Hall County	R	O
4	NJ	Naval Air Engineering Center	Lakehurst	R	
4	UT	Hill Air Force Base	Ogden	R	I
5	NJ	W.R. Grace/Wayne Int Stor (USDOE)	Wayne Township	R	O
6	UT	Ogden Defense Depot	Ogden	R	
6	CA	Sacramento Army Depot	Sacramento	R	
6	IL	Sangamo/Crab Orchard NWR (USDOI)	Carterville	R	
6	ME	Brunswick Naval Air Station	Brunswick	V R	
7	CA	Lawrence Livermore Lab (USDOE)	Livermore	R	O
7	CA	Sharpe Army Depot	Lathrop	R	O
7	OK	Tinker AFB (Soldier Cr/Bldg 3001)	Oklahoma City	R	
7	WA	McChord AFB (Wash Rack/Treatment)	Tacoma	R	
7	IL	Savanna Army Depot Activity	Savanna	R	
8	CA	Norton Air Force Base	San Bernardino	R	
9	CA	Castle Air Force Base	Merced	R	I
9	PA	Letterkenny Army Depot (PDO Area)	Franklin County	R	
9	NJ	Fort Dix (Landfill Site)	Pemberton Township	R	
10	AL	Alabama Army Ammunition Plant	Childersburg	R	O
10	DE	Dover Air Force Base	Dover	R	I
11	IL	Joliet Army Ammu Plant (LAP area)	Joliet	R	
12	PA	Letterkenny Army Depot (SE Area)	Chambersburg	R	O
12	NY	Griffiss Air Force Base	Rome	R	
12	VA	Defense General Supply Center	Chesterfield County	R	O
12	WA	Fort Lewis (Landfill No. 5)	Tacoma	R	
13	MN	Twin Cities Air Force (SAR Lndfil)	Minneapolis	R	
13	MO	Lake City Army Plant (NW Lagoon)	Independence	R	O
13	IL	Joliet Army Ammu Plant (Mfg Area)	Joliet	R	O
13	WA	Fairchild Air Force Base (4 Areas)	Spokane County	R	
14	TX	Lone Star Army Ammunition Plant	Texarkana	R	
14	OR	Umatilla Army Depot (Lagoons)	Hermiston	R	
14	WA	Bangor Ordnance Disposal	Bremerton	R	
15	LA	Louisiana Army Ammunition Plant	Doyline	R	
15	CA	Moffett Naval Air Station	Sunnyvale	R	
15	CA	Mather AFB (AC&W Disposal Site)	Sacramento	R	

Number of NPL Federal Facility Sites: 41

[1] Sites are placed in groups (Gr) corresponding to groups of 50 on the final NPL.
[2] V=Voluntary or negotiated response; F=Federal enforcement; D=Category to be determined; R=Federal and State response; S=State enforcement.
[3] I=Implementation activity underway, one or more operable units; O=One or more operable units completed; others may be underway; C=Implementation activity completed for all operable units.

[FR Doc. 89-5692 Filed 3-10-89; 8:45 am]

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federal register

Monday
March 13, 1989

Part VI

Environmental Protection Agency

40 CFR Part 300

The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities; Notice of Policy Statement

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3535-2]

The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities

AGENCY: Environmental Protection Agency.

ACTION: Notice of policy statement.

SUMMARY: The Environmental Protection Agency ("EPA") is announcing a policy relating to the National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, which was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")) and Executive Order 12580 (52 FR 2923, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list.

This notice describes a policy for placing on the NPL sites located on Federally-owned or -operated facilities that meet the NPL eligibility criteria set out in the NCP, even if the Federal facility is also subject to the corrective action authorities of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). EPA had requested public comment on this policy on May 13, 1987 (52 FR 17991); comments received are contained in the Headquarters Superfund Public Docket. Elsewhere in today's Federal Register is a rule adding Federal facility sites to the NPL in conformance with this policy.

EFFECTIVE DATE: This policy is effective immediately.

ADDRESSES: The Headquarters Superfund Public Docket is located at the U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. It is available for viewing "by appointment only" from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Telephone 202/382-3046.

FOR FURTHER INFORMATION CONTACT: Joseph Kruger, Hazardous Site Evaluation Division, Office of Emergency and Remedial Response (OS-230), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, or the Superfund Hotline, phone (800) 424-9346 (or 382-3000 in the Washington, DC, metropolitan area.)

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. sections 9601-9657 (CERCLA or "the Act"), in response to the dangers of uncontrolled or abandoned hazardous waste sites. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 *et seq.* To implement CERCLA, the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP, further revised by EPA on September 16, 1985 (50 FR 37624) and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases and threatened releases of hazardous substances, pollutants, or contaminants. In response to SARA, EPA proposed revisions to the NCP on December 21, 1988 (53 FR 51394).

Section 105(a)(8)(A) of CERCLA, as amended by SARA, requires that the NCP include criteria for "determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." Removal action involves cleanup or other actions that are taken in response to releases or threats of releases on a short-term or temporary basis (CERCLA section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy for a release (CERCLA section 101(24)). Criteria for determining priorities for possible remedial actions under CERCLA are included in the Hazard Ranking System ("HRS"), which EPA promulgated as Appendix A of the NCP (47 FR 31219, July 16, 1982).[1]

Section 105(a)(8)(B) of CERCLA, as amended by SARA, requires that the statutory criteria provided by the HRS be used to prepare a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List ("NPL"). Section 105(a)(8)(B) also requires that the NPL be revised at least annually.

A site can undergo CERCLA-financed remedial action only after it is placed on the final NPL as provided in the NCP at 40 CFR 300.66(c)(2) and 300.68(a). Although Federal facility sites are eligible for the NPL pursuant to the NCP at 40 CFR 300.66(c)(2), section 111(e)(3) of CERCLA, as amended by SARA, limits the expenditure of Superfund monies at Federally-owned facilities. Federal facility sites also are subject to the requirements of CERCLA section 120, added by SARA.

This notice announces the Agency's policy of including on the NPL Federal facility sites that meet the eligibility requirements (e.g., an HRS score of 28.50), even if such facilities are also subject to the corrective action authorities of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901-6991(i). Elsewhere in today's Federal Register EPA is adding Federal facility sites to the NPL in conformance with this policy.

II. Development of the Policy for Listing Federal Facility Sites

CERCLA section 105(a)(8)(B) directs EPA to list priority sites "among" the known releases or threatened releases of hazardous substances, pollutants, or contaminants, and section 105(a)(8)(A) directs EPA to consider certain enumerated and "other appropriate" factors in doing so. Thus, as a matter of policy, EPA has the discretion not to use CERCLA to respond to certain types of releases.

When the initial NPL was promulgated (48 FR 40662, September 8, 1983), the Agency announced certain listing policies relating to sites that might qualify for the NPL. One of these policies was that RCRA land disposal units that received hazardous waste after July 26, 1982 (the effective date of the RCRA land disposal regulations)

[1] EPA proposed major revisions to the HRS on December 23, 1988 (53 FR 51962); however, the current HRS applies to the listing of sites on the NPL until the revised HRS is finalized and takes effect. CERCLA section 105(c)(1).

would generally not be included on the NPL. On April 10, 1985 (50 FR 14117), the Agency announced that it was considering revisions to that policy based upon new authorities of the Hazardous and Solid Waste Amendments of 1984 ("HSWA") that allow the Agency to require corrective action at solid waste management units of RCRA facilities in addition to regulated hazardous waste management units.

On June 10, 1986 (51 FR 21057), EPA announced several components of a final policy for placing RCRA-regulated sites on the NPL, but made clear that the policy applied only to non-Federal sites. The Policy stated that the listing of non-Federal sites with releases that can be addressed under the expanded RCRA Subtitle C corrective action authorities generally would be deferred. However, certain RCRA sites at which Subtitle C corrective action authorities are available would generally be listed if they had an HRS score of 28.50 or greater and met at least one of the following criteria:

- Facilities owned by persons who have demonstrated an inability to finance a cleanup as evidenced by their invocation of the bankruptcy laws.
- Facilities that have lost authorization to operate, and for which there are additional indications that the owner or operator will be unwilling to undertake corrective action.
- Sites, analyzed on a case-by-case basis, whose owners or operators have a clear history of unwillingness to undertake corrective action.[2]

On June 10, 1986 (51 FR 21059), EPA stated that it would consider at a later date whether this revised policy for deferring non-Federal RCRA-regulated sites from the NPL should apply to Federal facilities.

On October 17, 1986, SARA took effect, adding a new section 120 to CERCLA devoted exclusively to Federal facilities. Section 120 explains the applicability of CERCLA to the Federal Government, and generally sets out a scheme under which contaminated Federal facility sites should be included in a special docket, evaluated, placed on the NPL (if HRS scores so warrant), and addressed pursuant to an Interagency Agreement with EPA.

As part of its deliberations on a Federal facilities listing policy, EPA considered pertinent sections of SARA and the proposed policy concerning RCRA corrective action at Federal facilities with RCRA-regulated hazardous waste management units (51 FR 7722, March 5, 1986). Specifically, that policy stated that:

- RCRA section 3004(u) subjects Federal facilities to corrective action requirements to the same extent as privately-owned or -operated facilities.
- The definition of a Federal facility boundary is equivalent to the property-wide definition of facility at privately-owned or -operated facilities.

The Agency determined that the great majority of Federal facility sites that could be placed on the NPL have RCRA-regulated hazardous waste management units within the Federal facility property boundaries, subjecting them to RCRA corrective action authorities. Therefore, application to Federal facilities of the March 5, 1986 boundary policy and the June 10, 1986 RCRA deferral policy would result in placing very few Federal facility sites on the NPL. However, CERCLA and its legislative history indicate that Congress clearly intended that Federal facility sites generally be placed on the NPL and addressed under the process set out in CERCLA section 120(e). Thus, EPA concluded that the RCRA deferral policy applicable to private sites might not be appropriate for Federal facilities. On May 13, 1987 (52 FR 17991), the Agency announced that it was considering adopting a policy for listing Federal facility sites that are eligible for the NPL, even if they are also subject to the corrective action authorities of Subtitle C of RCRA; public comment was specifically requested on this approach.

Congress' intent that Federal facility sites should be on the NPL, even if RCRA corrective action authorities apply, is evidenced by the nature of the comprehensive system of site identification and evaluation set up by CERCLA section 120, added by SARA. First, in section 120(c), EPA is required to establish a "Federal Agency Hazardous Waste Compliance Docket," based on information submitted under sections 103 and 120(b) of CERCLA, *and* sections 3016, 3005, and 3010 of RCRA.[3]

Thus, the docket is based heavily on information provided by Federal facilities that are subject to RCRA. If Congress had intended that Federal facilities subject to RCRA authorities should not also be examined under the Federal facility provisions of CERCLA, then the legislators would not have directed EPA to develop a docket of facilities (for evaluation *under CERCLA*) composed largely of Federal facilities subject to RCRA.

Second, the Agency is also directed, in CERCLA section 120(d), to "take steps to assure that a preliminary assessment is conducted *for each facility on the docket*," and where appropriate, to include such facilities on the NPL if the facility meets "the criteria established in accordance with section 105 under the National Contingency Plan for determining priorities among releases." (EPA does apply the CERCLA section 105 criteria—the Hazard Ranking System (HRS)—to Federal, as well as private, sites.) Here again, if Congress had intended that Federal facilities subject to RCRA authorities not be placed on the NPL, then the legislators would not have required EPA to evaluate for the NPL all Federal facilities in the docket—the large majority of which are subject to RCRA authorities.

Third, Congress set up the Interagency Agreement (IAG) process (CERCLA section 120(e) (2)–(4)) to evaluate the need for cleanups of Federal facility sites. If all Federal facility sites subject to RCRA Subtitle C were deferred from listing and attention under CERCLA, few Federal sites would come within the IAG process, contrary to Congressional intent.

Rather, Congress intended that EPA list, and evaluate in the IAG process, all Federal facility sites that are eligible for the NPL, including those facilities subject to RCRA Subtitle C authorities. As Senator Robert T. Stafford stated during the floor debate on section 120 of SARA (subsequently section 120 of CERCLA:

> [T]he amendments require a comprehensive nationwide effort to identify and assess *all* Federal hazardous waste sites that warrant attention. 132 Cong. Rec. S 14902 (daily ed., October 3, 1986) (emphasis added).

EPA has long expressed the view that placing Federal facility sites on the NPL serves an important informational function and helps to set priorities and focus cleanup efforts on those Federal sites that present the most serious problems (50 FR 47931, November 20, 1985).

[2] On August 9, 1988 (53 FR 30002/30005), EPA published additional information on Agency policy concerning criteria to determine if an owner or operator is unwilling or unable to undertake corrective action.

[3] Section 3016 of RCRA provides for the inventory of Federal sites where RCRA hazardous waste "is stored, treated, or disposed of or has been disposed of at any time"; section 3005 of RCRA requires the filing of information necessary for the issuance of permits (or the obtaining of interim status) to treat, store, or dispose of hazardous waste under RCRA; and RCRA section 3010 requires notifications that a RCRA hazardous waste is being generated, transported, treated, stored, or disposed of.

EPA believes that today's decision not to apply the June 1986 NPL/RCRA policy (for non-Federal sites) to Federal facilities is consistent with section 120(a)(2) of CERCLA, which provides that "all guidelines, rules, regulations and criteria which are applicable to * * * inclusion on the National Priorities List, or applicable to remedial actions * * * shall also be applicable to [Federal facilities]." Given Congressional intent that Federal facility sites should be included on the NPL, EPA interprets section 120(a)(2) to mean that the criteria to list sites should not be more exclusionary than the criteria to list non-Federal sites on the NPL. As discussed in the May 13, 1987, notice on the policy (52 FR 17992–3), most Federal facilities include RCRA-regulated hazardous waste management units and thus, almost all waste contamination areas within facility boundaries are subject to RCRA corrective action authorities; in addition, key exclusions in the non-Federal RCRA deferral policy are not applicable to Federal facilities. Thus, if the non-Federal RCRA deferral policy were applied to Federal sites, very few Federal sites would be listed.

The Agency believes that although section 120(a)(2) evidences Congress' intent that the Federal agencies comply with the same baseline of requirements applicable to private sites, the section does not require that all policies and requirements applicable to private and Federal facility sites be identical. Indeed, Congress specifically set out a series of requirements which apply to Federal facilities in a manner different from, or in addition to, those applicable to private sites, e.g., the preparation of a separate Federal Agency Hazardous Waste Compliance Docket (section 120(c)); the notification required before Federal agencies may transfer property (section 120(h)); and the entire process for signing Interagency Agreements at Federal facility sites (section 120(e) (2)–(4)).

Just as Congress recognized that there are unique aspects of Federal facilities requiring additional or special attention in the contexts just named, special attention is also required in deciding what listing/deferral policy should apply to Federal versus private sites. EPA's opinion is that significant differences inherent in the rules to which Federal facility sites and private sites are subject under CERCLA and the NPL dictate that different listing and deferral policies should be crafted for each class of facilities.

For private sites, the only legal significance of NPL listing is that the site becomes eligible for *Fund-financed* remedial action, as provided in the NCP at 40 CFR 300.66(c)(2) and 300.68(a)(1) (removal actions and enforcement actions can be taken at private sites regardless of NPL status). Indeed, EPA recently suggested in the preamble to proposed revisions to the NCP (53 FR 51416, December 21, 1988) that it may be appropriate to view the non-Federal NPL "as a list for informing the public of hazardous waste sites that appear to warrant * * * remedial action through CERCLA funding along." This relationship between the NPL and the availability of Fund monies (at private sites) is a central factor behind EPA's deferral policies. EPA has concluded that by deferring to other statutes like RCRA, "a maximum number of potentially hazardous waste sites can be addressed and EPA can direct its CERCLA efforts (and Fund monies, if necessary) to those sites where remedial action cannot be achieved by other means" (53 FR 51415, December 21, 1988). However, this goal of maximizing the use of limited Fund monies does not apply to Federal facility sites.

Federal facility sites on the NPL are not eligible for *Fund-financed* remedial actions (except in the very limited cases described in CERCLA section 111(e)(3)), pursuant to the NCP at 40 CFR 300.66(c)(2). Thus, the deferral of Federal facility sites from the NPL would not result in significant economies to the Fund, although it could do harm to the informational and management goals of including Federal facility sites on the NPL, as well as Congressional intent. Although the Agency might have decided to defer Federal facility sites subject to RCRA based on a desire to avoid duplication in remedial actions (another of the purposes behind RCRA deferral for private sites), EPA has concluded that this goal may be accomplished satisfactorily for Federal facilities through the process, set out in CERCLA section 120 (e)(2)–(e)(4), of developing comprehensive IAGs. As discussed in detail below, EPA will attempt to use the IAG process to achieve efficient, comprehensive solutions to site problems, and where appropriate, to divide responsibilities for cleanup among the various applicable authorities.

Finally, the deferral of Federal facility sites to RCRA-authorized States, in lieu of evaluation under the IAG process, may be inconsistent with the intent of CERCLA section 120(g), which provides that "no authority vested in the [EPA] Administrator under this section [120] may be transferred" to any person. 42 U.S.C. 9620(g).

III. Coordination of Response Authorities at Federal Facility Sites on the NPL

EPA recognizes that when it takes action under CERCLA to address a facility that is also subject to RCRA authorities, there is some risk of overlap or even conflict. Such conflict situations are not a problem where EPA is responsible for carrying out the requirements of both RCRA and CERCLA (since any jurisdictional overlaps can be managed within EPA). However, an overlap of authority may yield disagreements as to how a site should be cleaned up where a State has been authorized to carry out all or part of the RCRA program.[4]

However, this potential overlap between RCRA and CERCLA cleanup authorities is the result of Congressional design, not site listings. EPA neither intends nor believes that site listings themselves create a conflict between CERCLA and RCRA (or State law); rather, any conflict stems from the overlap of the corrective action authorities of the two statutes. The overlap exists whenever EPA takes CERCLA action at a site that has regulated hazardous waste management units subject to a State's RCRA program or other State law. EPA can take such CERCLA actions at sites *not* on the NPL as well as at sites on the NPL.[5] (Such conflicts may also occur at private sites as well as at Federal facility sites.) There may also be cases where the applicability of both RCRA and CERCLA authorities at NPL sites does *not* create a conflict—for example, where the RCRA hazardous waste management units are not included within the area to be addressed under CERCLA, or where the release is exempt from action under RCRA. Thus, conflict between RCRA and CERCLA corrective actions can occur at virtually any point in the process or not at all.

How RCRA authorities are affected (if at all) when CERCLA also applies to a site is a matter that varies greatly, depending upon the facts of the site. In some cases, the NPL site is physically distinct from the RCRA-regulated

[4] EPA recognizes that many States have hazardous waste laws independent of that upon which the State's authorized RCRA program may be based. Although this policy statement focuses primarily on the mechanism for applying RCRA (by EPA or authorized States) to Federal facilities on the NPL, the same analysis would apply to non-RCRA State laws that potentially overlap with CERCLA response authorities.

[5] Removal actions, as well as remedial actions ordered under section 106 of CERCLA, may be taken at non-NPL sites. *See* 40 CFR 300.66(c)(2) and 300.68(a)(1).

hazardous waste management units, and corrective action or closure at the regulated units may proceed under RCRA, while at the same time a cleanup action is proceeding at another area of the property under CERCLA, without the risk of inconsistency or duplication of response action. In other cases, the releases or contaminant plumes may overlap, such that a comprehensive solution under one statute may be the most efficient and desirable solution. The questions of which authority should control, and of how to avoid potential duplication or inconsistency, are often implementation issues, to be resolved in light of the facts of the case and after consultation between EPA and the concerned State.

EPA's belief is that in most situations, it is appropriate to address sites comprehensively under CERCLA, pursuant to an enforceable agreement (i.e., an IAG under CERCLA section 120), signed by the Federal facility, EPA, *and*, where possible, the State. In some circumstances, it may be appropriate under an IAG to divide responsibilities, focusing CERCLA activity only on certain prescribed units, leaving the cleanup of other units under the direct control of RCRA authorities, such as where the RCRA-regulated hazardous waste management unit is physically distinct from the CERCLA contamination and its cleanup would not disrupt CERCLA activities. Alternatively, the IAG can prescribe divisions of responsibility, such as stating that CERCLA will address ground water contamination while RCRA will address the closure of regulated hazardous waste management units. Any disagreements in the implementation of the IAG would be resolved by the signatory parties under the dispute resolution terms of the IAG.

Of course, there may be cases where a RCRA-authorized State declines to join the IAG process, or agreement on the terms of an IAG cannot be achieved. For instance, State officials may decide that the proper closure of a landfill should be accomplished through excavation, while CERCLA officials may determine that the same area should be managed differently as part of a comprehensive CERCLA action at the site. Although EPA will try to resolve any such conflicts and achieve agreement with the State in the IAG process, there may be cases where the conflicting views of EPA and the State concerning corrective action cannot be resolved.

CERCLA section 122(e)(6), entitled "inconsistent response actions," gives specific guidance on this point:

> INCONSISTENT RESPONSE ACTION.—When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study [RI/FS] for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

As the Conference Report on SARA noted, section 122(e)(6) was included in the bill "to clarify that no potentially responsible party [PRP] may undertake any remedial action at a facility unless such remedial action has been authorized by the President" (or his delegate, EPA)[6]. *See* H.R. Rep. 962, 99th Cong., 1st Sess. at 254 (1986). *See also* 132 Cong. Rec. S14919 (daily ed., October 3, 1986) ("This is to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem.")[7] This authorization requirement applies to any remedial actions taken by a PRP, including those actions ordered by a State, as both types of action could be said to present a potential conflict with a CERCLA-authorized action.[8]

CERCLA section 122(e)(6) does not constitute a prohibition on RCRA corrective action at CERCLA sites; rather, it provides a mechanism by which the Agency must approve of remedial actions commenced at sites after an RI/FS has been initiated under CERCLA. Such an approach would help to avoid duplicative and wasteful cleanup actions. This authorization mechanism would not affect normal hazardous waste management requirements under RCRA, such as complying with manifest, 90-day storage, and labeling requirements; any RCRA-regulated hazardous waste management units operating at a CERCLA site must continue to comply with RCRA hazardous waste management requirements, even if a CERCLA response action is underway. The Agency also intends to authorize many State RCRA actions to continue, e.g., where the RCRA action addresses a unit distinct from the CERCLA contamination, and where the RCRA action will not disrupt CERCLA activities.

Even where EPA decides that it is not appropriate to authorize a RCRA or other State action to continue under CERCLA section 122(e)(6) in order to avoid disruption or duplicative actions, CERCLA section 120(f) specifically provides that participation by State officials in remedy selection "shall be provided in accordance with section 121," and CERCLA section 121(d) specifically provides a process for taking account of "applicable or relevant and appropriate requirements" (ARARs) of RCRA (as well as other State and Federal statutes) when a remedy is selected. If any State requirements are waived pursuant to CERCLA section 121(d)(4), the affected State may obtain judicial review of such waiver, and even if unsuccessful, may ensure that those requirements are met by providing the necessary additional funding pursuant to CERCLA section 121(f)(3)(B). As the Agency has noted repeatedly in the past, "it is EPA's expectation that remedies selected and implemented under CERCLA will generally satisfy the RCRA corrective action requirements, and vice versa" (52 FR 17993, May 13, 1987, and 52 FR 27645, July 22, 1987).[9]

The discretion under CERCLA section 122(e)(6) not to authorize a PRP to go forward with a remedial action at a site

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[6] The authority under section 122(e)(6) to authorize a remedial action to continue after the initiation of an RI/FS at an NPL site has been delegated to the EPA Administrator. *See* Executive Order 12580, section 4(d)(1) (52 FR 2923, January 29, 1987). For most non-NPL sites, the general authority for carrying out the requirements of CERCLA section 122 has been delegated to the Federal agencies for sites under their jurisdiction or control; however, the ability of the Federal agencies to authorize sites under section 122(e)(6) is limited by the provisions of section 120(a)(4), as discussed below.

[7] Congress' intent that CERCLA actions should proceed without potential conflict with other remedial action is also suggested by the language in section 7002(b)(2)(B) of RCRA, which states that RCRA citizen suits alleging an imminent and substantial endangerment may *not* be brought if EPA: has commenced an action under CERCLA section 106 (or RCRA 7003); is engaging in a removal action under CERCLA section 104; or has incurred costs to begin an RI/FS under CERCLA and is diligently proceeding with remedial action; or has obtained a court order (including a consent decree) or issued an administrative order under CERCLA section 106 or RCRA section 7003, and a responsible party is diligently conducting a removal, an RI/FS, or proceeding with remedial action pursuant to that order. Similarly, RCRA section 1006(b) directs the Administrator to "integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication to the maximum extent practicable," with appropriate provisions of laws (such as CERCLA) granting regulatory authority to EPA.

[8] "Remedial action" is very broadly defined in section 101(24) of CERCLA as actions consistent with a permanent remedy at a site, including confinement of a release of hazardous substances, cleanup of hazardous substances, etc. EPA believes that remedial actions within the meaning of the term may include those taken under statutes other than CERCLA, including corrective action under RCRA.

[9] To the extent that this policy may be read as inconsistent with the district court's opinion in *State of Colorado v. U.S. Department of the Army*, C.A. No. 86-C-2524 (D. Colo., February 24, 1989), EPA disagrees with that opinion.

after a CERCLA remedial investigation/feasibility study (RI/FS) has begun—even if that action has been ordered by a State—is generally available at both private and Federal facility sites. However, CERCLA section 120(a)(4) provides that State laws shall apply to remedial actions—including those under CERCLA —at *Federal facility* sites that are *not* on the NPL, thus, acting as a general limitation on the more general section 122(e)(6).[10] Of course, no such limitation applies to Federal facility sites once they are placed on the NPL.

The plain language of section 122(e)(6) makes it clear that it is the RI/FS—not the listing itself—that triggers section 122(e)(6). Indeed, an RI/FS may be commenced prior to, as well as after, NPL listing.[11] This is especially true for Federal facility sites, as the President has delegated his authority to take CERCLA section 104 response actions (including RI/FSs) to the Federal agencies for most non-NPL sites (Executive Order 12580, at section 2(e)(1)).[12] Thus, when a Federal facility is placed on the NPL, an RI/FS will often have been commenced (or completed).

In order to invoke the authorization mechanism of CERCLA section 122(e)(6), EPA must make a threshold determination of whether or not an RI/FS "under this Act [CERCLA]" has been initiated; studies conducted by Federal facilities before a site has been placed on the NPL may or may not constitute an appropriate RI/FS in EPA's opinion.[13] As a matter of policy, the Agency will generally interpret CERCLA-quality RI/FSs to be those that are provided for, or adopted by reference, in an IAG. The Agency believes that such a policy is consistent with CERCLA section 120(e)(1), which directs Federal facilities, "in consultation with EPA," to commence an RI/FS within six months of the facility's listing on the NPL. In addition, the policy will promote consistency in RI/FS's, and will help to ensure that all appropriate information has been collected during the RI/FS, so that EPA may properly evaluate remedial alternatives at Federal facility sites as required under CERCLA section 120(e)(4). Further, by encouraging the development of IAGs at the early RI/FS stage, this policy may help to promote coordination among the parties, and avoid inconsistent actions.

Thus, the IAG will generally commit the Federal facility to complete both an RI/FS and any subsequent remedial action determined by EPA to be necessary.

Once an RI/FS has been commenced under (or incorporated into) an IAG, EPA must decide whether or not to authorize PRPs to continue with any non-CERCLA remedial actions (both voluntary and State-ordered) at the site. This decision will be made on a case-by-case basis, taking into account the status of CERCLA activities at the site, and the potential for disruption of or conflict with that work if the PRP action were authorized.

IV. Response to Public Comments

On May 13, 1987 (52 FR 17991), EPA solicited public comment on the Agency's intention to adopt a policy for including eligible Federal facility sites on the NPL, even if they are also subject to RCRA corrective action authorities; the Agency received six comments on the policy. EPA considered the comments raised, and responds to them as follows.

Two of the six commenters concur with the policy to include eligible Federal facility sites on the NPL and have no suggested revisions or additional comments.

One commenter "generally supports" the policy, but believes that the criteria used to list Federal facility sites are unclear. The commenter states that "as written, the proposed policy could be interpreted to mean that Federal hazardous facilities would be placed on the NPL regardless of their status under [RCRA] or their degree of actual hazard."

In response, the commenter is correct in concluding that under the policy, Federal facility sites would be placed on the NPL regardless of the facility's status under RCRA. As discussed above, this is consistent with Congressional intent that Federal facility sites should be on the NPL, and that listing criteria should not be applied to Federal sites in a manner that is more exclusionary than for private sites. However, the commenter is incorrect in suggesting that Federal facility sites will be listed regardless of the degree of hazard they present. The Agency intends to use the HRS, the same method used for non-Federal sites, to determine whether a Federal facility site poses an actual or potential threat to health or the environment and, therefore, qualifies for the NPL. (Currently, a site is generally eligible for the NPL if the HRS score is 28.50 or greater.) The application of the HRS to Federal facility sites is consistent with CERCLA section 120(d), which requires EPA to use the HRS in evaluating for the NPL the facilities on the Federal Agency Hazardous Waste Compliance Docket.

One commenter did not comment on the policy, but rather is concerned that no Superfund monies be spent at Federal facilities. The commenter believes that neither pre-remedial work (preliminary assessments and site inspections) nor remedial work should be financed by the Trust Fund.

In response, Executive Order 12580 (52 FR 2923, January 29, 1987), at section 2(e), delegates the responsibility for conducting most pre-remedial work to the Federal agencies. Therefore, the Federal agencies, rather than the Trust Fund, finance these activities, with EPA providing oversight. In addition, section 111(e)(3) of CERCLA, as amended by SARA, strictly limits the use of the Fund for remedial actions at Federally-owned facilities. Although the Administrator does have the discretion to use funds from the Hazardous Substances Superfund to pay for emergency removal actions for releases or threatened releases from Federal facilities, the concerned Executive Agency or department must reimburse the Fund for such costs. Executive Order 12580, section 9(i). The Department of Defense and the Department of Energy also have response authority for emergency removals (Executive Order, section 2(d)).

Another commenter opposes the policy of placing RCRA-regulated Federal facilities on the NPL, arguing that public notification is adequately addressed by other provisions of CERCLA (sections 120 (b), (c), and (d)), and that the policy is inconsistent with section 120(a), which requires that

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[10] Section 120(a)(4) states as follows: State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are *not* included on the National Priorities List. [Emphasis added.]

Nothing in this section prevents Federal facilities from arguing that the doctrines of laches, estoppel or implied preemption limit the effect of section 120(a)(4).

[11] *See SCA Services of Indiana, Inc. v. Thomas*, 634 F.Supp. 1355, 1361 (W.D. Ind. 1986) ("CERCLA clearly makes the conduct of an RI/FS a removal, not remedial, action, so that the restriction that remedial actions be taken only when the site is on the NPL is simply irrelevant to a RI/FS"); 52 FR 27622 (July 22, 1987) ("an RI/FS can be performed at proposed [NPL] sites pursuant to the Agency's removal authority under CERCLA").

[12] Section 104 authorities were delegated to the Departments of Defense and Energy more generally, although such functions must still be exercised consistent with the requirements of section 120 of CERCLA. Executive Order 12580, section 2(d).

[13] "RI/FS" is a term of art under CERCLA, and applies to a special site study and evaluation pursuant to section 300.68(d) of the NCP. EPA, as the agency entrusted with the development and implementation of the NCP, is the recognized expert on what constitutes an acceptable RI/FS under CERCLA.

Federal facilities comply with CERCLA in the same manner as any nongovernmental entity. The commenter believes that the adoption of the proposed policy is inconsistent with EPA's policy regarding non-Federal facilities.

In response, CERCLA sections 120 (b), (c), and (d) refer to the establishment of the Federal Agency Hazardous Waste Compliance Docket and to the evaluation of facilities on the docket for the NPL.[14] The Agency agrees that this docket will provide the public with some information regarding hazardous waste activities at Federal facilities, as well as information concerning contamination of contiguous or adjacent property. The Agency believes, however, that evaluating sites using the HRS, and placing on the NPL those sites that pose the most serious problems, will serve to inform the public of the relative hazard of these sites. The listing process also affords the public the opportunity to examine HRS documents and references for a particular site, and to comment on a proposed listing. In addition, the NPL provides response categories and cleanup status codes for sites, and deletes sites when no further response is required, adding to the informational benefits of using the NPL. Therefore, EPA believes that listing Federal facility sites will advise the public of the status of Federal government cleanup efforts, as well as help Federal agencies set priorities and focus cleanup efforts on those sites that present the most serious problems, consistent with the NCP (50 FR 47931, November 20, 1985).

As to the comment concerning CERCLA section 120(a), EPA agrees that the section provides that Federally-owned facilities are subject to and must comply with CERCLA to the same extent as any nongovernmental entity. Further, sections 120(a)(2) and 120(d) provide that EPA should use the same rules and criteria to evaluate Federal sites for the NPL as are applied to private sites. However, today's policy is not inconsistent with those sections. As a threshold matter, it is uncontroverted that an HRS score of 28.50 or greater is an eligibility requirement for both Federal and private sites. The question is, should NPL-eligible Federal sites be deferred from listing as a matter of policy. As explained above, the Agency does not believe that CERCLA section 120(a)(2) can be read to require identical treatment of Federal and private sites in all circumstances; the fact that Congress legislated a number of requirements in addition to, or instead of, those applicable to private facilities (e.g., sections 120 (c), (e)(2), (h)), demonstrates the legislators' recognition of the need to address certain unique aspects of Federal facilities differently than for private sites. Rather, EPA interprets CERCLA section 120(a) to mean that the criteria to list Federal facility sites should not be more exclusionary than the criteria to list non-Federal sites. In this case, it is clear that if EPA were to apply the non-Federal RCRA deferred listing policy to Federal facilities, very few Federal sites would be considered for the NPL, counter to the spirit and intent of section 120 (c) and (d) of CERCLA and the statute's legislative history. Moreover, one of the key factors in EPA's decision to adopt a RCRA deferral policy for private sites—the need to manage and conserve Fund resources—does not apply to Federal facilities because the remedies are not Fund-financed. EPA believes that it is appropriate, and consistent with Congressional intent, to take these differences into account, as long as the result is not to treat Federal agencies in a more exclusionary manner than private facilities.

Two commenters expressed concern that listing Federal facility sites might interfere with enforcement activities under RCRA. One commenter stated that the policy is inconsistent with CERCLA section 120(i), which requires that Federal facilities comply with all RCRA requirements.

In response, the Agency's view is that today's policy will facilitate enforcement activities at Federal facility sites, not interfere with them. In effect, by encouraging the drafting of comprehensive IAGs for Federal facilities, this policy will advance the goal of site remediation. In addition, the IAG process allows EPA to take steps to avoid duplication and conflict; the IAG may define areas of a Federal facility that may efficiently be addressed under RCRA (e.g., units that are distinct from, and do not disrupt, CERCLA activities). In addition, States will be encouraged to become signatory parties to IAGs, reducing the likelihood of intergovernmental conflict over jurisdiction and the selection of remedy.

In any event, it is not the act of placing a site on the NPL that creates a potential conflict between CERCLA and RCRA; rather, the corrective action authorities of the two statutes overlap, pursuant to statutory design. Indeed, the alleged interference with RCRA corrective actions by CERCLA cleanups can occur at any point in the process, depending upon the specific facts of the case. In those cases where the relevant statutes do overlap, EPA believes that one of the statutes must sometimes be chosen for practical reasons, and Congress has set out a procedure for resolving such conflicts in CERCLA section 122(e)(6).[15] However, the goal of today's policy is to minimize any such conflicts through the IAG process.

The Agency acknowledges that in the case of Federal facilities, listing does have a significance not present for private sites. For instance, CERCLA section 120(e)(2) provides that for Federal facility sites *on the NPL*, EPA will play a role in selecting remedies, while CERCLA section 120(a)(4) provides that State laws concerning removal and remedial actions shall apply to Federal facilities when such facilities are not on the NPL (the section does not discuss how State laws apply at Federal sites that are on the NPL). However, any difference in EPA or State roles at NPL versus non-NPL Federal facility sites results from the statutory scheme reflected in CERCLA sections 120(a)(4) and 121(d), and not from the act of listing itself. CERCLA directs EPA to list Federal sites on the NPL and then specifies certain statutory consequences.

Further, merely alleging that there may be some effect on State enforcement actions as a result of a policy of including Federal facilities on the NPL is not grounds for rejecting today's policy. The Agency has reviewed both sides of the question, and has determined that it is in the best interest of the public and environmental protection to place Federal facility sites on the NPL and thus to make CERCLA authorities available to achieve comprehensive remedies for contamination at such sites (when appropriate). In addition, the IAG process, as discussed in this policy, will serve to minimize duplication and inconsistency with potential State orders.

[14] Pursuant to section 120(c) of CERCLA, EPA published the Federal Agency Hazardous Waste Compliance Docket on February 12, 1988 (53 FR 4280). The docket was established based on information submitted by Federal agencies to EPA under sections 3005, 3010, and 3016 of RCRA and under section 103 of CERCLA. The docket serves to identify Federal facilities that must be evaluated in accordance with CERCLA section 120(d) to determine if they pose a risk to public health and the environment. Section 120(d) requires EPA to evaluate facilities on the docket using the HRS for possible inclusion on the NPL.

[15] It is important to note that the section 122(e)(6) authorization requirement at Federal facilities is not triggered automatically by NPL listing, but rather takes effect where an RI/FS has been initiated at a listed Federal site; as a matter of policy, this start-up point for the RI/FS will not be recognized in most cases until an enforceable IAG has been signed, which may be well after a site is listed.

EPA also disagrees with the commenter's suggestion that today's policy is inconsistent with CERCLA section 120(i), which provides that "nothing in this section [120] shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [RCRA] (including corrective action requirements)." EPA interprets that section simply to mean that section 120 does not impair otherwise applicable RCRA requirements; this mandate is met even if an action is conducted under CERCLA, as CERCLA section 121(d)(2) specifically provides that ARARs of RCRA and State law must be achieved with regard to any on-site remedy. Even if a RCRA or State requirement that is an ARAR is waived by EPA (section 121(d)(4)), the State may obtain judicial review of such a waiver, and even if unsuccessful, may require that the remedial action conform to the requirement in question by paying the additional costs of meeting such standard (CERCLA section 121(f)(3)); thus, the intent of section 120(i) is satisfied.

This interpretation of section 120(i) follows directly from the language of the provision itself, which states that "nothing in this section"—as compared to "nothing in this Act"—shall affect RCRA obligations. This leaves in place limitations contained in *other* sections of the statute, such as the permit waiver provision (section 121(e)); the process for selecting and waiving ARARs (sections 121 (d)(2) and (d)(4)); and the ban on remedial actions not approved by the President (section 122(e)(6)).

For all these reasons, the Agency believes that today's Federal facilities listing policy is appropriate, that it reflects Congressional intent, and that it is consistent with CERCLA.

Pursuant to the policy described in this notice, the Agency will place eligible Federal facility sites on the NPL even if the site is also subject to the corrective action authorities of Subtitle C of RCRA.

Date: March 6, 1989.

Jonathan Z. Cannon,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 89-5693 Filed 3-10-89; 8:45 am]

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federal register

Monday
March 13, 1989

Part VII

Securities and Exchange Commission

Forms Under Review of the Office of Management and Budget; Notice

Part VII

Securities and Exchange Commission

Forms Under Review of the Office of Management and Budget Notice

SECURITIES AND EXCHANGE COMMISSION

[Regulation 13D–G (File No. 270–137) et al.]

Forms Under Review of Office of Management and Budget

Agency Clearance Officer: Kenneth A. Fogash (202) 272–2142.

Upon Written Request Copy Available From: Securities and Exchange Commission, Office of Consumer Affairs and Information Services, Washington, DC 20549.

Revision

In the matter of:

Regulation 13D–G (File No. 270–137)
Regulation 14D (File No. 270–144)
Regulation 14A (File No. 270–56)
Rule 13e–3 (File No. 270–1)

Notice is hereby give that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*.), the Securities and Exchange Commission has submitted for OMB approval proposed revisions to Securities Exchange Act beneficial ownership rules and related amendments.

With respect to Regulation 13D–G approximately 6536 respondents are affected and an estimated 15 burden hours are required per response. Approximately 366 respondents are affected by the revisions to Regulation 14D and an estimated 354 burden hours are required per response. With respect to Schedule 13E–3 and Regulation 14A, respectively, 221 and 8733 respondents are affected with an estimated 140 and 105 burden hours required per response. The estimated average burden hours are made solely for purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

Direct general comments to Gary Wasman at the address below. Direct any comments concerning the accuracy of the estimated average burden hours for compliance with SEC rules and forms to Kenneth A. Fogash, Deputy Executive Director, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–6004. and Gary Waxman, Clearance Officer, Office of Management and Budget [Paperwork Reduction Project 3235–0145–Regulation 13D/G; 3235–0102–Regulations 14D and E; 3235–0059–Regulation 14A; and 3235–0007–Rule 13e–3], Room 3228, New Executive Office Building, Washington, DC 20503.

Jonathan G. Katz,
Secretary.
March 2, 1989.

[FR Doc. 89–5946 Filed 3–10–89; 11:33 am]
BILLING CODE 8010–01–M

federal register

Monday
March 13, 1989

Part VIII

Interstate Commerce Commission

49 CFR Parts 1312 and 1314
Electronic Filing of Traffics; Notice of Stay of Final Rules

Part VIII

Interstate Commerce Commission

INTERSTATE COMMERCE COMMISSION

49 CFR Parts 1312 and 1314

[Ex Parte No. 444]

Electronic Filing of Tariffs

AGENCY: Interstate Commerce Commission.

ACTION: Notice of Stay of final rules.

SUMMARY: By decision served February 10, 1989, and published in the **Federal Register** at 54 FR 6403 (February 10, 1989) the Commission adopted regulations allowing electronic tariff filing as an alternative to printed tariffs, and established, in lieu of the current detailed tariff regulations, simple tariff standards governing the construction, filing, and maintenance of tariffs. However, the Commission has also required that, during a 1-year transition period, carriers using electronic tariffs continue to file printed paper tariffs with the Commission. *Electronic Filing of Tariffs, 5* I.C.C.2d____, served February 10, 1989, p. 9. National Motor Freight Traffic Association, Inc., Central States Motor Freight Bureau, Inc., Central & Southern Motor Freight Tariff Association, Inc., Eastern Central Motor Carriers Association, Middle Atlantic Conference, Middlewest Motor Freight Bureau, New England Motor Rate Bureau, Inc., Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, Regular Common Carrier Conference, Rocky Mountain Motor Tariff Bureau, Inc., and Southern Motor Carriers Rate Conference, jointly, have filed a petition to reopen the proceeding[1] and a motion for stay of the effective date. A reply in support of the motion has been filed by the National Small Shipments Traffic Conference, Inc., and Health and Personal Care Drug Conference, Inc. The rules were to become effective March 13, 1989. In the prior decision, we specifically recognized that it is possible that some provisions, that carriers and/or shippers find useful or essential, have been deleted, and that we would consider such matters in connection with future petitions or complaints. The petition to reopen raises such issues. Accordingly, we will stay the effective date of these rules as requested, pending our consideration of the petition to reopen.

EFFECTIVE DATE: This stay is effective as of March 10, 1989.

[1] This decision addresses only the motion for stay. The merits of the petition to reopen will be addressed at a later date.

FOR FURTHER INFORMATION CONTACT:

Charles E. Langyher, (202) 275–7739 or Lawrence C. Herzig, (202) 275–7358. [TDD for hearing impaired: (202) 275–1721].

SUPPLEMENTARY INFORMATION: This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Parts 1312 and 1314

Freight forwarders, Maritime carriers, Motor carriers, Pipelines, Railroads, Tariffs.

It is ordered:

1. The effective date of these rules is stayed pending consideration of the petition to reopen.

Decided: March 9, 1989. By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley and Phillips. Chairman Gradison dissented in part with a separate expression.

Noreta R. McGee,

Secretary.

[FR Doc. 89–5954 Filed 2–30–89; 12:03 pm]

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CFR CHECKLIST

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[2] No amendments to this volume were promulgated during the period Jan.1, 1988 to Dec.31, 1988. The CFR volume issued January 1, 1988, should be retained.

[3] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1988. The CFR volume issued January 1, 1987, should be retained.

[4] No amendments to this volume were promulgated during the period Apr. 1, 1980 to March 31, 1988. The CFR volume issued as of Apr. 1, 1980, should be retained.

[5] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[6] No amendments to this volume were promulgated during the period July 1, 1986 to June 30, 1988. The CFR volume issued as of July 1, 1986, should be retained.

[7] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.