AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

7-18-89
Vol. 54 No. 136

federal register

Tuesday
July 18, 1989

United States
Government
Printing Office
SUPERINTENDENT
OF DOCUMENTS
Washington, DC 20402

OFFICIAL BUSINESS
Penalty for private use, $300

SECOND CLASS NEWSPAPER

Postage and Fees Paid
U.S. Government Printing Office
(ISSN 0097-6326)

7-18-89
Vol. 54 No. 136
Pages 30007-30204

Federal Register

Tuesday
July 18, 1989

FEDERAL REGISTER Published daily, Monday through Friday, (not published on Saturdays, Sundays, or on official holidays), by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

The **Federal Register** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders and Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress and other Federal agency documents of public interest. Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless earlier filing is requested by the issuing agency.

The **Federal Register** will be furnished by mail to subscribers for $340 per year in paper form; $195 per year in microfiche form; or $37,500 per year for the magnetic tape. Six-month subscriptions are also available at one-half the annual rate. The charge for individual copies in paper or microfiche form is $1.50 for each issue, or $1.50 for each group of pages as actually bound, or $175.00 per magnetic tape. Remit check or money order, made payable to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or charge to your GPO Deposit Account or VISA or Mastercard.

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 54 FR 12345.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	202–783–3238
Magnetic tapes	275–3328
Problems with public subscriptions	275–3054

Single copies/back copies:

Paper or fiche	783–3238
Magnetic tapes	275–3328
Problems with public single copies	275–3050

FEDERAL AGENCIES

Subscriptions:

Paper or fiche	523–5240
Magnetic tapes	275–3328
Problems with Federal agency subscriptions	523–5240

For other telephone numbers, see the Reader Aids section at the end of this issue.

Contents

Federal Register
Vol. 54, No. 136
Tuesday, July 18, 1989

Agriculture Department
See Federal Crop Insurance Corporation

Antitrust Division
NOTICES
National cooperative research notifications:
PDES, Inc., 30116

Arts and Humanities, National Foundation
See National Foundation on the Arts and the Humanities

Blackstone River Valley National Heritage Corridor Commission
NOTICES
Meetings, 30103

Bonneville Power Administration
NOTICES
Bonneville Acquisition Guide; availability, 30106

Civil Rights Commission
NOTICES
Meetings; State advisory committees:
Illinois, 30103

Coast Guard
RULES
Drawbridge operations:
Virginia, 30038
Regattas and marine parades:
Defenders' Day Celebration, 30034
(2 documents)
Great Kennebec River Whatever Race, 30035
Ray Catena Mercedes Benz Offshore Grand Prix, 30036
Windjammer Days, 30037

Commerce Department
See Export Administration Bureau; National Oceanic and Atmospheric Administration

Commodity Futures Trading Commission
NOTICES
Contract market proposals:
Minneapolis Grain Exchange—
Hard Red Spring wheat, 30104

Comptroller of the Currency
PROPOSED RULES
National banks:
Lending limits—
Loan commitment treatment, 30054

Defense Department
See also Navy Department
PROPOSED RULES
Acquisition regulations:
Quality assurance—
Contractor's warranty specifications (redesign), 30101
Small business and small disadvantaged business concerns, 30101

Drug Enforcement Administration
NOTICES
Applications, hearings, determinations, etc.:
Liberty Discount Drugs, Inc., 30116
Warren, David W., D.O., 30117

Education Department
RULES
Elementary and secondary education:
Areas affected by Federal activities, etc.—
Assistance for local educational agencies impact aid programs, 30059
Neglected or delinquent childrens program, 30192
NOTICES
Grants and cooperative agreements; availability, etc.:
Talent search program, 30190

Energy Department
See also Bonneville Power Administration
Meetings:
Nuclear Facility Safety Advisory Committee, 30105

Environmental Protection Agency
RULES
Air quality implementation plans; approval and promulgation; various States:
District of Columbia, 30040

Equal Employment Opportunity Commission
PROPOSED RULES
Reports and records:
Record retention and recordkeeping requirements, 30097

Export Administration Bureau
RULES
Export licensing:
Commodity control list—
Personal computers; decontrol, 30011
NOTICES
Foreign availability assessments:
Personal computers, 30103

Federal Aviation Administration
RULES
Airworthiness directives:
Boeing, 30007, 30009
(2 documents)
Standard instrument approach procedures, 30010
PROPOSED RULES
Airworthiness directives:
Aerospatiale, 30059
Boeing, 30061
SAAB-Scania, 30062

Federal Communications Commission
RULES
Frequency allocations and radio treaty matters:
Fixed and mobile services bands limited to military services; footnotes revised, 30041
Radio and television broadcasting:
Aural broadcast STL and ICR stations, and TV auxiliary broadcast stations; technical and operational requirements review; correction, 30043

Radio stations; table of assignments:
Illinois et al., 30041
Iowa, 30042
Ohio, 30041

Federal Crop Insurance Corporation
RULES
Crop insurance; various commodities:
Macadamia nuts, 30007

Federal Deposit Insurance Corporation
NOTICES
Meetings; Sunshine Act, 30132

Federal Emergency Management Agency
NOTICES
Disaster and emergency areas:
Kentucky, 30106

Federal Highway Administration
PROPOSED RULES
Engineering and traffic operations:
Highway design standards—
Interstate system, 30095

Federal Mine Safety and Health Review Commission
NOTICES
Meetings; Sunshine Act, 30132

Federal Reserve System
NOTICES
Meetings; Sunshine Act, 30132

Federal Trade Commission
NOTICES
Prohibited trade practices:
General Rent-A-Car Systems, Inc., et al., 30106
KKR Associates et al., 30107

Food and Drug Administration
PROPOSED RULES
Biological products:
Blood and blood products; labeling requirement removed, 30093
NOTICES
Meetings:
Consumer information exchange, 30110

Health and Human Services Department
See also Food and Drug Administration; Public Health Service; Social Security Administration
NOTICES
Organization, functions, and authority delegations:
Regional Cost Allocation Divisions; consolidation, 30107
Privacy Act:
Systems of records, 30108

Health Resources and Services Administration
See Public Health Service

Housing and Urban Development Department
NOTICES
Agency information collection activities under OMB review, 30136
Organization, functions, and authority delegations:
Assistant Secretary for Housing-Federal Housing Commissioner et al., 30111
Deputy Assistant Secretary for Single Family Housing et al., 30111
Regional Administrators et al., 30112

Interior Department
See Land Management Bureau; Minerals Management Service; Surface Mining Reclamation and Enforcement Office

International Trade Commission
NOTICES
Meetings; Sunshine Act, 30132
(2 documents)

Justice Department
See also Antitrust Division; Drug Enforcement Administration
NOTICES
Pollution control; consent judgments:
Boyd, MD, et al., 30115
Campbell Soup Co., 30115
Martin Marietta Corp. et al., 30115

Land Management Bureau
NOTICES
Meetings:
Rock Springs District Grazing Advisory Board, 30113
Resource management plans, etc.:
Yuma Resource Area, AZ, 30113
Survey plat filings:
Minnesota, 30114

Mine Safety and Health Federal Review Commission
See Federal Mine Safety and Health Review Commission

Minerals Management Service
NOTICES
Meetings:
Royalty Management Advisory Committee, 30114

National Foundation on the Arts and the Humanities
NOTICES
Meetings:
Humanities Panel, 30117

National Oceanic and Atmospheric Administration
RULES
Fishery conservation and management:
Gulf of Mexico and South Atlantic spiny lobster, 30045
Pacific Coast groundfish, 30046
PROPOSED RULES
Fishery conservation and management:
Gulf of Alaska, and Bering Sea and Aleutian Islands groundfish, 30102
NOTICES
Meetings:
North Pacific Fishery Management Council, 30104

National Science Foundation
NOTICES
Antarctica; environmental law compliance; report availability, 30119

Navy Department
NOTICES
Environmental statements; availability, etc.:
Naval Air Station, Fallon, NV; geothermal resources development, 30105

Nuclear Regulatory Commission
PROPOSED RULES
Preserving free flow of safety information to Commission in employment agreements, 30049
NOTICES
Environmental statements; availability, etc.:
Commonwealth Edison Co., 30120
Public Service Co. of New Hampshire et al., 30121
Meetings; Sunshine Act, 30133
Applications, hearings, determinations, etc.:
Safety Light Corp. et al., 30120
Tennessee Valley Authority, 30120

Personnel Management Office
NOTICES
Agency information collection activities under OMB review, 30121, 30122
(2 documents)

Public Health Service
See also Food and Drug Administration
NOTICES
Meetings:
National Vaccine Advisory Committee, 30110

Securities and Exchange Commission
RULES
Securities:
Foreign broker-dealers; registration requirement exemptions, 30013
PROPOSED RULES
Securities:
Foreign broker-dealers; foreign regulation recognition, 30087
Offshore offers and sales, 30063
Restricted securities; resale, 30076
NOTICES
Meetings; Sunshine Act, 30133
Self-regulatory organizations; proposed rule changes:
Government Securities Clearing Corp., 30124
National Securities Clearing Corp., 30125
New York Stock Exchange, Inc., 30127
Pacific Stock Exchange, Inc., 30122
Philadelphia Stock Exchange, Inc., 30123
Applications, hearings, determinations, etc.:
IDS Financial Corp. et al., 30123

Small Business Administration
NOTICES
Disaster loan areas:
Kentucky et al., 30128
Applications, hearings, determinations, etc.:
CMNY Capital II, L.P., 30128

Social Security Administration
NOTICES
Organizations, functions, and authority delegations, 30110

State Department
NOTICES
Bridge permit applications:
Eagle Pass, TX, 30129
Meetings:
International Radio Consultative Committee, 30129
Telegraph and Telephone Consultative Committee, 30129
(2 documents)

Surface Mining Reclamation and Enforcement Office
PROPOSED RULES
Permanent program and abandoned mine land reclamation plan submissions:
Maryland, 30098

Transportation Department
See Coast Guard; Federal Aviation Administration; Federal Highway Administration

Treasury Department
See also Comptroller of the Currency
NOTICES
Agency information collection activities under OMB review, 30130, 30131
(4 documents)

United States Information Agency
RULES
Exchange-visitor program:
China; extension of stay, 30033
NOTICES
Meetings:
Public Diplomacy, U.S. Advisory Commission, 30131

Veterans Affairs Department
RULES
Acquisition regulations
Packaging requirements; estimated quanities, 30043
PROPOSED RULES
Dioxin and radiation exposure; health effects studies evaluation, 30099

Separate Parts In This Issue

Part II
Department of Housing and Urban Development, 30136

Part III
Department of Education, 30190

Part IV
Department of Education, 30192

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.

7 CFR
455 30007

10 CFR
Proposed Rules
30 30049
40 30049
50 30049
60 30049
70 30049
72 30049
150 30049

12 CFR
Proposed Rules
32 30054

14 CFR
39 (2 documents) 30007, 30009
97 30010

14 CFR
Proposed Rules
39 (3 documents) 30059–30062

15 CFR
799 30011

17 CFR
240 30013
Proposed Rules
230 (2 documents) 30063, 30076
240 30087

21 CFR
Proposed Rules
610 30093
640 30093

22 CFR
514 30033

23 CFR
Proposed Rules
625 30095

29 CFR
Proposed Rules
1602 30097
1627 30097

30 CFR
Proposed Rules
920 30098

33 CFR
100 (5 documents) 30034–30037
117 30038

34 CFR
203 30190
222 30039

38 CFR
Proposed Rules
1 30099

40 CFR
52 30040

47 CFR
2 30041
73 (3 documents) 30041, 30042
74 30043

48 CFR
809 30043
810 30043
814 30043
816 30043
828 30043
852 30043
870 30043
Proposed Rules
219 30101
246 30101

50 CFR
204 30045
640 30045
663 30046
Proposed Rules
672 30102
675 30102

Rules and Regulations

Federal Register
Vol. 54, No. 136
Tuesday, July 18, 1989

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

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 455

[Amdt. No. 1; Doc. No. 7062S]

Macadamia Nut Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Macadamia Nut Crop Insurance Regulations (7 CFR Part 455), effective for the 1989 and succeeding crop years, to clarify the reference to reinsured companies in the Good Faith Reliance on Misrepresentation provisions. The intended effect of this rule is to clarify a reference to reinsured companies in the provisions of good faith reliance on misrepresentation; provisions to make clear that the reinsured companies make determinations for their policies.

EFFECTIVE DATE: July 18, 1989.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, Room 4090, South Building, U.S. Department of Agriculture, Washington, DC, 20250, telephone (202) 447–3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512–1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is January 1, 1993.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC amends the Macadamia Nut Crop Insurance Regulations (7 CFR Part 455) to clarify the reference to reinsured companies in the good faith reliance on misrepresentation section. The Good Faith Reliance on Misrepresentation provisions provide relief in those cases where an agent or employee of FCIC or a reinsured company misrepresented material facts of the insurance program, took an erroneous action, or gave erroneous advice and the insured relied thereon in good faith.

FCIC, uses two systems of delivery of the program, one is direct sale through an Agency Sales and Service Contract, and the other through policies sold under a Reinsurance Agreement. FCIC exercises jurisdiction over Agency Sales and Service contractors and their agents and FCIC employees, therefore, good faith reliance determinations in these instances are appropriate.

However, FCIC does not make for reinsured companies, determinations arising from good faith reliance matters. The reinsured companies make good faith reliance determinations in connection with their policies.

Since this rule is only for the purposes of clarification of the rule and does not change the effect of the regulations, good cause is shown for publishing this rule without the opportunity for public notice and comment.

List of Subjects in 7 CFR Part 455

Crop insurance; Macadamia nut.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Macadamia Nut Crop Insurance Regulations (7 CFR Part 455), to be effective for the 1989 and succeeding crop years, as follows:

PART 455—[AMENDED]

1. The authority citation for 7 CFR Part 455 is revised to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR 455.5 is amended by revising the last sentence to read as follows:

§ 455.5 Good faith reliance on misrepresentation.

* * * * *

Request for relief under this section must be submitted to the Corporation or to the Reinsured Company, whichever is applicable, in writing.

Done in Washington, DC, on June 22, 1989.

David W. Gabriel,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 89–16707 Filed 7–17–89; 8:45 am]

BILLING CODE 3410-08-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88–NM–203–AD; Amdt. 39–6269]

Airworthiness Directives; Boeing Model 737 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Boeing Model 737 series airplanes through line number 1581 with a second observer's seat installed, which requires installation of a placard, inspection of the second observer's seat for missing fasteners that may have been omitted during installation, and repair, if necessary. This amendment is prompted by reports of two missing fasteners that were inadvertently omitted on some airplanes during the installation of the second observer's seat, and are required to secure that seat to the forward lavatory. This condition, if not corrected, could result in failure of the attaching hardware to provide adequate strength for the lavatory mounted second observer's seat, when occupied.

EFFECTIVE DATE: August 24, 1989.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Transport Airplane Directorate, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Pliny Brestel, Airframe Branch, ANM-120S; telephone (206) 431-1931. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive which requires installation of a placard, inspection of the second observer's seat for missing fasteners, and repair, if necessary, was published in the **Federal Register** on March 1, 1989 (54 FR 8548). The comment period ended April 24, 1989.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

One operator commented that the airline had already instituted a program to inspect all seats.

The Air Transport Association (ATA) of America commented that one of its members advised that the Boeing Service Letter 737-SL-25-41, dated October 14, 1988, did not contain adequate instructions for fastener installation when the corresponding holes were not previously drilled. Since issuance of the NPRM Boeing Service Letter 737-SL-25-41-A, dated April 20, 1989, has been issued to add the pertinent instructions. The FAA has reviewed and approved the revision and has determined that compliance may also be made with the A revision. The final rule has been changed to include this later revision as a service information source. This change does not increase the economic burden on any operator, nor does it increase the scope of the rule.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the following rule, with the change previously noted.

There are approximately 1,554 Model 737 series airplanes of the affected design in the worldwide fleet. It is estimated that 722 airplanes of U.S. registry will be affected by this AD, that it will take approximately two manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. The placard may be manufactured locally and the cost is expected to be negligible. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $57,760.

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.

For the reasons discussed above, I certify that this action (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) 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. A final evaluation has been prepared for this action and is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends Part 39 of the Federal Aviation Regulations 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. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Applies to all Model 737 series airplanes through line number 1581, equipped with a second observer's seat, certificated in any category, compliance required as indicated, unless previously accomplished.

To ensure structural integrity of the second observer's seat, accomplish the following:

A. Within 30 days after the effective date of this AD, install a placard above the second observer's seat, stating: "NO OCCUPANCY." This placard may be removed once the terminating action of paragraph B., below, has been accomplished.

B. Within 6 months after the effective date of this AD, inspect the second observer's seat installation for missing fasterners, in accordance with Boeing Service Letter 737-SL-25-41, dated October 14, 1988, or Boeing Service Letter 737-SL-25-41-A, dated April 20, 1989. If fasteners are found to be missing, repair prior to further flight, in accordance with the service letter.

C. 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, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment, and then send it to the Manager, Seattle Aircraft Certification Office.

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Transport Airplane Directorate, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective August 24, 1989.

Issued in Seattle, Washington, on July 10, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-16740 Filed 7-17-89; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 88-NM-100-AD; Amdt. 39-6267]

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes, that requires ultrasonic and visual inspections for cracks and corrosion, and overhaul, if necessary, of the wing landing gear beam outboard end fittings. This amendment is prompted by reports of a fracture of a left wing landing gear beam outboard end fitting on one airplane. This condition, if not corrected, could result in separation of the outboard end of the landing gear beam with possible damage to adjacent control cables or hydraulic lines in the area of the landing gear beam.

EFFECTIVE DATE: August 22, 1989.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Transport Airplane Directorate Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Dan R. Bui, Airframe Branch, ANM-120S; telephone (206) 431-1919. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive which requires inspection and overhaul, if necessary, of the wing landing gear beam outboard end fittings on certain Boeing Model 747 series airplanes, was published as a Supplemental Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on March 17, 1989 (54 FR 11228). The comment period for the proposal closed on April 12, 1989.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

The Air Transport Association (ATA) of America, on behalf of its members, expressed no objections to the proposed rule.

The manufacturer recommended that if corrosion is found, the ultrasonic inspections required by paragraph A. should be repeated at intervals not to exceed 6 months, and rework, in accordance with Boeing Service Bulletin 747-57-2244, Revision 1, dated July 28, 1988, should be accomplished within 12 months. The FAA has considered the manufacturer's recommendation and has determined that if no cracks are detected, the rework for corrosion may be delayed up to 12 months, provided the inspection for cracks is accomplished at intervals not to exceed 6 months. This procedure will provide an acceptable level of safety, and also provide adequate time for the operators to schedule the rework. A new paragraph has been added to reflect this change.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the following rule with the change previously described. The FAA has determined that this change will neither increase the economic burden on any operator, nor will it increase the scope of the AD.

There are approximately 628 Model 747 series airplanes of the affected design in the worldwide fleet. It is estimated that 192 airplanes of U.S. registry will be affected by this AD, that it will take approximately 10 manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $76,800.

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.

For the reasons discussed above, I certify that this action (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) 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. A final evaluation has been prepared for this action and is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends Part 39 of the Federal Aviation Regulations 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. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Applies to Model 747 series airplanes, listed in Boeing Service Bulletin 747-57-2244, Revision 1, dated July 28, 1988, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent failure of a wing landing gear beam outboard end fitting with possible damage to control cables or hydraulic lines in the area of the landing gear beam, accomplish the following:

A. Prior to the accumulation of 30,000 flight hours, or 8 years in service, whichever occurs first, or within the next 14 months after the effective date of this AD, whichever occurs later, visually inspect around the fitting lug bushings at the wing landing gear beam outboard end fittings for corrosion, and ultrasonically inspect the wing landing gear beam outboard end fittings for cracks, in accordance with Boeing Service Bulletin 747-57-2244, Revision 1, dated July 28, 1988.

B. If no cracking or corrosion is found, repeat the inspections required by paragraph A., above, at intervals not to exceed 18 months.

C. If cracking is found, prior to further flight, remove the wing landing gear beam outboard fitting, and rework in accordance with Boeing Service Bulletin 747-57-2244, Revision 1, dated July 28, 1988.

D. If only corrosion is found, rework in accordance with Boeing Service Bulletin 747-57-2244, Revision 1, dated July 28, 1988, within the next 12 months. The ultrasonic

inspections for cracks required by paragraph A., above, must be accomplished at intervals not to exceed 6 months until rework is accomplished.

E. Terminating action for the inspections required by paragraphs A. and B., above, consists of rework of the wing landing gear beam outboard fittings in accordance with Boeing Service Bulletin 747-57-2244, Revision 1, dated July 28, 1988.

F. 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, Seattle Transport Airplane Office, FAA, Northwest Mountain Region.

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

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Transport Airplane Directorate, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective August 22, 1989.

Issued in Seattle, Washington, on July 7, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-16739 Filed 7-17-89; 8:45 am]

BILLING CODE 4910-13-M

---

14 CFR Part 97

[Docket No. 25955; Amdt. No. 1404]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

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

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

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

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

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591;
2. The FAA Regional Office of the region in which the affected airport is located; or
3. The Flight Inspection Field Office which originated 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), Technical Programs 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 contained in FAA form document is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

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

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

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major

rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Approaches, Standard Instrument, Incorporation by reference. Issued in Washington, DC on July 7, 1989.

Robert L. Goodrich,

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)).

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

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 September 21, 1989*

Lanai City, HI—Lanai, VOR or TACAN RWY 3, Amdt. 4

** * * Effective August 24, 1989*

Macomb, IL—Macomb Muni, VOR/DME-A, Amdt. 6
Labanon, NH—Lebanon Muni, LOC RWY 7, Orig., CANCELLED
Labanon, NH—Lebanon Muni, ILS RWY 7, Amdt. 4, CANCELLED
Charlotte, NC—Charlotte/Douglas Intl, LOC BC RWY 23, Amdt. 8
Charlotte, NC—Charlotte/Douglas Intl, ILS RWY 5, Amdt. 34
Charlotte, NC—Charlotte/Douglas Intl, ILS RWY 18R, Amdt. 6
Charlotte, NC—Charlotte/Douglas Intl, ILS RWY 36L, Amdt. 12
Charlotte, NC—Charlotte/Douglas Intl, ILS RWY 36R, Amdt. 4
Rhinelander, WI—Rhinelander-Oneida County, VOR RWY 5, Amdt. 10
Rhinelander, WI—Rhinelander-Oneida County, VOR RWY 9, Amdt. 3
Rhinelander, WI—Rhinelander-Oneida County, VOR RWY 27, Amdt. 3
Rhinelander, WI—Rhinelander-Oneida County, VOR/DME RWY 23, Amdt. 8
Rhinelander, WI—Rhinelander-Oneida County, ILS RWY 9, Amdt. 4

** * * Effective June 30, 1989*

Jacksonville, FL—Craig Muni, ILS RWY 32, Amdt. 1

** * * Effective June 29, 1989*

Mount Vernon, OH—Knox County, RNAV RWY 10, Amdt. 1

[FR Doc. 89-16741 Filed 7-17-89; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Part 799

[Docket No. 90129-9131]

RIN 0694-AA04

Decontrol of Certain Personal Computers; ECCN 1565A of the Commodity Control List

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Interim rule with request for comments.

SUMMARY: The Bureau of Export Administration maintains the Commodity Control List (CCL), which identifies those items subject to Department of Commerce export controls.

This rule amends the validated license controls on certain personal computers described in ECCN 1565A of the CCL. This action is in accordance with a determination of foreign availability under section 5(f) of the Export Administration Act of 1979, as amended. Notice of the foreign availability determination is published in the NOTICES section of this Federal Register. As a result of this finding, certain personal computers (those having characteristics set forth in the Supplementary Information section of this document), will now require a validated license for export only to destinations in Country Groups Q, S, W, Y and Z, the People's Republic of China, and Afghanistan for national security reasons. A validated license for national security reasons is not required for exports to all other destinations.

DATE: This rule is effective July 18, 1989. Comments must be received by August 17, 1989.

ADDRESSES: Written comments (six copies) should be sent to: Vincent Greenwald, Office of Technology and Policy Analysis, Bureau of Export Administration, P.O. Box 273, U.S. Department of Commerce, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Raj Dheer, Computer Systems Technical Center, Office of Technology and Policy Analysis, Bureau of Export Administration, Telephone: (202) 377-2279.

SUPPLEMENTARY INFORMATION:

Background

This rule amends the validated license controls on certain personal computers described in ECCN 1565A of the CCL. This action is in accordance with a finding of foreign availability under section 5(f) of the Export Administration Act of 1979, as amended. As a result of this finding, a validated license is not needed for export to Country Groups T and V (except the People's Republic of China and Afghanistan) of microprocessor-based personal computers shipped as complete systems with all of the following characteristics:

(1) A "total processing data rate" not exceeding 68 million bits per second;

(2) A "total internal storage available to the user" not exceeding 39 million bits;

(3) A word length of not more than 16 bits (systems with 16-bit external word length and not more than a 32-bit internal architecture are regarded as 16-bit systems for purposes of this restriction);

(4) A maximum CPU to memory bandwidth of less than 160 Mbits/s;

(5) A CPU bus architecture that does not support multiple bus masters; and

(6) The systems do not include controlled "related equipment" other than input/output control unit/disk drive combinations having all of the following characteristics—

(a) A "total transfer rate" not exceeding 10.3 Mbit/s;

(b) A total connected "net capacity" not exceeding 140 MByte; and

(c) A "total access rate" not exceeding 80 accesses per second with a maximum "access rate" of 40 accesses per second per drive.

This decontrol does not affect microprocessor based personal computers that are:

1. Ruggedized above a commercial/office environment;

2. Highly portable computers (those that can be battery powered or other self-contained form of power); or

3. Stand-alone graphics workstations with characteristics equalling or exceeding the parameters in ECCN 1565A Advisory Note 9(a)(7)(i) and (iv). For the purposes of this decontrol, personal computers are defined as microprocessor based computers that are:

1. Designed and advertised by the manufacturer for personal, home or business use; and

2. Are normally sold through retail establishments.

Rulemaking Requirements

1. This rule is consistent with Executive Orders 12291 and 12661.

2. This rule involves a collection of information subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This collection has been approved by the Office of Management and Budget under control number 0694–0005. As a result of this rule, a reduction of paperwork burden on the public is anticipated. Affected OMB controlled collection actions include 0694–000, 0694–007, and 0694–0010.

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

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

5. Section 13(a) of the Export Administration Act of 1979 (EAA), as amended (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. Section 13(b) of the EAA does not require that this rule be published in proposed form because this rule does not impose a new control. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. However, because of the importance of the issues raised by these regulations, this rule is issued in interim form and comments will be considered in the development of final regulations.

The period for submission of comments will close August 17, 1989. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views. The Department is particularly interested in receiving comments on the removal of export controls in accordance with section 5(f)(8) of the Export Administration Act of 1979, as amended, "Removal of Controls on Less Sophisticated Goods or Technology."

All non-confidential public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form. Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 4886, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the *Code of Federal Regulations.* Information about the inspection and copying of records may be obtained from Margaret Cornejo, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 377–2593.

The Department will accept public comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The information for which confidential treatment is requested should be submitted on sheets of paper separate from any non-confidential information submitted. The top of each page should be marked with the term "CONFIDENTIAL BUSINESS INFORMATION." The Bureau of Export Administration will either accept the submission in confidence or, if the submission fails to meet the standards for confidential treatment, will return it. A non-confidential summary must accompany each submission of confidential information. The summary will be made available for public inspection.

Information accepted by the Bureau of Export Administration as privileged under subsections (b) (3) or (4) of the Freedom of Information Act (5 U.S.C., Section 552(b) (3) and (4)) will be kept confidential and will not be available for public inspection, except according to law.

List of Subjects in 15 CFR Part 799

Exports, Reporting and recordkeeping requirements.

Accordingly, the Export Administration Regulations (15 CFR Parts 730–799) are amended as follows:

PART 799—[AMENDED]

1. The authority citation for Part 799 continues to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. App. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981, by Pub. L. 99–64 of July 12, 1985, and by Pub. L. 100–418 of August 23, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); Pub. L. 95–223 of December 28, 1977 (50 U.S.C. 1701 *et seq.*); E.O. 12532 of September 9, 1985 (50 FR 36861, September 10, 1985) as affected by notice of September 4, 1986 (51 FR 31925, September 8, 1986); Pub. L. 99–440 of October 2, 1986 (22 U.S.C. 5001 *et seq.*); and E.O. 12571 of October 27, 1986 (51 FR 39505, October 29, 1986).

2. In Supplement No. 1 to § 799.1 (the Commodity Control List), Commodity Group 5 (Electronics and Precision Instruments), ECCN 1565A is amended by revising the *Validated License Required* paragraph to read as follows:

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

* * * * *

Validated License Required: Country Groups QSTVWYZ. A validated license is not required for export to Country Groups T and V, except the People's Republic of China and Afghanistan, of microprocessor-based personal computers shipped as complete systems with *all* of the following characteristics:

(a) A "total processing data rate" not exceeding 68 million bits per second;

(b) A "total internal storage available to the user" not exceeding 39 million bits;

(c) A word length of not more than 16 bits (systems with 16-bit external word

length and not more than a 32-bit internal architecture are regarded as 16-bit systems for purposes of this restriction);

(d) A maximum CPU to memory bandwidth of less than 160 Mbit/s;

(e) A CPU bus architecture that does not support multiple bus masters; and

(f) The systems do not include controlled "related equipment" other than input/output control unit/disk drive combinations having all of the following characteristics—

(1) A "total transfer rate" not exceeding 10.3 Mbit/s;

(2) A total connected "net capacity" not exceeding 140 MByte; and

(3) A "total access rate" not exceeding 80 accesses per second with a maximum "access rate" of 40 accesses per second per drive.

Note: The decontrol does not affect microprocessor based personal computers that are:

(a) Ruggedized above a commercial/office environment;

(b) Highly portable computers (those that can be battery powered or other self contained form of power); or

(c) Stand-alone graphic workstations with characteristics equalling or exceeding the parameters in ECCN 1565A Advisory Note 9(a)(7) (i) and (iv).

Note: For the purposes of this decontrol, personal computers are defined as microprocessor based computers that are:

(a) Designed and advertised by the manufacturer for personal, home or business use; and

(b) Are normally sold through retail establishments.

* * * * *

Dated: July 13, 1989.

James M. LeMunyon,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 89-16841 Filed 7-17-89; 8:45 am]

BILLING CODE 3510-DT-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-27017, International Series Release No. 105; File No. S7-11-88]

RIN: 3235-AD27

Registration Requirements for Foreign Broker-Dealers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting proposed Rule 15a-6, which provides exemptions from broker-dealer registration for foreign entities engaged in certain activities involving U.S. investors and securities markets. The final rule incorporates the proposed interpretive statement that the Commission issued for comment when proposing the rule. In another release also issued today, the Commission is soliciting further comment on the concept of recognition of foreign securities regulation as a substitute for U.S. registration of foreign broker-dealers.

EFFECTIVE DATE: August 15, 1989.

FOR FURTHER INFORMATION CONTACT: Robert L.D. Colby, Chief Counsel, (202) 272-2844, or John Polanin, Jr., Special Counsel, (202) 272-2848, Division of Market Regulation, or Thomas S. Harman, Chief Counsel, (202) 272-2030, Division of Investment Management (regarding investment adviser registration requirements discussed in Part IV), Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Commission is adopting proposed Rule 15a-6 to provide conditional exemptions from broker-dealer registration for foreign broker-dealers that engage in certain activities involving U.S. investors and securities markets. These activities include (i) "nondirect" contacts by foreign broker-dealers with U.S. investors and markets, through execution of unsolicited securities transactions, and provision of research to certain U.S. institutional investors; and (ii) "direct" contacts, involving the execution of transactions through a registered broker-dealer intermediary with or for certain U.S. institutional investors, and without this intermediary with or for registered broker-dealers, banks acting in a broker or dealer capacity, certain international organizations, foreign persons temporarily present in the United States, U.S. citizens resident abroad, and foreign branches and agencies of U.S. persons. The Commission's goals in adopting Rule 15a-6 at this time are (i) to facilitate access to foreign markets by U.S. institutional investors through foreign broker-dealers and the research that they provide, consistent with maintaining the safeguards afforded by broker-dealer registration; and (ii) to provide clear guidance to foreign broker-dealers seeking to operate in compliance with U.S. broker-dealer registration requirements.

In addition, the Commission is withdrawing the interpretive statement that it proposed together with Rule 15a-6. The final rule ("Rule") includes exemptions incorporating many of the positions originally set forth in the proposed interpretive statement. The Commission has included in this release a discussion of the purposes and scope of broker-dealer regulation and the general principles of U.S. registration for international broker-dealers, in order to emphasize the importance that the Commission attaches to broker-dealer registration and regulation in the international context.

Finally, the Commission has issued a separate release discussing the concept of an exemption from broker-dealer registration based on recognition of foreign regulation. Many commenters addressing the proposed rule favored this approach, but the Commission believes that the numerous complex issues raised by this approach require further exploration before any action is taken on the concept. To clarify the application of U.S. broker-dealer registration requirements to the cross-border activities of foreign broker-dealers, the Commission is adopting the Rule now, while soliciting more detailed comments on the parameters of the concept of an exemption from broker-dealer registration based on recognition of foreign securities regulation.

II. Introduction

Rule 15a-6 is based on the Commission's recognition of the fact that the pace of internationalization in securities markets around the world continues to accelerate.[1] As the Commission noted when it published Rule 15a-6 for comment,[2] multinational offerings of securities have become frequent,[3] and linkages are developing between secondary markets [4] and

---

[1] In its recent *Policy Statement on Regulation of International Securities Markets*, the Commission outlined its views on the appropriate regulatory response to this development, which it broadly described as facilitating efficient and honest markets where investors and issuers can seek the greatest return on investment and the lowest cost of capital, without regard for national boundaries. Securities Act Release No. 6807 (Nov. 14, 1988), 53 FR 46963.

[2] Securities Exchange Act Release No. 25801 (June 14, 1988), 53 FR 23645, 23648 ("Release 34-25801").

[3] *See Internationalization of the Securities Markets*, Report of the Staff of the U.S. Securities and Exchange Commission to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Energy and Commerce (July 27, 1987) ("Report on Internationalization") at III-43 to III-53.

[4] Since 1985, the Commission has approved several linkages between U.S. and foreign exchanges, including the link between the Montreal Stock Exchange and the Boston Stock Exchange, and the links between the Toronto Stock Exchange and the American and Midwest Stock Exchanges, respectively. *See* Report on Internationalization at V-49 to V-57. Presently, only the Montreal Stock

Continued

clearing systems.[5] The desire of investors to trade in financial markets around the world is increasing steadily, and many major institutional investors, particularly investment companies, insurance companies, pension funds, and large commercial banks, are active on an international basis.[6]

As interest in foreign securities has grown, the geographical reach of intermediaries based in national markets has expanded greatly. Many U.S. and foreign broker-dealers are developing an international securities business, establishing offices throughout the world.[7] According to statistics compiled by the Commission's Office of Economic Analysis, 179 registered U.S. broker-dealers were affiliated with foreign broker-dealers or foreign banks as of 1987. In contrast, in 1973 there were approximately twenty-eight non-Canadian U.S. broker-dealers with foreign parents.[8] As of 1988, there were approximately fifty members of the New York Stock Exchange in which foreign entities had an ownership interest. In 1973, there were four.[9]

The Commission responded to this international expansion in broker-dealer activities by publishing Release 34–25801. This release had two purposes. First, as discussed at greater length below, the Commission sought to make known the existing U.S. requirements for registration of foreign broker-dealers. Second, the Commission sought to facilitate investment by U.S. institutional investors in foreign securities markets by proposing a rule that would increase access to foreign broker-dealers, consistent with the investor safeguards afforded by broker-dealer regulation. The Commission recognized that foreign broker-dealers can provide valuable market experience, trade execution, and research services to U.S. institutions interested in entering overseas markets.

Release 34–25801 comprised an interpretive statement and a proposed rule. The interpretive statement was a summary of the staff's current positions regarding broker-dealer registration by foreign entities. Proposed Rule 15a–6, developed from past interpretive, no-action, and exemptive positions, would have exempted from the broker-dealer registration requirements of section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act")[10] foreign broker-dealers that engaged in securities transactions with certain non-U.S. persons or with specified U.S. institutional investors under limited conditions.

Subsequently, members of the Committee on Federal Regulation of Securities of the Section of Business Law of the American Bar Association ("ABA") submitted a comment letter suggesting an expanded version of proposed Rule 15a–6, which generally reflected the substance of the interpretive statement. The ABA suggested that an expanded rule, among other things, would "spell out clearly in one place the ground rules to which foreign broker-dealers are subject" and be "more consistent with orderly development of the law in this area."[11] Believing that expansion of proposed Rule 15a–6 to include additional portions of the interpretive statement deserved "serious consideration," the Commission solicited comment on an expanded rule.[12]

The Commission received thirty-two comment letters in response to proposed Rule 15a–6 and the interpretive statement.[13] The commenters generally supported the Commission's goal of facilitating access to foreign markets by U.S. institutional investors, consistent with the purposes underlying broker-dealer registration. Commenters also generally supported expansion of the proposed rule to include the substance of the interpretive statement.

III. Broker-Dealer Regulation

A. Purposes and Scope of Broker-Dealer Regulation

In the context of adopting exemptions from the U.S. broker-dealer regulatory scheme, the Commission believes that it is important to reiterate the fundamental significance of broker-dealer registration within the structure of U.S. securities market regulation. Because of the broker-dealer's role as an intermediary between customers and the securities markets, broker-dealers have been required to register with the Commission since 1935,[14] and they were registered with numerous states before enactment of the Exchange Act in 1934.[15] The definitions in the Exchange Act of the

---

Exchange/Boston Stock Exchange linkage is in operation. In addition, the Commission has approved a pilot program developed by the National Association of Securities Dealers, Inc. ("NASD") and the International Stock Exchange of the United Kingdom and the Republic of Ireland, Ltd. ("ISE"), linking the NASD's automated quotations system ("NASDAQ") and the ISE's electronic quotation system ("SEAQ"). Securities Exchange Act Release No. 23158 (Apr. 21, 1986), 51 FR 15989. The pilot program has been extended to October 2, 1989. Securities Exchange Act Release No. 24979 (Oct. 2, 1987), 51 FR 37684. The Commission also has approved a pilot program providing for an exchange of quotations between NASDAQ and the Stock Exchange of Singapore. Securities Exchange Act Release No. 25457 (Mar. 14, 1988), 53 FR 9156.

[5] *E.g.*, Letter from Jonathan Kallman, Assistant Director, Division of Market Regulation, SEC, to Karen L. Saperstein, Esq., Associate General Counsel, International Securities Clearing Corporation ("ISCC") (Sept. 20, 1988) (ISCC linkage with Japan Securities Clearing Corporation).

[6] Greenwich Associates, *Institutional Investors 1989*, 9–12, 72–87.

[7] One commentator recently estimated that approximately thirty broker-dealers will possess the integrated back-office trading and management information systems necessary to execute and clear securities transactions on a global basis by the year 2000. Kraus, *Growth Predicted in Global Traders*, American Banker, Mar. 20, 1989, at 14.

[8] New York Stock Exchange Advisory Committee on International Capital Markets, *Recommendations Regarding Foreign Access to the U.S. Securities Markets* (July 1973), Appendix B.

[9] *Id.* at 12.

[10] 15 U.S.C. 78*o*(a).

[11] Letter from John M. Liftin, Esq., Committee on Federal Regulation of Securities, Section of Business Law, ABA, to Jonathan G. Katz, Secretary, SEC (Sept. 14, 1988).

[12] Securities Exchange Act Release No. 26136 (Sept. 30, 1988), 53 FR 38967 ("Release 34–26136").

[13] A detailed comment summary has been prepared and placed in the Commission's public files, together with all comment letters received. *See* File No. S7–11–88.

[14] As originally enacted, the Exchange Act dealt primarily with exchange regulation, and section 15 of the Exchange Act authorized the Commission to provide, by rule, for registration of brokers or dealers that were not already exchange members. After the Commission initially adopted rules requiring registration of over-the-counter broker-dealers, Congress in 1936 amended section 15 to codify the Commission's rules on broker-dealer registration. *See* L. Loss, *Fundamentals of Securities Regulation* 409–10 (1988) and the concept release also issued today, *infra* note 34.

[15] *See generally* L. Loss & E. Cowett, *Blue Sky Law* 26–30 (1958).

terms "broker" [16] and "dealer" [17] and the registration requirements of section 15(a) of the Exchange Act [18] were drawn broadly by Congress to encompass a wide range of activities involving investors and securities markets.[19] Section 15(a) of the Exchange Act generally requires that any broker or dealer using the mails or any means or instrumentality of interstate commerce (referred to as the jurisdictional means) [20] to induce or effect transactions in securities [21] must register as a broker-dealer with the Commission.

Registered broker-dealers are subject to a panoply of U.S. regulations and supervisory structures intended to protect investors and the securities markets.[22] Registered broker-dealers must be members of a self-regulatory organization ("SRO") [23] and the Securities Investor Protection Corporation ("SIPC").[24] They are subject to statutory disqualification standards and the Commission's disciplinary authority,[25] which are designed to prevent persons with an adverse disciplinary history from becoming, or becoming associated with, registered broker-dealers. They also are required by the Commission's net capital regulations [26] to maintain sufficient capital to operate safely. In addition, they are required to maintain adequate competency levels, by satisfying SRO qualification requirements.[27]

Further, registered broker-dealers are under extensive recordkeeping and reporting obligations,[28] fiduciary duties [29] and special antifraud rules,[30] and the Commission's broad enforcement authority over broker-dealers.[31] That authority, in turn, helps assure that broker-dealers are complying with the statutory and regulatory provisions governing the U.S. securities industry.[32] Moreover, the

---

[16] Section 3(a)(4) of the Exchange Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." 15 U.S.C. 78c(a)(4). The term "bank," however, is limited by section 3(a)(6) of the Exchange Act, 15 U.S.C. 78c(a)(6), to banks directly regulated by U.S. state or federal bank regulators, and thus foreign banks that act as brokers or dealers within the jurisdiction of the United States are subject to U.S. broker-dealer registration requirements. *See* Release 34–25801, 53 FR at 23645 n.1. To the extent, however, that a foreign bank establishes a branch or agency in the United States that is supervised and examined by a federal or state banking authority and otherwise meets the requirements of section 3(a)(6), the Commission would consider this branch or agency to be a "bank" for purposes of sections 3(a)(4) and 3(a)(5) of the Exchange Act.

The Commission believes that the determination whether any particular financial institution meets the requirements of section 3(a)(6) is the responsibility of the financial institution and its counsel. *Cf.* Securities Act Release No. 6661 (Sept. 23, 1986), 51 FR 34460 ("Release 33–6661") (determination as to whether branch or agency of foreign bank falls within the definition of "bank" under section 3(a)(2) of Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77c(a)(2), is responsibility of issuers and their counsel). The Commission notes, however, that section 4(d) of the International Banking Act, 12 U.S.C. 3102(d), expressly prohibits agencies of foreign banks established under federal law from receiving deposits or exercising fiduciary powers, criteria necessary for qualification as a bank under section 3(a)(6)(C). *See Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 927 (1984) (federally-chartered agencies of foreign banks prohibited from receiving deposits from foreign, as well as domestic, sources). It also should be noted that the definition of bank under section 3(a)(6) of the Exchange Act differs somewhat from the definition of bank under section 3(a)(2) of the Securities Act, particularly with respect to exercising fiduciary powers and receiving deposits. As discussed *infra* note 168, the Securities Act definition is applicable in determining whether U.S. branches and agencies of foreign banks qualify as U.S. institutional investors under the Rule.

[17] Section 3(a)(5) of the Exchange Act, 15 U.S.C. 78c(a)(5), defines "dealer" as "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys and sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business." Although by its terms this definition is broad, it has been interpreted to exclude various activities not within the intent of the definition, such as buying and selling for investment. *See, e.g.*, Letter from Robert L.D. Colby, Chief Counsel, Division of Market Regulation, SEC, to Elizabeth J. Tolmach, Esq., Caplin & Drysdale (Apr. 2, 1987) (United Savings Association of Texas) (no-action position on government securities dealer registration). In addition, the registration requirements of section 15(a) of the Exchange Act exclude from registration additional categories of persons, such as intrastate broker-dealers. *Cf.* Douglas & Bates, *Some Effects of the Securities Act Upon Investment Banking*, 1 U. Chi. L. Rev. 283, 302 n.68 (1934); Douglas & Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 206 n.189 (1933) ("rule of reason" should apply to similarly broad "dealer" definition in section 2(12) of Securities Act, 15 U.S.C. 77b(12)).

[18] *See supra* note 10.

[19] For instance, if a U.S. issuer sells its securities in the United States through its own employees, the activities of these employees may require broker-dealer registration. This is also true for foreign issuers using their employees to sell securities within the United States. However, the Commission has adopted Rule 3a4–1, 17 CFR 240.3a4–1, which provides a safe-harbor exemption from broker-dealer registration for an issuer's personnel selling the issuer's securities under certain circumstances. *See* Securities Exchange Act Release No. 22172 (June 27, 1985), 50 FR 27940.

[20] Specifically, section 15(a)(1), 15 U.S.C. 78*o*(a)(1), refers to "use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) * * *." Given the broad definition of "interstate commerce" in section 3(a)(17) of the Exchange Act, 15 U.S.C. 78c(a)(17), which includes "trade, commerce, transportation, or communication * * * between any foreign country and any State," virtually any transaction-oriented contact between a foreign broker-dealer and the U.S. securities markets or a U.S. investor in the United States involves interstate commerce and could provide the jurisdictional basis for broker-dealer registration.

[21] Section 15(a) does not require registration for transactions in exempted securities, which are defined in section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12), commercial paper, bankers' acceptances, and commercial bills. 15 U.S.C. 78*o*(a)(1). The Canadian Bankers' Association asked the Commission to clarify that the U.S. broker-dealer registration requirements do not apply to transactions in U.S. commercial paper by Canadian banks in the U.S. market. Commercial paper, bankers' acceptances, and commercial bills are not defined in the Exchange Act. Nonetheless, the Commission notes that the definition of "security" in section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), generally is understood to exclude instruments exempt from registration under section 3(a)(3) of the Securities Act, 15 U.S.C. 77c(a)(3), by virtue of their classification as commercial paper. *See* Securities Exchange Act Release No. 4412 (Sept. 20, 1961) [1957–61 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 2045 (factors identifying exempted commercial paper under section 3(a)(3) of Securities Act); *Sanders* v. *John Nuveen & Co.*, 463 F.2d 1075 (7th Cir.), *cert. denied*, 409 U.S. 1009 (1972) (applying same factors under section 3(a)(10) of Exchange Act).

[22] Many of the statutory and regulatory provisions cited below as applicable to registered broker-dealers actually are applicable by their terms to other unregistered broker-dealers. *E.g.*, sections 15(b)(4) and 15(b)(6) of the Exchange Act, 15 U.S.C. 78*o*(b)(4) and 78*o*(b)(6); Rules 15c3–1, 15c3–3, 17a–3, 17a–4, and 17a–5, 17 CFR 240.15c3–1, 15c3–3, 17a–3, 17a–4, and 17a–5. Nevertheless, the staff would not recommend that the Commission take enforcement action against foreign broker-dealers for want of compliance with those provisions, with the exception of sections 15(b)(4) and 15(b)(6), if the foreign broker-dealers were exempt from broker-dealer registration under the Rule.

[23] Section 15(b)(8) of the Exchange Act, 15 U.S.C. 78*o*(b)(8).

[24] Section 3(a)(2) of the Securities Investor Protection Act of 1970, 15 U.S.C. 78ccc(a)(2).

[25] *See* sections 3(a)(39), 15(b)(4), and 15(b)(6) of the Exchange Act, 15 U.S.C. 78c(a)(39), 78*o*(b)(4), and 78*o*(b)(8).

[26] *See* Rule 15c3–1, 17 CFR 240.15c3–1.

[27] *E.g.*, NASD Schedules to By-Laws, Schedule C, *NASD Manual* (CCH) ¶¶1782–91. *See* section 15(b)(7) of the Exchange Act, 15 U.S.C. 78*o*(b)(7).

[28] *E.g.*, Rules 17a–3 (recordkeeping), 17a–4 (record preservation), and 17a–5 (reporting), 17 CFR 240.17a–3, 17a–4, and 17a–5. In addition, for nonresident registered broker-dealers the Commission has adopted Rule 17a–7, which establishes requirements for U.S. maintenance of records by these broker-dealers. 17 CFR 240.17a–7. *See also* NASD Schedules to By-Laws, Schedule C (VIII), *NASD Manual* (CCH) ¶1790.

[29] *See Hanly V. SEC*, 415 F.2d 589, 596 (2d Cir. 1969) ("A securities dealer occupies a special relationship to a buyer of securities in that by his position he implicitly represents he has an adequate basis for the opinions he renders").

[30] *E.g.*, section 15(c) of the Exchange Act, 15 U.S.C. 78*o*(c), and the rules thereunder, *e.g.*, Rule 15c1–2, 17 CFR 240.15c1–2.

[31] *See* sections 15(c) and 21 of the Exchange Act, 15 U.S.C. 78*o*(c) and 78u.

[32] *E.g.*, Rule 14b–1, 17 CFR 240.14b–1 (prompt forwarding of proxy information to beneficial owners of securities); Rule 17a–8, 17 CFR 240.17a–8 (financial recordkeeping and reporting of currency and foreign transactions); Rule 17a–13, 17 CFR

Continued

Commission's financial supervision of entities participating in the interdependent network of securities professionals contributes to the financial soundness of this nation's securities markets.

These considerations remain important regardless of whether a broker-dealer's activities involve contacts with individual or institutional investors. When Congress authorized and subsequently required the Commission to register broker-dealers, Congress did not condition the requirement for registration on the type of investor involved. In 1975, Congress amended section 15(a) to extend the broker-dealer registration requirements to all broker-dealers trading exclusively on a national securities exchange or in municipal securities.[33] Moreover, as noted in the concept release issued today,[34] Congress recently reaffirmed the importance of regulating securities professionals who operated in a largely institutional market by enacting the Government Securities Act of 1986.[35] Congress enacted this legislation to remedy serious problems, including a depositors' run on savings and loan associations and savings banks that resulted in the temporary closing of seventy-one of those financial institutions, that had developed in a primarily institutional market due in part to inadequate regulation of the professional intermediaries in that market.[36]

Accordingly, after reviewing the comments, the Commission is proceeding cautiously by adopting the limited exemptions incorporated in the Rule. As discussed previously, however, the Commission is seeking comment in the Concept Release on a conceptual approach that might increase the ability of U.S. institutional investors to deal with foreign broker-dealers in a manner that is consistent with the protection of those investors and with the Exchange Act.

B. General Principles of U.S. Registration for International Broker-Dealers

Before discussing the exemptions in the Rule, it is useful to review the general principles governing U.S. registration of brokers and dealers engaging in international activities.[37] The definitions of "broker" [38] and "dealer" [39] do not refer to nationality, and the scope of these definitions includes both domestic and foreign persons [40] performing the activities described therein. Consequently, any use of the U.S. jurisdictional means to engage in these activities could trigger the broker-dealer registration requirements of section 15(a).[41]

1. Broker-Dealer Operations

As a policy matter, the Commission now uses a territorial approach in applying the broker-dealer registration requirements to the international operations of broker-dealers.[42] Under this approach, all broker-dealers physically operating within the United States that effect, induce, or attempt to induce any securities transactions would be required to register as broker-dealers with the Commission, even if these activities were directed only to foreign investors outside the United States. Conversely, as explained in the interpretive statement in Release 34-25801, U.S. entities would not be required to register if they conducted their sales activities entirely outside the United States.[43]

240.17a-13 (quarterly security counts); Rule 17f-1, 17 CFR 240.17f-1 (reports and inquiries concerning missing, lost, counterfeit, or stolen securities); Rule 17f-2, 17CFR 240.17f-2 (fingerprinting of securities industry personnel).

[33] Securities Act Amendments of 1975, Pub. L. No. 94-29, § 11, 89 Stat. 97, 121 (1975).

[34] Securities Exchange Act Release No. 27018 (July 11, 1989) ("Concept Release").

[35] Pub. L. No. 99-571, 100 Stat. 3208 (1986).

[36] *See* S. Rep. No. 99-426, 99th Cong., 2d Sess. 6-10 (1986).

[37] These principles similarly would apply to registration of government securities brokers or government securities dealers under section 15C of the Exchange Act, 15 U.S.C. 78*o*-5, and to registration of municipal securities dealers under section 15B of the Exchange Act, 15 U.S.C. 78*o*-4. Neither these principles nor the Rule, however, necessarily reflect the requirements of any state securities laws, which may apply to the activities of foreign broker-dealers within the jurisdiction of those states. Foreign broker-dealers exempt from registration by virtue of compliance with the Rule still could be subject to the registration requirements established by state securities laws, since the Commission has no authority to grant exemptions from those requirements.

[38] *See* note 16 *supra*.

[39] *See* note 17 *supra*.

[40] Section 3(a)(9) of the Exchange Act, 15 U.S.C. 78c(a)(9), defines "person" as a "natural person, company, government, or political subdivision, agency, or instrumentality of a government," again without reference to nationality.

[41] *See supra* note 20 and accompanying text. Apart from concerns about broker-dealer registration, foreign broker-dealers should be careful that any offers or sales of securities comply with the registration provisions of the Securities Act, when applicable. *See* Securities Act Releases No. 4708 (July 9, 1964), 29 FR 9828 ("Release 33-4708"), and No. 6779 (June 10, 1988), 53 FR 22661 ("Release 33-6779").

A potential limitation on the broad application of section 15(a) may be found in section 30(b) of the Exchange Act, which excludes from the application of the Exchange Act or the rules thereunder any person "transact[ing] a business in securities without the jurisdiction of the United States," in the absence of Commission rules explicitly applying those provisions to these persons. 15 U.S.C. 78dd(b). While no rules have been adopted, the exemption provided by section 30(b) has been held unavailable if transactions occur in a U.S. securities market, *Roth v. Fund of Funds, Ltd.*, 405 F.2d 421 (2d Cir. 1968), *cert. denied*, 394 U.S. 975, *reh. denied*, 395 U.S. 941 (1969); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir.), *rev'd in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969); *Selzer v. The Bank of Bermuda, Ltd.*, 385 F. Supp. 415 [S.D.N.Y. 1974]; *In the Matter of I.O.S., Ltd. (S.A.)*, [1971-72 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶78,637 (Mar. 14, 1972); if offers and sales are made abroad to U.S. persons or in the United States to facilitate sales of securities abroad, *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973); *Traves v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1336 n.8 (2d Cir. 1972); *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 448, 453-59 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 519 F.2d 974 (2d Cir. 1975), *cert. denied sub nom. Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975); or if the United States is used as a base for securities fraud perpetrated on foreigners, *Arthur Lipper Corp. v. SEC*, 547 F.2d 171 (2d Cir. 1976), *reh. denied*, 551 F.2d 915 (2d Cir. 1977), *cert. denied*, 434 U.S. 1009 (1978).

In their comment letters, the College Retirement Equities Fund ("CREF"), Westpac Banking Corporation, and Debevoise & Plimpton argued that section 30(b) should exempt from Commission regulation foreign broker-dealers operating exclusively outside this country and contacting U.S. institutional investors in the United States from outside this country. They asserted that reading section 30(b) to protect only foreign broker-dealers not using the U.S. jurisdictional means to effect, induce, or attempt to induce any transactions in securities with or for U.S. persons would render the section meaningless, on the grounds that foreign broker-dealers avoiding this use of the U.S. jurisdictional means would not be subject to the requirements of section 15(a) in the first place.

The Commission's position on the application of section 30(b) historically has been, and continues to be, that the phrase "without the jurisdiction of the United States" in that section does not refer to the territorial limits of this country. *See, e.g.*, Securities and Exchange Commission, *Brief Amicus Curiae on Rehearing by the Full Court, Schoenbaum v. Firstbrook* (2d Cir. 1968) at 23. Moreover, even if section 30(b) were read to incorporate a territorial approach, the Commission does not believe that section 30(b) would exempt from broker-dealer registration the activities suggested by the commenters. In particular, directed selling efforts to U.S. investors in the United States hardly could be considered activities not traversing the U.S. territorial limits. A broker-dealer operating outside the physical boundaries of the United States, but using the U.S. mails, wires, or telephone lines to trade securities with U.S. persons located in this country, would not be, in the words of section 30(b), "transact[ing] a business in securities without the jurisdiction of the United States."

[42] Proposed Regulation S also follows a territorial approach, *see* Release 33-6779, 53 FR at 22665-66. This territorial approach is different from the limited nationality approach taken in Release 33-4708, which stated that, to avoid being subject to the registration requirements of the Securities Act, an offering must be "made under circumstances reasonably designed to preclude distribution or redistribution of the securities within, *or to nationals of*, the United States." 29 FR at 9829 (emphasis added).

[43] *See* Release 34-25801, 53 FR at 23646 n.9 and accompanying text. After the effective date of the Rule, the staff will withdraw two prior inconsistent no-action positions regarding arrangements under which sales or related activities involving exclusively foreign persons emanated from within this country. Letter from Amy Natterson Kroll,

Continued

Also, the Commission uses an entity approach with respect to registered broker-dealers. Under this approach, if a foreign broker-dealer physically operates a branch in the United States, and thus becomes subject to U.S. registration requirements, the registration requirements and the regulatory system governing U.S. broker-dealers would apply to the entire foreign broker-dealer entity. If the foreign broker-dealer establishes an affiliate in the United States, however, only the affiliate must be registered as a broker-dealer; the foreign broker-dealer parent would not be required to register.[44] Under this arrangement, absent exemptions, only the registered U.S. affiliate would be authorized to trade with any person in the United States or perform securities functions on behalf of those customers, such as effecting trades, extending credit, maintaining records and issuing confirmations, and receiving, delivering, and safeguarding funds and securities.[45]

Some commenters questioned whether, under these principles, a registered broker-dealer's personnel who are stationed outside the United States with a foreign broker-dealer may contact U.S. and foreign persons located in the United States on behalf of the registered broker-dealer, provided that these personnel are U.S.-registered and subject to U.S. regulatory supervision.[46] Assuming these persons were subject to the registered broker-dealer's supervision and control [47] and satisfied all U.S. SRO qualification standards,[48] the Commission believes that it is consistent with these principles for a registered broker-dealer's registered representative stationed outside the United States with a foreign broker-dealer to contact persons in the United States from within or without this country on behalf of the registered broker-dealer.

2. U.S. Investors

In addition to requiring broker-dealer operations physically located within the United States to register, the Commission's territorial approach generally would require broker-dealer registration by foreign broker-dealers that, from outside the United States, induce or attempt to induce trades by any person in the United States.[49] The Commission would not require registration, however, of foreign broker-dealers dealing from abroad with foreign persons domiciled abroad but temporarily present in this country.[50]

If foreign broker-dealers are effecting trades outside the United States with or for individual U.S. citizens resident abroad, but have no other contacts within the jurisdiction of the United States, the Commission generally would not expect these foreign broker-dealers to register. Most U.S. citizens residing abroad typically would not expect, in choosing to deal with foreign broker-dealers, that these foreign broker-dealers would be subject to U.S. registration requirements. Nor would foreign broker-dealers soliciting U.S. citizens resident abroad normally expect that they would be covered by U.S. broker-dealer requirements, since they generally would not be directing their sales efforts toward groups of U.S. nationals. To make clear that registration is not required of foreign broker-dealers dealing with U.S. persons resident abroad, including branches and agencies of U.S. persons located abroad, the Commission has included in the Rule a specific exemption for these foreign broker-dealers, as discussed in greater detail below. The Commission historically has taken the view, however, that foreign broker-dealers specifically targeting identifiable groups of U.S. persons resident abroad, *e.g.*, U.S. military and embassy personnel, could be subject to U.S. broker-dealer registration requirements.[51] This position is reflected in the exemption.

3. Solicitation

The proposed interpretive statement explained that if a transaction with a person in the United States is solicited, the broker-dealer effecting the transaction must be registered.[52] Although the requirements of section 15(a) do not distinguish between solicited and unsolicited transactions, the Commission does not believe, as a policy matter, that registration is necessary if U.S. investors have sought out foreign broker-dealers outside the United States and initiated transactions in foreign securities markets entirely of their own accord. In that event, U.S. investors would have taken the initiative to trade outside the United States with foreign broker-dealers that are not conducting activities within this country. Consequently, the U.S. investors would have little reason to expect these foreign broker-dealers to be subject to U.S. broker-dealer requirements. Moreover, requiring a foreign broker-dealer to register as a broker-dealer with the Commission because of unsolicited trades with U.S. persons could cause that foreign broker-dealer to refuse to deal with U.S. persons under any circumstances.

As noted in the proposed interpretive statement,[53] however, the Commission generally views "solicitation," in the context of broker-dealer regulation,[54] as including any affirmative effort by a broker or dealer intended to induce transactional business for the broker-dealer or its affiliates.[55] Solicitation

---

Attorney, Division of Market Regulation, SEC, to Kevin McMahon, Esq., Jones, Grey & Bayley, P.S. (Aug. 1, 1986) (Barons Mortgage Association); Letter from Lynne G. Masters, Attorney, Office of Chief Counsel, Division of Market Regulation, SEC, to Chester J. Jachimiec, Esq., Winstead, McGuire, Sechrest & Minick (Aug. 3, 1987) (States Petroleum, Inc.). The withdrawal of these no-action positions was discussed when the interpretive statement was proposed, but no comments were received. *See* Release 34–25801, 53 FR at 23650 n.48.

[44] Similarly, only the affiliate's personnel must be licensed appropriately by the NASD or another SRO. *See* sections 3(a)(18) and 15(c)(8) of the Exchange Act, 15 U.S.C. 78c(a)(18) and 78*o*(c)(8).

[45] *See* note 189 *infra* regarding whether a registered broker-dealer would be permitted to function as an introducing broker to an unregistered foreign broker-dealer.

[46] The Securities Industry Association ("SIA") and Merrill Lynch & Co., Inc. The SIA inquired concerning contacts originating from outside the United States, while Merrill Lynch addressed contacts originating inside this country also.

[47] Section 15(b)(4)(E) of the Exchange Act, 15 U.S.C. 78*o*(b)(4)(E), imposes a reasonable supervision standard, and section 20(a) of the Exchange Act, 15 U.S.C. 78t(a), establishes both controlling person liability and a good faith defense.

[48] *See* text accompanying note 27 *supra*.

[49] *See* proposed interpretive statement, Release 34–25801, 53 FR at 23649–51.

[50] The Rule incorporates an exemption for foreign broker-dealers engaging in securities activities with these persons. *See* Part IV.B. *infra*.

[51] *See* Release 34–4708 (a public offering of securities specifically directed toward U.S. citizens abroad, such as military personnel, would be regarded as subject to Securities Act registration); *SEC v. Siamerican Securities, Ltd.*, Litigation Release No. 6937 (June 17, 1975) (charging, among other things, violation of section 15(a) regarding solicitation of securities transactions from American citizens stationed in Southeast Asia, for execution primarily on U.S. exchanges and over-the-counter markets). *See also* Release 33–6779, 53 FR at 22670 n.106 ("offerings specifically targeted at identifiable groups of U.S. citizens resident abroad" would not be eligible for safe-harbor exemption from Securities Act registration under Rule 903 of proposed Regulation S). By "targeting," the Commission means selling efforts intentionally directed toward identifiable groups of U.S. citizens resident abroad.

[52] *See* Release 34–25801, 53 FR at 23646; *see also* Report on Internationalization at V–42.

[53] Release 34–25801, 53 FR at 23650.

[54] Section 15(a)(1) of the Exchange Act requires registration of brokers and dealers that effect securities transactions or "induce *or attempt to induce* the purchase or sale of, any security." 15 U.S.C. 78*o*(a)(1) (emphasis added). If a foreign broker-dealer's securities activities brought it within the definitions of "broker" or "dealer" in section 3(a) (4) or (5), using the U.S. jurisdictional means to solicit trades from U.S. customers would be sufficient to trigger the registration requirements of section 15(a).

[55] The Report on Internationalization said that "[k]ey to the issue of solicitation is whether the

Continued

includes efforts to induce a single transaction or to develop an ongoing securities business relationship. Conduct deemed to be solicitation includes telephone calls from a broker-dealer to a customer encouraging use of the broker-dealer to effect transactions, as well as advertising one's function as a broker or a market maker in newspapers or periodicals of general circulation in the United States or on any radio or television station whose broadcasting is directed into the United States. Similarly, conducting investment seminars for U.S. investors, whether or not the seminars are hosted by a registered U.S. broker-dealer, would constitute solicitation.[56] A broker-dealer also would solicit customers by, among other things, recommending the purchase or sale of particular securities, with the anticipation that the customer will execute the recommended trade through the broker-dealer.

Thirteen commenters argued that this definition of solicitation should be narrowed.[57] In particular, Fidelity Investments did not think that visits to this country by an unregistered foreign broker-dealer "to introduce itself as being available to execute trades" or "to explain regulatory changes occurring in its own jurisdiction" should be deemed solicitation, based on Fidelity's assumption that these activities would not constitute inducements to effect trades through the foreign broker-dealer.[58] The other comments supported broader latitude with respect to the distribution of research by foreign broker-dealers to U.S. institutional investors and with respect to the distribution in this country by foreign exchanges of foreign market makers' quotations, both of which the proposed interpretive statement treated as solicitation.[59]

The Commission generally believes that a narrow construction of solicitation would be inconsistent with the express language of section 15(a)(1), which refers to both inducing or attempting to induce the purchase or sale of securities,[60] and would be unwarranted in the context of the domestic application of U.S. broker-dealer registration requirements. As a matter of policy, however, the Commission has created a conditional exemption in the Rule to permit expanded U.S. distribution of foreign broker-dealers' research reports to major U.S. institutions, which is discussed below.

In addition, the Commission believes that expanded third-party distribution of foreign broker-dealers' quotations in this country without registration should be allowed on an interpretive basis.[61] As the proposed interpretive statement explained,[62] the dissemination in the United States of a broker-dealer's quotes for a security typically would be a form of solicitation. The staff nonetheless has given assurances that enforcement action would not be recommended for lack of broker-dealer registration with respect to the collective distribution by organized foreign exchanges of foreign market makers' quotes, in the absence of other inducements to trade on the part of these market makers.[63] Several commenters discussed an exemption in the Rule for the collective distribution of foreign broker-dealers' quotations. The ABA suggested exempting from registration foreign broker-dealers that acted as market makers and provided their names, addresses, telephone numbers, and quotes as part of the collective distribution by a "recognized foreign securities market" of foreign market makers' quotes.[64] Members of the Securities Law Committee of the Chicago Bar Association ("CBA") concurred. Sullivan & Cromwell maintained that the fact-specific nature of these arrangements rendered them more suitable for resolution by the staff through no-action or interpretive procedures. The Public Securities Association ("PSA") suggested that, if a foreign broker-dealer participated in a third-party quotation system "principally directed at foreign persons," dissemination of its quotations to U.S. institutional investors should not be considered solicitation of those investors, provided that the foreign broker-dealer did not engage in other activities in the United States requiring broker-dealer registration.[65]

At the present time, the Commission generally would permit the U.S. distribution of foreign broker-dealers' quotations by third-party systems, *e.g.*, systems operated by foreign marketplaces or by private vendors, that distributed these quotations primarily in foreign countries. The Commission recognizes that access to foreign market makers' quotations is of considerable interest to registered broker-dealers and institutional investors, who seek timely information on foreign market conditions.[66] The Commission's position, however, would apply only to third-party systems that did not allow securities transactions to be executed between the foreign broker-dealer and persons in the United States through the systems. In addition, foreign broker-dealers whose quotes were distributed through the systems would not be allowed to initiate contacts with U.S. persons, beyond those exempted under the Rule, without registration or further exemptive rulemaking. The Commission believes that questions regarding the future development of third-party quotation systems with internal execution capabilities designed, for example, to facilitate cross-border trading in securities while the domestic markets for those securities are closed, should be addressed under present

---

foreign broker-dealer's contacts with U.S. markets reasonably may be viewed as attempting to induce an investor's purchase or sale of a security." Report on Internationalization at V–42. *See also* Letter from David Romanski, Attorney, Division of Market Regulation, SEC, to Hugh Seymour, Hoare & Govett, Ltd. (Sept. 28, 1973), discussed in Release 34–25801, 53 FR at 23646 n.12 and accompanying text.

[56] *See* Hoare & Govett letter, *supra* note 55.

[57] Fidelity Investments, Madrid Stock Exchange, Dechert Price & Rhoads, Ross & Hardies, CREF, Stikeman, Elliott, Continental Bank, Association of German Banks, Toronto Stock Exchange, the SIA, the ABA, the Committee on International Banking, Securities, and Financial Transactions of the International Law and Practice Section of the New York State Bar Association ("NYSBA"), and Sullivan & Cromwell.

[58] Letter from John I. Fitzgerald, Vice President and General Counsel, Fideltiy Investments, to Jonathan G. Katz, Secretary, SEC (Sept. 13, 1988), at 3. Several other commenters agreed. *See* Part IV.B. *infra*.

[59] *See* Release 34–25801, 53 FR at 23650–51.

[60] *See supra* note 54.

[61] *See* Part IV.B. *infra*. The Commission also has created an exemption in the direct contact provisions of the Rule to permit associated persons of foreign broker-dealers to make visits to U.S. institutional investors under limited conditions. The Rule does not permit foreign associated persons to conduct any other activities within this country, unless those activities would not require broker-dealer registration.

[62] Release 34–25801, 53 FR at 23651.

[63] *See* Release 34–25801, 53 FR at 23647 nn.21–27 and accompanying text. The staff's no-action assurances also extended to the execution of trades resulting from these quotes.

[64] Letter from Liftin to Katz, *supra* note 11, at 4. The ABA did not offer any specific criteria for defining a "recognized foreign securities market," which it defined as a foreign securities market determined by the Commission (or the staff, pursuant to delegated authority) to be entitled to this treatment.

[65] Letter from Frances R. Bermanzohn, Senior Vice President and General Counsel, PSA, to Jonathan G. Katz, Secretary, SEC (Oct. 28, 1988), at 9.

[66] The Commission would have reservations, however, about certain specialized quotation systems, which might constitute a more powerful inducement to effect trades because of the nature of the proposed transactions. For example, a foreign broker-dealer whose quotations were displayed in a system that disseminated quotes only for large block trades might well be deemed to have engaged in solicitation requiring broker-dealer registration, as opposed to a foreign broker-dealer whose quotes were displayed in a system that disseminated the quotes of numerous foreign dealers or market makers in the same security.

circumstances by the staff on a case-by-case basis or by the Commission in further rulemaking proceedings. The Commission also believes that the *direct* dissemination of a foreign market maker's quotations to U.S. investors, such as through a private quote system controlled by a foreign broker-dealer, would not be appropriate without registration, because the dissemination of these quotations would be a direct, exclusive inducement to trade with that foreign broker-dealer.

4. Registered Broker-Dealers

Some commenters asked the Commission to confirm that foreign broker-dealers would not become subject to the registration requirements of section 15(a) by using the U.S. jurisdictional means to deal only with registered broker-dealers.[67] The staff already has taken no-action positions on broker-dealer registration with respect to foreign broker-dealers engaging in securities transactions with registered broker-dealers and with banks acting in a broker or dealer capacity (including acting as municipal or governmental securites dealers).[68] The Commission has codified this position as an exemption in the Rule,[69] so that transactions by foreign broker-dealers with registered broker-dealers acting as principal or agent, or with banks acting in a broker or dealer capacity, need not take place within the framework established by the proposed rule.[70]

IV. Rule 15a–6 and Concept Release

A. Overview

The Commission's response to the issues raised by the comments on the interpretive statement and proposed Rule 15a–6 is threefold. First, the Commission is adopting exemptions allowing *nondirect* contacts between foreign broker-dealers and U.S. investors. Second, the Commission is adopting exemptions allowing *direct* contacts between foreign broker-dealers and certain U.S. investors through intermediaries, and between foreign broker-dealers and certain other persons directly. Third, the Commission is seeking comment in the Concept Release on a conceptual approach based on recognition of foreign regulation as a substitute in part for U.S. broker-dealer registration.

1. Rule 15a–6

The first two prongs of this approach are incorporated in the Rule, which the Commission has decided to adopt in an expanded format substantially as published in Release 34–26136. The Rule thus incorporates much of the proposed interpretive statement to realize the benefits of codification identified by many commenters.[71] As adopted, the Rule contains exemptions from broker-dealer registration for nondirect contacts through unsolicited transactions and the distribution of research reports, and it allows for direct contacts with certain U.S. institutional investors through intermediaries and with certain other defined classes of persons without intermediaries.

2. Recognition of Foreign Securities Regulation

The third prong of the Commission's approach is represented by the Concept Release on recognition of foreign securities regulation also issued today. In the proposed interpretive statement, the Commission noted that the development of comprehensive broker-dealer regulation in foreign nations suggested that agreements with foreign securities authorities as to some form of recognition of foreign broker-dealer regulation might be possible in the future. Under this conceptual approach, a country could recognize regulation of a foreign broker-dealer by the latter's home country as a substitute, to some extent, for its own domestic regulation. The Commission pointed out, however, that this approach "could raise the possibility of reduced U.S. investor protection, unless the foreign jurisdiction had a broker-dealer regulatory system that was comparable and compatible with that of the United States, this system was comprehensively enforced, and ready cooperation in surveillance and enforcement matters between the United States and the foreign jurisdiction was the norm."[72] In light of these factors, the Commission stated that it was weighing whether some degree of mutual recognition of international broker-dealers might be possible in the future.

Seventeen commenters favored some form of mutual recognition.[73] Several of these commenters advocated permitting a foreign broker-dealer to deal directly with U.S. institutional investors after the Commission made a formal determination that its home country's broker-dealer regulatory regime was adequate,[74] particularly if there were a satisfactory information-sharing and mutual cooperation agreement between U.S. and foreign regulators.[75]

The comments indicate great interest by U.S. institutional investors and foreign market professionals and securities authorities in an exemption from broker-dealer registration based on recognition of foreign regulation. The many complex issues inherent in this approach require careful deliberation by the Commission and foreign securities authorities before the parameters of this exemption could be defined sufficiently to realize the desired goals of increased access to foreign markets by U.S. institutional investors, and more efficient regulation of the cross-border activities of foreign broker-dealers, without resulting in reduced protection for U.S. investors and securities markets. Therefore, the Commission has decided to adopt the Rule at the present time, in light of the increasing cross-border activities of foreign broker-dealers and the need for clarification of the application of the U.S. broker-dealer registration requirements to these activities, while also soliciting specific comment on a conceptual approach based on recognition of foreign securities regulation.

3. Withdrawal of Proposed Interpretive Statement

In view of its other actions, the Commission considers it unnecessary to publish separately a final interpretive statement. The Rule as adopted includes exemptions incorporating many of the positions originally set forth in the proposed interpretive statement, and this release specifically discusses

---

[67] The Institute of International Bankers, the ABA, the PSA, the SIA, Securitiy Pacific Corporation, and Sullivan & Cromwell.

[68] Letter from John Polanin, Jr., Attorney, Office of Chief Counsel, Division of Market Regulation, SEC, to Robert L. Tortoriello, Esq., Cleary, Gottlieb, Steen & Hamilton (July 7, 1988) (National Westminster Bank PLC); Letter from Robert L.D. Colby, Chief Counsel, Division of Market Regulation, SEC, to Robert L. Tortoriello, Esq., Cleary, Gottlieb, Steen & Hamilton (Apr. 1, 1988) (Security Pacific Corporation).

[69] *See* Part IV.B *infra*.

[70] *See* Release 34–25801, 53 FR at 23653–54.

[71] *See supra* notes 11–13 and accompanying text.

[72] Release 34–25801, 53 FR at 23652.

[73] Andras Research Capital Inc., Bank of America, Brown Brothers Harriman, Fidelity Investments, National Companies and Securities Commission (Australia) ("NCSC"), Ross & Hardies, CREF, Stikeman, Elliott, Westpac Banking Corporation, The Toronto Stock Exchange, the Institute of International Bankers, the SIA, James Capel & Co., Debevoise & Plimpton, the Vancouver Stock Exchange, the NYSBA, and The Montreal Exchange.

[74] Westpac Banking Corporation, the Institute of International Bankers, James Capel, and Debevoise & Plimpton.

[75] The SIA advocated that the Commission require participating foreign regulators to accord U.S. broker-dealers "national treatment," *i.e.*, treatment similar to that accorded to domestic broker-dealers in the foreign country.

others, especially in connection with the general principles stated above. To avoid confusion, the Commission is withdrawing the proposed interpretive statement, but the staff's interpretive and no-action letters and the Commission exemptions cited therein will remain valid until expressly modified or withdrawn. In addition, the Commission wishes to confirm that the staff's guidance will continue to remain available regarding both the application of the Rule and the general application of the U.S. broker-dealer registration requirements to the activities of foreign broker-dealers.[76]

B. Rule 15a–6

The Commission is adopting proposed Rule 15a–6 under section 15(a)(2) of the Exchange Act [77] to provide conditional exemptions from broker-dealer registration for foreign broker-dealers that do not initiate direct contacts with U.S. persons, that solicit or effect transactions by certain U.S. institutional investors through registered broker-dealers, or that solicit or effect securities transactions by certain other persons.

1. Structure of the Rule

As previously noted, the Commission is adopting Rule 15a–6 in an expanded format similar to that published in Release 34–26136. A majority of commenters that addressed the issue supported expansion of the proposed exemptive rule to include the substance of the interpretive statement,[78] and the Commission concurs with those comments suggesting that an expanded rule would be understood more easily, especially by foreigners unfamiliar with the Commission interpretive practices. Therefore, Rule 15a–6 as adopted incorporates many of the positions articulated in the interpretive statement, although it differs in some respects from the expanded rule published in Release 34–26136. For ease of reference, the Rule has been organized into nondirect contacts, direct contacts, and trading with or for specified persons.

Rule 15a–6(a) exempts only foreign brokers or dealers, which are defined in paragraph (b)(3) to mean persons not resident in the United States that are not offices or branches of, or natural persons associated with, registered broker-dealers, and whose securities activities would fall within the definitions of "broker" or "dealer" in sections 3(a)(4) or 3(a)(5) of the Exchange Act, respectively.[79] The definition in paragraph (b)(3) expressly includes any U.S. person engaged in business as a broker or dealer entirely outside the United States. This definition also includes foreign banks to the extent that they operate from outside the United States, but not their U.S. branches or agencies.[80]

The proposed rule would have exempted foreign broker-dealers only from section 15(a). The expanded rule also would have exempted foreign broker-dealers required to register as municipal securities dealers by section 15B(a)(1) of the Exchange Act,[81] and several commenters believed that foreign broker-dealers required to register as government securities brokers or dealers by section 15C(a)(1) of the Exchange Act[82] should be included as well.[83] Pursuant to section 15B(a)(4) of the Exchange Act,[84] the Commission has made the exemptions in the Rule applicable to foreign broker-dealers engaging in municipal securities activities involving U.S. investors, although the Commission believes that these activities are not likely to be extensive. In addition, the Commission will recommend to the Department of the Treasury that the latter exercise its authority under section 15C(a)(4) of the Exchange Act [85] to provide similar exemptions to foreign broker-dealers engaging in government securities activities involving U.S. investors.

As proposed, Rule 15a–6(a) was phrased as a conditional exemption from the broker-dealer registration requirements of section 15(a).[86] The expanded rule stated instead that a qualifying broker-dealer "is not subject to" these registration requirements.[87] Several commenters objected that an exemption implied that the exempted activities required registration absent the exemption.[88] The Commission has determined to adopt Rule 15a–6 as an exemption, rather than as an exclusion from registration. In the Commission's view, many of the activities covered by provisions of the Rule plainly would require registration, absent an exemption. To keep the rule as simple as possible, the Commission is adopting all the provisions of the Rule as exemptions from registration, pursuant to sections 15(a)(2) and 15B(a)(4) of the Exchange Act.[89]

Several commenters argued that failure to comply with the proposed rule in one instance should not affect the availability of the exemptions under the proposed rule in other cases.[90] The justifications proffered by these commenters were the desire to avoid attaching "unduly severe consequences" to "isolated, inadvertent violations" [91]

---

[76] Questions on this subject should be addressed to the Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth St. NW., Mail Stop 5–1, Washington, DC 20549, (202) 272–2848.

[77] 15 U.S.C. 78*o*(a)(2).

[78] Of the thirteen commenters who addressed the question of whether the substance of the interpretive statement should be included in the proposed rule, eleven supported expansion of the rule: Continental Illinois National Bank and Trust Company of Chicago, the PSA, The Toronto Stock Exchange, the Institute of International Bankers, Chase Manhattan Government Securities, the SIA, Security Pacific Corporation, Salomon Brothers Inc., Sullivan & Cromwell, Merrill Lynch, and the CBA. The NYSBA, while not commenting explicitly on expansion of the proposed rule, suggested that in terpretive statement be "converted into an interpretive rule" to provide foreign broker-dealers "a clearer basis" on which to evaluate the application of U.S. law to their activities. Letter from Lauren D. Rachlin, Chairman, NYSBA, to Jonathan G. Katz, Secretary, SEC (Nov. 7, 1988), at 5. The Institute of International Bankers suggested that the Commission retain the proposed interpretive statement for discussion of matters not specifically addressed by the ABA's formulation of the proposed rule. The SIA, Security Pacific, Salomon Brothers, and Merrill Lynch believed that the Commission should make clear that future requests for interpretive guidance still would be considered after the adoption of the Rule. Only the PSA (which preferred the ABA's approach if the Commission adopted the Rule) and The Montreal Exchange argued against an expanded rule, believing that codification of interpretive positions on foreign broker-dealer registration would impair the staff's ability to exercise its judgment on this subject in a flexible manner.

[79] *Supra* notes 16–17. *See also* note 19 *supra* regarding Rule 3a4–1, 17 CFR 240.3a4–1.

[80] The Institute of International Bankers contended that U.S.-regulated branches or agencies of foreign banks should be excluded from broker-dealer registration in the same way as domestic banks, by virtue of section 3(a)(6) of the Exchange Act, 15 U.S.C. 78c(a)(6). As explained in note 16 *supra*, the Commission has taken the position that the status of these branches and agencies under section 3(a)(6) is fact-specific, and U.S. branches or agencies of foreign banks that fall within the definition of bank under section 3(a)(2) of the Securities Act will be treated as U.S. institutional investors under the Rule. *See also* note 168 *infra*.

[81] 15 U.S.C. 78*o*–4(a)(1).

[82] 15 U.S.C. 78*o*–5(a)(1).

[83] The ABA, the PSA, and the CBA.

[84] 15 U.S.C. 78*o*–4(a)(4).

[85] 15 U.S.C. 78*o*–5(a)(4).

[86] *See supra* note 10.

[87] Release 34–26136, 53 FR at 38968.

[88] The ABA, Sullivan & Cromwell, the PSA, and Continental Bank.

[89] *See* notes 77 and 84 *supra*. Section (a) of the proposed rule also stated that the rule applied to any foreign broker-dealer "subject to the registration requirements of paragraph (1) of section 15(a) of the Act, because it induces or attempts to induce the purchase or sale of any security by a U.S. person." Release 34–25801, 53 FR at 23655. This language has been deleted from the Rule, because it merely restated the language of section 15(a)(1), 15 U.S.C. 78*o*(a)(1). The exemption under Rule 15a–6 is necessary only if the registration requirements of section 15(a) are triggered. As stated in Part IV.A. above, the staff's guidance will continue to be available on this issue.

[90] The PSA, Security Pacific Corporation, and Sullivan & Cromwell.

[91] Letter from Dan C. Aardal, Assistant General Counsel, Security Pacific Corporation, to Jonathan G. Katz, Secretary, SEC (Oct. 31, 1988).

and the belief that enforcement considerations did not prohibit a transactional approach, since remedies are available to both the Commission and private investors on a transactional basis.[92]

In the Commission's view, failure to comply with the conditions of one exemption in the Rule regarding certain activities would not prevent reliance on the same or other exemptions in the Rule with respect to other activities. Also the Commission is modifying the position expressed in the proposed interpretive statement that a foreign broker-dealer's obligation to register, once incurred, "continues until the foreign broker-dealer completely ceases to do business with or for [U.S.] investors" whom it has solicited and with or for whom it has effected securities transactions.[93] With respect to the Commission's exercise of its enforcement authority under section 15(a), the Commission would view a violation of U.S. registration requirements by a foreign broker-dealer as an ongoing violation until the foreign broker-dealer completely ceased to conduct U.S. securities activities that were not exempt under the Rule, or that required registration under the general principles discussed earlier in this release. Of course, the foreign broker-dealer would remain liable for its violative conduct, even after it ceased all nonexempt U.S. securities activities. Further, if a foreign broker-dealer repeatedly engaged in nonexempt U.S. securities activities intermittently with exempt U.S. activities, this course of conduct could support the conclusion that the foreign broker-dealer was in violation of section 15(a) during the entire course of its U.S. activities.[94]

2. Nondirect Contacts

a. *Unsolicited Transactions.* As discussed previously, the Commission believes that registration should not be required when a foreign broker-dealer effects an unsolicited trade for a U.S. investor. Accordingly, paragraph (a)(1) of the Rule exempts from registration a foreign broker-dealer to the extent that it "effects transactions in securities with or for persons that have not been solicited by the foreign broker or dealer." This paragraph codifies part of the proposed interpretive statement [95] and generally has been taken from paragraph (a)(2) of the expanded rule published in Release 34–26136.[96]

The expanded rule did not define the concept of solicitation, and neither does the Rule as adopted. The Commission's general views on meaning of the term "solicitation" have been discussed previously. Taking into account the expansive, fact-specific, and variable nature of this concept, the Commission believes that the question of solicitation is best addressed by the staff on a case-by-case basis, consistent with the principles elucidated in this release.

b. *Provision of Research to U.S. Persons.* As noted in the interpretive statement,[97] the provision of research to investors also may constitute solicitation by a broker or dealer. Broker-dealers often provide research to customers on a nonfee basis, with the expectation that the customer eventually will trade through the broker-dealer. They may provide research to acquaint potential customers with their existence, to maintain customer goodwill, or to inform customers of their knowledge of specific companies or markets, so that these customers will be encouraged to use their execution services for that company or those markets. In each instance, the basic purpose of providing the nonfee research is to generate transactional business for the broker-dealer. In the Commission's view, the deliberate transmission of information, opinions, or recommendations to investors in the United States, whether directed at individuals or groups, could result in the conclusion that the foreign broker-dealer has solicited those investors.

Consistent with earlier staff no-action positions,[98] however, the proposed interpretive statement took the position that the provision to U.S. persons of research reports prepared by a foreign broker-dealer would not require broker-dealer registration by that foreign broker-dealer, if the research reports were distributed to U.S. persons by an affiliated U.S. broker-dealer, if that affiliated broker-dealer prominently stated on the research report that it had accepted responsibility for its content, if the research report prominently indicated that any U.S. persons receiving the research and wishing to effect transactions in any security discussed therein should do so with the U.S. affiliate, not the foreign broker-dealer, and if transactions with U.S. persons in any securities identified in the research actually were effected only with or through the U.S. affiliate, not the

[92] The commenters did not elaborate or mention explicitly section 29(b) of the Exchange Act, 15 U.S.C. 78cc(b). *See* note 94 *infra*.

[93] Release 34–25801, 53 FR at 23651.

[94] If a foreign broker-dealer deals with U.S. investors in violation of the broker-dealer registration requirements, it would be subject to Commission enforcement action under section 15(a) of the Exchange Act, *supra* note 10. Indeed, one commenter, even while recommending changes to proposed Rule 15a–16, exhorted the Commission, "after spending extensive efforts in developing a concise codification of interpretative and exemptive positions which will inure to the benefit of all broker-dealers, domestic and foreign, [to] be prepared to demand appropriate compliance with the registration requirements of the 1934 Act with respect to entities engaging in activity which requires registration and which is outside of the exemptions provided by proposed Rule 15a–16." Letter from Donald N. Gershuny, Merrill Lynch & Co., Inc., to Jonathan G. Katz, Secretary, SEC (Oct. 31, 1988).

The foreign broker-dealer also still would be subject to the Commission's broker-dealer rules, because the definition of "registered broker or dealer" in section 3(a)(48) of the Exchange Act, 15 U.S.C. 78c(a)(48), includes a broker-dealer "required to register" pursuant to section 15(a). Also included are brokers and dealers registered or required to register pursuant to section 15B, 15 U.S.C. 78o–4, and, with respect to the definition of "member" in section 3(a)(3), 15 U.S.C. 78c(a)(3), and sections 6 and 15A regarding national securities exchanges and registered securities associations, respectively, 15 U.S.C. 78f and 78o–3, those entities and government securities brokers and government securities dealers registered or required to register pursuant to section 15C(a)(1)(A), 15 U.S.C. 78o–5(a)(1)(A).

It should be noted also that a foreign broker-dealer dealing with U.S. investors in violation of the broker-dealer registration requirements potentially would be exposed to customers' rescission actions brought under section 29(b) of the Exchange Act, 15 U.S.C. 78cc(b). *See, e.g., Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 558 (5th Cir. 1982), *aff'd on other grounds*, 752 F.2d 178 (5th Cir. 1985) (later appeal); *Eastside Church of Christ v. National Plan, Inc.*, 391 F.2d 357 (5th Cir.), *cert. denied*, 393 U.S. 913 (1968) (allowing investors to rescind transactions with unregistered broker-dealer). *See also* Gruenbaum & Steinberg, *Section 29(b) of the Securities Exchange Act of 1934: A Viable Remedy Awakened*, 48 Geo. Wash. L. Rev. 1 (1979). The right of rescission under section 29(b), 15 U.S.C. 78cc(b), ordinarily would be invoked by private parties, and the Commission believes that it would not be appropriate to make a general statement on the availability of that right in the context of adopting the Rule.

Of course, the broker-dealer's securities activities would continue to be subject to the antifraud provisions of the federal securities laws, *e.g.*, section 17(a) of the Securities Act, 15 U.S.C. 77q(a), and sections 10(b) and 15(c) of the Exchange Act, 15 U.S.C. 78j(b) and 78o(c), and the rules thereunder, *e.g.*, Rules 10b–5 and 15c1–2, 17 CFR 240.10b–5 and 240.15c1–2, irrespective of the firm's lack of registration. The extraterritorial application of the antifraud provisions of the federal securities laws was discussed in the proposed interpretive statement. Release 34–25801, 53 FR at 23649 n.39. *See also* note 41 *supra*. The Commission continues to believe that the antifraud provisions should be interpreted broadly to restrain securities fraud affecting the United States. *See Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989).

[95] *See* Release 34-25801, 53 FR at 23650–51.

[96] The adopted language differs from the expanded rule in two ways. The expanded rule referred to "execution" of transactions, but "effects" is consistent with the express language of section 15(a)(1) of the Exchange Act, 15 U.S.C. 78o(a)(1). Also, the expanded rule referred to solicitation of "customers" without defining them, but "persons" is preferable because of its definition in section 3(a)(9) of the Exchange Act. *See* note 40 *supra*.

[97] Release No. 25810, 53 FR at 23650–51.

[98] *See* Release 34–25801, 53 FR at 23646–48.

foreign broker-dealer.[99] This position was incorporated into paragraph (a)(3) of the expanded rule in Release 34–26136, although the requirement for affiliation between the registered broker-dealer and the foreign broker-dealer was deleted.

Some commenters criticized this position on research as too restrictive.[100] For example, Fidelity Investments claimed that, while the research that it receives from foreign broker-dealers is "voluminous," it plays "only a very small part" in the final investment decisions made by its fund managers.[101] The Madrid Stock Exchange argued that research distributed free of charge in the United States by foreign broker-dealers to U.S. institutional investors "on a routine basis, for information purposes" should not be deemed solicitation of brokerage business.[102] CREF agreed that any other position would impede the flow of foreign research to U.S. institutional investors.

Dechert Price & Rhoads, on behalf of five Spanish broker-dealers, argued that provision of research to existing U.S. institutional clients should not be deemed solicitation, even if trades were effected for those clients as a result.[103] These foreign broker-dealers believed that it would be difficult for them to screen out transactions from U.S. institutional investors that have received their research. They maintained that it would be too costly for smaller foreign broker-dealers to establish U.S. affiliates to be responsible for and distribute their research and effect any resulting trades, and that larger foreign broker-dealers thus would have a competitive advantage. The Association of German Banks also objected to the requirement that the U.S. affiliate prominently state that it had accepted responsibility for a research report prepared by a foreign broker-dealer. The SIA, while not objecting to the proposed interpretive position on research itself, suggested that foreign broker-dealers should be allowed to send research directly to U.S. institutional investors, as long as U.S. affiliates accepted responsibility for the research and effected any resulting trades.[104]

In publishing the proposed rule and interpretive statement, the Commission was motivated, in part, by the desire of U.S. institutional investors for access to foreign markets through foreign broker-dealers and the research that they provide.[105] Accordingly, the Rule takes into account the comments on the important role of research in facilitating access to these markets. The Commission does not wish to restrict major U.S. investors' ability to obtain research reports of foreign origin if adequate regulatory safeguards are present.

Paragraph (a)(2) of the Rule therefore provides an exemption from registration for foreign broker-dealers that furnish research reports[106] directly or indirectly[107] to major U.S. institutional investors[108] under certain conditions. The research report must not recommend the use of the foreign broker-dealer to effect trades in any security,[109] and the foreign broker-dealer must not initiate follow-up contact with the major U.S. institutional investors receiving the research, or otherwise induce or attempt to induce the purchase or sale of any security by those major U.S. institutional investors.[110] If these conditions are met, the foreign broker-dealer may effect trades in the securities discussed in the research or other securities at the request of major U.S. institutional investors receiving the report. Under these conditions, the Commission believes that direct distribution would be consistent with the free flow of information across national boundaries without raising substantial investor protection concerns.

If, however, the foreign broker-dealer already had a relationship with a registered broker-dealer that facilitated compliance with the direct contact exemption in the Rule, the Rule would require all trades resulting from the provision of research to be effected through that registered broker-dealer pursuant to the provisions of that exemption. If the foreign broker-dealer had entered into this prior relationship, the procedures for identifying trades from major U.S. institutional investors and routing them through the registered broker-dealer largely would have been established. Thus, the benefits of a registered broker-dealer's intermediation in effecting trades would

---

[99] Article III, section 35(d)(2) of the NASD Rules of Fair Practice requires that all "[a]dvertisements and sales literature shall contain the name of the [NASD] member, [and of] the person or firm preparing the material, if other than the member" and that "[s]tatistical tables, charts, graphs or other illustrations used by members * * * should disclose the source of the information if not prepared by the member." *NASD Manual* (CCH) ¶ 2195 at 2177–78. Under section 35(a)(1), "advertisement" means any "material published, or designed for use in" various public print and electronic media. *Id.* at 2174. Under section 35(a)(2), "sales literature" specifically includes "research reports, market letters, performance reports or summaries, [and] seminar texts. * * *" *Id.* Rule 472.40(7) of the New York Stock Exchange ["NYSE"] requires that communications with the public that are "not prepared under the direct supervision of the [NYSE] member organization or its correspondent [NYSE] member organization should show the person (by name and appropriate title) or outside organization which prepared the material." *NYSE Guide* (CCH) ¶ 2472.40(7) at 4027. Under Rule 472.10(1), a "communication" includes "market letters [and] research reports * * *." *Id.* at ¶ 2472.10(1). The Commission would not view an activity that merely complied with these requirements, in itself, as solicitation by a foreign broker-dealer.

[100] *See* note 13 *supra*.

[101] Letter from Fitzgerald to Katz, *supra* note 58, at 3.

[102] Letter from Enrique Benito Rodriquez, Chairman, Madrid Stock Exchange, to Jonathan G. Katz, Secretary, SEC (Oct. 21, 1988), at 2.

[103] CREF also said that communications between a foreign broker-dealer and a U.S. investor after the investor had opened its account with the foreign broker-dealer on the investor's own initiative should not be deemed solicitation. The Toronto and Vancouver Stock Exchanges agreed. The Commission believes, however, that the existence of these communications could support the conclusion that the foreign broker-dealer was engaged in the securities business within the jurisdiction of the United States, by virtue of having regular customers, and thus was subject to U.S. broker-dealer registration requirements.

[104] While expressing general agreement with the discussion of research in the proposed interpretive statement, Sullivan & Cromwell concurred with the SIA on this point, as did the NYSBA and the ABA, although the ABA did not suggest imposition of the execution condition explicitly.

[105] Release 34–25801, 53 FR at 23648.

[106] Paragraph (a)(2) of the Rule would not distinguish between research reports provided in written or electronic form.

[107] As adopted, paragraph (a)(2) is broader than the proposed interpretive statement in that, like the expanded rule, it permits the distribution of foreign research in this country directly by a foreign broker-dealer.

[108] Paragraph (b)(4) of the Rule defines "major U.S. institutional investor" as a U.S. institutional investor with assets, or assets under management, in excess of $100 million, or a registered investment adviser with assets under management in excess of $100 million. Paragraph (b)(7) of the Rule defines "U.S. institutional investor" as a registered investment company, bank, savings and loan association, insurance company, business development company, small business investment company, or employee benefit plan defined in Rule 501(a)(1) of Regulation D under the Securities Act, 17 CFR 230.501(a)(1), a private business development company defined in Rule 501(a)(2), 17 CFR 230.501(a)(2), an organization described in section 501(c)(3) of the Internal Revenue Code, as defined in Rule 501(a)(3), 17 CFR 230.501(a)(3), or a trust defined in Rule 501(a)(7), 17 CFR 230.501(a)(7). To determine the total assets of an investment company under the Rule, a registered investment company may include the assets of any family of investment companies of which it is a part, and the term "family of investment companies" is defined in paragraph (b)(1) of the Rule.

[109] The Commission would not consider disclosure in the research report that the foreign broker-dealer is a market maker in a security discussed in the report to violate this requirement.

[110] If a foreign broker-dealer wished to initiate direct contact with U.S. persons, it could do so using the direct contact exemption in paragraph (a)(3) of the Rule, and the conditions imposed by that exemption, including the participation of a registered broker-dealer intermediary, would address the investor protection concerns raised by those contacts.

be provided without imposing substantial additional costs.

Although this exemption is limited to major U.S. institutional investors, the Rule's research exemption is broader than either the proposed interpretive statement or the expanded rule in that a registered broker-dealer would not be required to take responsibility for the content of the report.[111] In addressing the responsibilities of the U.S. affiliate under paragraph (a) of the proposed rule, some commenters maintained that the registered broker-dealer's performance of supervisory responsibilities would result in little additional protection, at least with respect to substantial institutional investors.[112]

By its terms, the exemption in paragraph (a)(2) of the Rule is available only with respect to research provided to major U.S. institutional investors. Therefore, the Commission has decided to retain the narrower position regarding the distribution of research expressed in Release 34–25801 with respect to other investors.[113] Under this position, the Commission would not require broker-dealer registration by a foreign broker-dealer whose research reports were distributed [114] to U.S. persons by a registered broker-dealer,[115] if that broker-dealer prominently stated on the research report that it had accepted responsibility for its content,[116] if the research report prominently indicated that any U.S. persons receiving the research and wishing to effect any transactions in any security discussed in the report should do so with the registered broker-dealer, not the foreign broker-dealer, and if transactions with U.S. recipients of the report in any securities identified in the research actually were effected only with or through the registered broker-dealer, not the foreign broker-dealer. This position is consistent with the Commission's goal of facilitating the flow of information and capital across national boundaries.[117]

The Commission wishes to emphasize, however, that neither the exemption nor this position regarding research is applicable with respect to "soft-dollar" arrangements between foreign broker-dealers and U.S. persons.[118] As discussed in the proposed interpretive statement,[119] in many cases research is provided to customers with the express or implied understanding that the customers will pay for it by directing trades to the broker-dealer that result in an agreed-upon level of commission dollars.[120] These "soft-dollar" research arrangements are used widely by broker-dealers both in the United States and abroad.[121] If a foreign broker-dealer provided research to a U.S. investor pursuant to an express or implied understanding that the investor would direct a given amount of commission income to the foreign broker-dealer, the Commission would consider the foreign broker-dealer to have induced purchases and sales of securities, irrespective of whether the trades received from the investor related to the particular research that had been provided. Accordingly, both the exemption for research in paragraph (a)(2) and the position retained from Release 34–25801 set forth above would be inapplicable.[122]

c. Investment Adviser Registration. Finally, it is important to emphasize that foreign broker-dealers must consider separately other registration requirements contained in the U.S. securities laws. Specifically, in the proposed interpretive statement, the Commission noted that if a branch or affiliate of a foreign entity in the United States disseminated research information, registration as an investment adviser might be required under section 203 of the Investment Advisers Act of 1940 ("Advisers Act").[123] Several commenters requested clarification on this point, one expressing concern that a previous no-action position taken by the Division of Investment Management [124] might not apply in light of the direct communications between foreign broker-dealers and certain U.S. institutional investors that could take place under the proposed rule if adopted. A foreign broker-dealer providing research to U.S. persons generally would be an investment adviser within the meaning of the Advisers Act. The staff takes the position that the broker-dealer exclusion in section 202(a)(11)(C) of the Advisers Acts [125]—for broker-dealers who provide investment advice that is solely incidental to their brokerage business and who receive no special compensation for such advice—is available only to registered broker-dealers.

The Division of Investment Management, however, generally would expect to respond favorably to no-action requests regarding registration under the Advisers Act by foreign brokers and dealers who meet the conditions of paragraph (a)(2), (a)(3), or (a)(4) of the Rule if their activities are limited to those described in section 202(a)(11)(C) [126]—that is, if they provide investment advice solely incidental to their brokerage business and receive no special compensation for it. In the future, the Commission may consider whether to propose and adopt an exemptive rule under the Advisers Act for foreign broker-dealers providing the types of services covered by the Rule.

---

[111] Of course, if a foreign broker-dealer, for its own business reasons, chose to distribute its research in the United States through a registered broker-dealer, affiliated or not, the SRO rules discussed in note 99 *supra* would require disclosure of the identity of the preparer of the research.

[112] *E.g.*, Association of German Banks.

[113] *See supra* notes 98–99 and accompanying text.

[114] The Commission would not require registration by a foreign broker-dealer whose research reports were included in a broadly-distributed electronic database to which U.S. persons who were not major U.S. institutional investors had access, provided that (i) a registered broker-dealer accepted responsibility for the research and for its inclusion in the database, (ii) the registered broker-dealer prominently stated on the research report (as displayed in the database) that it had accepted responsibility for its content, and (iii) the research report prominently indicated that any U.S. persons accessing the report and wishing to effect any transactions in the securities discussed in the report should do so with the registered broker-dealer, not the foreign broker-dealer. This position would not limit the research exemption in paragraph (a)(2) of the Rule for research distributed directly to major U.S. institutional investors, whether in written or electronic form.

[115] The requirement for affiliation between the foreign broker-dealer and the registered broker-dealer through ownership or control has been deleted here as in the Rule.

[116] As noted above, commenters expressed concern over the ability of the registered broker-dealer to accept responsibility for research prepared by the foreign broker-dealer. The Commission believes that a registered broker-dealer would meet its responsibility under the Rule if it took reasonable steps to satisfy itself regarding the key statements in the research. In cases where there are no indications that the content of the research is suspect, this responsibility can be fulfilled by reviewing the research in question and comparing it with other public information readily available regarding the issuer, to make certain that neither the facts nor the analysis appear inconsistent with outstanding information regarding the issuer.

[117] *See supra* note 1.

[118] Paragraph (a)(2)(iv) of the exemption so provides.

[119] Release 34–25801, 53 FR at 23651.

[120] *See* Release 34–25801, 53 FR at 23646 n.16 and accompanying text.

[121] For example, the Securities and Investments Board ("SIB") notes in a recent discussion paper that soft-dollar arrangements in the United Kingdom have increased significantly at a time when the level of brokerage commissions generally has decreased. SIB, *Soft Commission Arrangements in the Securities Markets* (February 1989).

[122] CREF explicitly stated that its position against deeming research to be solicitation did not apply to "soft-dollar" arrangements.

[123] 15 U.S.C. 80b–3. *See* Release 34–25801, 53 FR at 23651 n.56.

[124] *Citicorp* (pub. avail. Sept. 14, 1986).

[125] 15 U.S.C. 80b–2(a)(11)(C).

[126] *Id.*

3. Direct Contacts

a. Transactions with U.S. Institutional Investors and Major U.S. Institutional Investors. Paragraph (a)(3) of the Rule provides an exemption from broker-dealer registration for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional investor or a major U.S. institutional investor,[127] provided that any resulting transactions are effected through a registered broker-dealer and certain conditions are met by the foreign broker-dealer, foreign associated persons, and the registered broker-dealer. As described in the proposed interpretive statement,[128] many foreign broker dealers have established registered broker-dealer affiliates in the United States that are fully qualified to deal with U.S. investors and trade in U.S. securities. Nonetheless, these foreign broker-dealers may prefer to deal with institutional investors in the United States from their overseas trading desks, where their dealer operations are based. In addition, because overseas trading desks often are principal sources of current information on foreign market conditions and foreign securities, many U.S. institutions want direct contact with overseas traders. Foreign broker-dealers themselves often are not willing to register as broker-dealers directly with the Commission, however, because registration would require the entire firm to comply with U.S. broker-dealer requirements.[129]

The no-action request granted to Chase Capital Markets US [130] allowed foreign trading operations to receive calls from U.S. institutional investors without the foreign broker-dealers registering with the Commission. Under the terms of that letter, foreign broker-dealers could be put in touch with U.S. institutional investors by a registered broker-dealer affiliate, with a U.S.-qualified representative participating in telephone conversations, effecting any resulting transactions, and taking full responsibility for the trades. Like an earlier Commission exemption letter,[131] the letter to Chase Capital Markets US provided that the foreign broker-dealer would assist the Commission in the conduct of investigations by furnishing information concerning its contacts with U.S. investors and trading records relating to the execution of U.S. investors' orders by the firm. Both letters also indicated that the foreign broker-dealers would endeavor, directly or indirectly, to obtain the consent of foreign customers to the release of any information sought by the Commission.

In the Commission's view, it is desirable to broaden U.S. investors' access to foreign sources of information through structures that maintain fundamental investor protections. Accordingly, the Commission supports allowing direct contact between foreign broker-dealers and U.S. institutional investors, subject to requirements concerning these contacts and the execution of orders.[132] The Rule as adopted allows a foreign broker-dealer to contact U.S. institutional investors if an associated person of a registered broker-dealer participates in each of these contacts. The Rule also allows a foreign broker-dealer to contact major U.S. institutional investors without the participation of an associated person of a registered broker-dealer in any of these contacts. In each case, any resulting transactions must be effected through an intermediary registered broker-dealer,[133] which need not be affiliated with the foreign broker-dealer through ownership or control. The Commission believes that these versions of the intermediary concept used in the Chase Capital Markets US letter and set forth in the proposed rule and the expanded rule greatly increase the utility of the exemption in paragraph (a)(3) of the Rule, the operation of which is described more fully below.[134]

(1) Comments on U.S. broker-dealer requirement. As proposed, Rule 15a–6 would have provided an exemption from broker-dealer registration for foreign broker-dealers that effected trades with certain U.S. institutional investors through a registered broker-dealer.[135] The foreign broker-dealer's personnel involved in contacts with U.S. institutional investors would have been subject to certain requirements, and the registered broker-dealer would have been responsible for supervising the contact and any resulting trades. If a trade was agreed upon, the rule would have required the registered broker-dealer to effect the trade on behalf of the investor, taking full responsibility for all aspects of the trade. In proposing Rule 15a–6, the Commission stated that requiring the intermediation of a registered broker-dealer would maintain important regulatory safeguards. The registered broker-dealer's responsibility for effecting all trades, combined with its recordkeeping and reporting duties pursuant to section 17 of the Exchange Act [136] and the rules thereunder,[137] "would facilitate Commission review of this trading and also subject this trading to the U.S. broker-dealer's supervisory responsibility." [138]

Fifteen commenters argued that the Commission should not require the participation of a registered broker-dealer affiliate in transactions with major institutional investors.[139] In particular, commenters asserted that U.S. institutions meeting the $100 million asset test in the proposed rule should be able to be solicited by foreign broker-dealers and then transact business directly with those broker-dealers, because requiring the intermediation of a registered broker-dealer would increase costs, impede the flow of foreign research to U.S. institutions, and reduce the ability of these institutions to invest in foreign markets in which local broker-dealers had not established registered U.S. affiliates.[140] Other commenters maintained that the Commission should grant an exemption from the registration requirements of section 15(a) to foreign broker-dealers

---

[127] *See infra* notes 156–69 and accompanying text; *see also* note 108 *supra*.

[128] Release 34–25801, 53 FR at 23651.

[129] *See supra* notes 44–45 and accompanying text.

[130] Letter from Amy Natterson Kroll, Attorney, Office of Chief Counsel, Division of Market Regulation, SEC, to Frank C. Puleo, Esq., Milbank, Tweed, Hadley & McCloy (July 28, 1987).

[131] *See* Letter from Jonathan Katz, Secretary, SEC, to Marcia MacHarg, Esq., Debevoise & Plimpton (Aug. 13, 1986) (Vickers da Costa Securities Inc./Citicorp), *infra* note 205 and accompanying text.

[132] *See* Release 34–25801, 53 FR at 23652.

[133] It would be permissible for more than one registered broker-dealer to serve as intermediary between U.S. institutional investors, major U.S. institutional investors, and a foreign broker-dealer seeking to comply with the Rule.

[134] The Division of Investment Management generally would expect to respond favorably to no-action requests regarding registration as an investment adviser from foreign broker-dealers complying with the provisions of paragraph (a)(3) of the Rule. *See supra* notes 123–26 and accompanying text.

[135] Release 34–25801 did not make clear, however, whether the registered broker-dealer was required to be affiliated with the foreign broker-dealer. *See* note 142 *infra*.

[136] 15 U.S.C. 78q.

[137] *See* note 28 *supra*.

[138] Release 34–25801, 53 FR at 23654.

[139] Andras Research Capital, Brown Brothers Harriman, Fidelity Investments, Madrid Stock Exchange, Ross & Hardies, CREF, Dechert Price & Rhoads, Association of German Banks, Westpac Banking Corporation, Toronto Stock Exchange, Institute of International Bankers, Chase Manhattan Government Securities, the ABA, The Canadian Bankers' Association, and The Montreal Exchange.

[140] For example, the Toronto Stock Exchange believed that the costs of establishing a registered U.S. broker-dealer affiliate would be significant. In addition, the PSA and Chase Manhattan Government Securities argued that requiring the participation of a U.S. affiliate would be excessively burdensome where the only contact with U.S. investors related to transactions in U.S. government securities.

that deal only with institutional investors, on the grounds that these investors can fend for themselves in the international securities markets.[141] As discussed below in Part IV.B., however, the Commission believes that not all the regulatory concerns raised by such an exemption would be alleviated by the institutional nature or size of these investors.

The Commission had requested comment on whether the nature of the relationship between the foreign broker-dealer and the registered broker-dealer "should involve a specified degree of ownership or control." [142] Three commenters replied that no affiliate relationship should be required between the foreign broker-dealer and the intermediary registered broker-dealer.[143] These commenters generally argued that the use of any registered broker-dealer to perform the duties set forth in the proposed rule would provide sufficient investor protection and would lower the costs of compliance with the rule by smaller foreign broker-dealers. Finally, one commenter suggested that nonresident registered broker-dealers be permitted to perform the duties assigned to the registered broker-dealer by the proposed rule, regardless of their location or affiliation with the foreign broker-dealer.[144]

Nine commenters argued that the responsibilities imposed on the registered broker-dealer affiliate by the proposed rule should be reduced in some fashion.[145] The comments stated that the registered broker-dealer's supervisory responsibilities regarding the activities of the foreign broker-dealer should be relaxed, because the registered broker-dealer's lack of information and control regarding the foreign broker-dealer's activities and relative lack of expertise in foreign securities and markets would hinder the performance of its supervisory duties. In particular, one commenter said that the foreign broker-dealer alone should be responsible for all requirements concerning confirmation and extension of credit in connection with securities transactions, "and correspondingly liable in case of failure." [146] Another commenter emphasized the protection afforded by other provisions in the proposed rule and the registered broker-dealer's difficulty in supervising foreign personnel operating independently in different time zones.[147]

Other commenters took a slightly different approach, suggesting that the registered broker-dealer be allowed to delegate certain functions, but not liability for performing them, to the foreign broker-dealer. Thus, these commenters would allow the registered broker-dealer to assume liability for the acts and omissions of the foreign broker-dealer, rather than actually performing the functions assigned to the registered broker-dealer by the proposed rule. They also opposed requiring the registered broker-dealer to maintain all books and records for U.S. institutional investors' accounts, claiming that the requirement in the rule for the foreign broker-dealer to provide the Commission, upon request, with information or documents within its possession, custody, or control would be an adequate substitute.

The Commission has determined to continue to require the intermediation of a registered broker-dealer,[148] to address concerns regarding financial responsibility and the effective enforcement of U.S. securities laws. The Rule does not require, however, any affiliation between the foreign broker-dealer and the registered broker-dealer through ownership or control. This position, together with the conditional eligibility of nonresident registered broker-dealers to serve as intermediary under the Rule,[149] should reduce greatly the costs incurred by a foreign broker-dealer in establishing a relationship with a registered broker-dealer to comply with the conditions of the direct contact exemption. Accordingly, the Commission does not believe that it is appropriate to allow the registered broker-dealer to delegate the performance of its duties under the Rule to the foreign broker-dealer, with the exception of physically executing foreign securities trades in foreign markets or on foreign exchanges,[150] and merely retain responsibility for errors or omissions in their performance. With respect to the recordkeeping requirements in the Rule, however, the Commission notes that it might be more efficient and less costly for the registered broker-dealer to handle data processing in a centralized fashion. As long as the registered broker-dealer has physical possession of all records required by the Rule, employing a third party, such as the foreign broker-dealer, to process these records mechanically would be permissible.

The Commission believes that the concerns expressed by commenters over the proposed rule's imposition on the registered broker-dealer of supervisory responsibility concerning transactions under paragraph (a)(3) between the foreign broker-dealer and U.S. institutional investors or major U.S. institutional investors are, to some extent, valid. Accordingly, the Commission would no longer take the position that the Rule requires the registered broker-dealer to implement procedures to obtain positive assurance that the foreign broker-dealer is operating in accordance with U.S. requirements.[151] The Commission believes, however, that the registered broker-dealer, in effecting trades arranged by the foreign broker-dealer, has a responsibility to review these trades for indications of possible violations of the federal securities laws. The registered broker-dealer's intermediation in these trades is intended to help protect U.S. investors and securities markets. The registered broker-dealer would have an obligation, as it has for all customer accounts, to review any Rule 15a–6 account for indications of potential problems.[152]

---

[141] *E.g.*, the SIA.

[142] Release 34–25801, 53 FR at 23653 n.68.

[143] Institute of International Bankers, Sullivan & Cromwell, and Dwight D. Quayle, Esq., of Ropes & Gray.

[144] Quayle.

[145] Fidelity Investments, the NCSC, the PSA, Westpac Banking Corporation, the SIA, Debevoise & Plimpton, Security Pacific, Sullivan & Cromwell, and Merrill Lynch.

[146] Letter from Dennis H. Greenwald, Chairman, Federal Regulation Committee, SIA, to Jonathan G. Katz, Secretary, SEC (Oct. 31, 1988), at 11.

[147] Security Pacific.

[148] The Rule draws on the definition of "U.S. broker or dealer" in the expanded rule. Paragraph (b)(5) of the Rule defines the term "registered broker or dealer" to include persons registered with the Commission under sections 15(b), 15B(a)(2), or 15C(a)(2) of the Exchange Act, 15 U.S.C. 78*o*(b), 78*o*–4(a)(2), or 78*o*–5(a)(2), respectively.

[149] The Rule permits a nonresident registered broker-dealer to serve as intermediary under the Rule, provided that the nonresident broker-dealer complies with Rule 17a–7(a), 17 CFR 240.17a–7(a). *See* Part IV.B. *infra*.

[150] *See infra* note 185 and accompanying text.

[151] Release 34–25801, 53 FR at 23654.

[152] In particular, SRO rules impose specific supervisory duties on SRO members regarding customers' accounts. *E.g.*, Article III, Section 27, NASD Rules of Fair Practice, *NASD Manual* (CCH) ¶2177 at 2109 ("Each member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses. * * *"); NYSE Rule 342.16, *NYSE Guide* (CCH) ¶2342 at 3587 ("Duties of supervisors of registered representatives should ordinarily include at least review of correspondence of registered representatives, transactions, and customer accounts."); NYSE Rule 405, *NYSE Guide* (CCH) ¶2405 at 3896 ("Every member organization is required * * * to * * * (1) Use due diligence to learn the essential facts relative to every customer, every order, [and] every cash or margin account * * * accepted or carried by such organization. (2) Supervise diligently all accounts handled by registered representatives of the organization.")

Moreover, if the registered broker-dealer ignores indications of irregularity that should alert the registered broker-dealer to the likelihood that the foreign broker-dealer is taking advantage of U.S. customers or otherwise violating U.S. securities laws, and the registered broker-dealer nevertheless continues to effect questionable transactions on behalf of the foreign broker-dealer or its customers, the registered broker-dealer's role in the trades may give rise to possible violations of the federal securities laws.[153]

Finally, Rule 15a–6 as adopted does not allow banks to serve as the intermediary in transactions between U.S. institutional investors or major U.S. institutional investors and foreign broker-dealers. Despite the views expressed by several banks,[154] the Commission does not believe that it would be appropriate to permit any unregistered entity to perform this function, since this entity would not be subject to the Commission's extensive statutory authority to regulate, examine, and discipline registered broker-dealers.[155]

(2) Comments on U.S. institutional investor classifications. Proposed Rule 15a–6 would have allowed unregistered foreign broker-dealers to contact certain classes of U.S. institutional investors, which were limited to U.S. persons described in Rule 501(a) (1), (2), or (3) of Regulation D under the Securities Act[156] that, with the exception of registered broker-dealers, had total assets in excess of $100 million. These investors included domestic banks, savings and loan associations, brokers or dealers registered under section 15(b) of the Exchange Act,[157] insurance companies, registered investment companies, small business investment companies, employee benefit plans, private business development companies, and certain section 501(c)(3) organizations under the Internal Revenue Code.[158] Registered investment advisers were included as U.S. institutional investors within the rule if they had in excess of $100 million in assets under management. Further, if a registered investment company itself did not have total assets in excess of $100 million, it qualified as a U.S. institutional investor if it was part of a family of investment companies (as defined in the rule) that had total assets in excess of $100 million.

The expanded rule allowed direct contact with specified institutional investors, using the structure set out in the Chase Capital Markets U.S. letter.[159] Under the expanded rule, a foreign broker-dealer either could contact these institutional investors with the participation of an associated person supervised by a U.S. registered broker-dealer, or could contact major institutional investors directly. Similar conditions applied to both alternatives.

Six commenters opined that the definition of U.S. institutional investor should be expanded to include all accredited investors under Regulation D, regardless of assets.[160] In particular, the claim was made that persons qualifying as accredited investors under Regulation D, but with less than $100 million in assets, possessed adequate sophistication and judgment in financial matters to deal directly with foreign broker-dealers, consistent with their ability to make investment decisions without the disclosure afforded by the registration requirements of the Securities Act. It was averred that an asset test did not necessarily correlate with the degree of sophistication required to deal with unregistered foreign broker-dealers. Other commenters expressed a somewhat narrower view, asserting that the definition of U.S. institutional investor should be limited to institutional accredited investors.[161]

Alternatively, some commenters proposed other asset tests for major institutional investors, ranging from $1 million to 25 million in assets.[162] Another commenter suggested that, after a one-year trial period, the Commission consider broadening the definition of major U.S. institutional investor to include more institutions.[163] Finally, two commenters specifically said that the definition of U.S. institutional investor should include U.S. branches or agencies of foreign banks.[164]

As discussed in the Concept Release, the Commission recognizes that substantial institutional investors often have greater financial sophistication than individual investors. At the same time, the Commission does not believe that sophistication is in all circumstances an effective substitute for broker-dealer regulation. For example, systemic safeguards flowing from broker-dealer registration, such as financial responsibility requirements, are benefits that can be assured more effectively through governmental regulation.[165]

After considering the comments, the Commission has decided to retain the proposed rule's $100 million asset test for foreign broker-dealers contacting major U.S. institutional investors without an associated person of a registered broker-dealer participating in the contact.[166] As the Commission

---

[153] *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Securities Exchange Act Release No. 19070 (Sept. 21, 1982), 26 SEC Docket 254 (continued execution of orders placed by investment adviser with discretion over account may subject broker-dealer to aiding and abetting liability, if broker-dealer has knowledge of improprieties in adviser's handling of account and adviser commits primary violation of securities laws).

[154] The Canadian Bankers' Association, the Institute of International Bankers, and the Bank of America expressed the view that domestic banks should be permitted to serve as the U.S. intermediary for affiliated foreign broker-dealers. They claimed that, although U.S. banks are not registered with the Commission and thus, as pointed out by the ABA, are not subject to the Commission's regulatory, supervisory, or disciplinary authority, supervision by banking regulatory authorities would be an adequate substitute for Commission regulation.

[155] As explained below, however, the Commission has decided to include banks acting in a broker or dealer capacity (including acting as a municipal or government securities broker or dealer) in the category of persons with or for whom a foreign broker-dealer could effect, induce, or attempt to induce transactions and still qualify for an exemption from registration under the Rule.

[156] 17 CFR 230.501(a) (1), (2), or (3).

[157] 15 U.S.C. 78o(b).

[158] 26 U.S.C 501(c)(3).

[159] *Supra* note 130.

[160] CREF, Continental Bank, the PSA, Westpac Banking Corporation, Chase Manhattan Government Securities, and Debevoise & Plimpton.

[161] The ABA, Sullivan & Cromwell, and Merrill Lynch. Continental Bank urged the Commission to adopt this approach if the Rule was not made applicable to all accredited investors.

[162] Security Pacific, the Institute of International Bankers, and the Toronto Stock Exchange.

[163] The NYSBA.

[164] The Institute of International Bankers and the NYSBA. In proposing Rule 15a–6, the Commission noted that accredited institutional investors under Regulation D included only domestic banks. Release 34–25801, 53 FR at 23654. *But see* note 168 *infra*.

[165] Similarly, in proposing Rule 144A, which would provide a safe-harbor exemption from the registration requirements of the Securities Act for resales of securities to institutional investors, the Commission sought to define a limited class of institutional investors that it could be "confident * * * have extensive experience" in the market. Securities Act Release No. 6806 (Oct. 25, 1988), 53 FR 44016, 44028 ("Release 33–6806"). The Commission proposed to permit only a subset of institutions, those with over $100 million in assets, to resell securities free of resale restrictions. Release 33–6806, 53 FR at 44027–29. All comments received on proposed Rule 144A, together with a comment summary, are publicly available in File No. S7–23–88.

[166] Some commenters on proposed Rule 144A, *supra* note 165, suggested that the rule, if adopted, permit only those institutions with over $100 million in investment securities to resell securities free of resale restrictions. The staff is giving this suggestion serious consideration, in addition to considering other changes to the definition in Rule 144A of institutional investor including the scope of the term "family of investment companies that also appears in the Rule. If the Commission incorporates these changes into Rule 144A, then the Commission also will consider whether to incorporate similar standards into Rule 15a–6.

stated in proposing the rule, the asset test was based on the view that "direct U.S. oversight of the competence and conduct of foreign sales personnel may be of less significance where they are soliciting only U.S. institutional investors with high levels of assets," and the $100 million asset level was intended "to increase the likelihood that the institution or its investment advisers have prior experience in foreign markets that provides insight into the reliability and reputation" of foreign broker-dealers.[167]

Currently, the Commission continues to believe that institutions with this level of assets are more likely to have the skills and experience to assess independently the integrity and competence of the foreign broker-dealers providing this access. Moreover, these larger institutions have greater ability to demand information demonstrating the financial position of the foreign broker-dealer.

Accordingly, the Rule allows foreign broker-dealers to contact U.S. institutional investors with the participation of a U.S. associated person, and to contact independently U.S. institutional investors with over $100 million in assets or assets under management. The Rule thus adds the $100 million asset test to the U.S. institutional investor definition for certain purposes.[168]

The Commission notes that the expanded rule deleted the language in the proposed rule that included the following in the definition of U.S. institutional investor: institutions organized or incorporated under the laws of the United States, its territories or possessions, or any state or the District of Columbia; institutions organized or incorporated under the laws of any foreign jurisdiction but conducting business principally in the United States; and branches of foreign entities located in the United States or its territories or possessions. The Commission has deleted these references from the Rule as unnecessary, because these entities already are included in the definition without regard to nationality. Accordingly, the use of the procedures specified in the exemptions under the Rule, in lieu of broker-dealer registration, would be required of foreign broker-dealers that solicited the permanent U.S. branches or agencies of any foreign entities.[169] This position is consistent with the general principles discussed above regarding foreign persons present in this country on other than a temporary basis.

(3) Operation. Paragraph (a)(3)(i) of the Rule sets forth the conditions to be met by a foreign broker-dealer wishing to engage in direct contacts with U.S. institutional investors or major U.S. institutional investors without registration. Paragraph (a)(3)(i)(A) requires the foreign broker-dealer to effect these transactions through a registered broker-dealer, as discussed below. Under paragraph (a)(3)(i)(B), the foreign broker-dealer must provide the Commission, upon request or pursuant to agreements reached between any "foreign securities authority" [170] and the Commission or the U.S. government, with any information or documents within the possession, custody, or control of the foreign broker-dealer, any testimony of foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the Commission requests and that relates to transactions under the direct contact exemption under paragraph (a)(3) of the Rule. Unlike the proposed rule, however, these requirements are subject to an exception for information, documents, testimony, or assistance withheld in compliance with foreign blocking statutes or secrecy laws.

If, after the foreign broker-dealer has exercised its best efforts to provide this information, documents, testimony, or assistance, which specifically includes requesting the appropriate foreign governmental body and, if legally necessary, its customers (with respect to customer information) to permit the foreign broker or dealer to provide the requested information, documents, testimony, or assistance to the Commission, the foreign broker-dealer is prohibited by applicable foreign law or regulations from satisfying the Commission's request, then it would continue to qualify for the exemption under paragraph (a)(3). Under paragraph (c), however, the Commission, after notice and opportunity for hearing, may withdraw the direct contact exemption under paragraph (a)(3) of the Rule with respect to the subsequent activities of the foreign broker-dealer, or class thereof, whose home country's law or regulations have prohibited the foreign broker-dealer from responding to the Commission's requests for information, documents, testimony, or assistance under paragraph (a)(3)(i)(B).

Several commenters suggested that the Commission not require foreign broker-dealers to comply with the requirements in paragraph (a)(3)(i)(B) to the extent that doing so actually would result in a violation of foreign blocking statutes, secrecy laws, or legal requirements to obtain the consent of foreign customers.[171] The Commission agrees with the commenters that automatic removal of a foreign broker-dealer from the Rule's protections would be inappropriate. Nevertheless, given the importance of the Commission's access to information, documents, testimony, and assistance concerning foreign broker-dealers' exempted activities for the Commission's enforcement of the U.S. securities laws, the Commission believes that foreign broker-dealers should be given strong incentives to use their best efforts to provide requested information, documents, testimony, and assistance to the Commission, including consulting with the foreign securities authority or other appropriate governmental body administering any relevant foreign law or regulations restricting compliance.

---

[167] Release 34-25801, 53 FR at 23654.

[168] *See supra* note 108 and accompanying text regarding U.S. distribution of foreign research; *see infra* notes 178-80 and accompanying text regarding U.S. visits by foreign associated persons. The Rule also includes certain trusts recognized under Rule 501(a)(7), 17 CFR 230.501(a)(7), within the definition of U.S. institutional investor. In addition, when proposing Rule 15a-6, the Commission said that U.S. branches or agencies of foreign banks could not qualify as U.S. institutional investors, because Regulation D treated only domestic banks as accredited investors. *See supra* note 164. Rule 501(a)(1), 17 CFR 230.501(a)(1), refers to banks defined in section 3(a)(2) of the Securities Act, which generally means "any national bank, or any banking institution organized under the laws of any State, Territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official." 15 U.S.C. 77c(a)(2). In Release 33-6661, *supra* note 16, the Commission decided that U.S. branches or agencies of foreign banks subject to an appropriate level of U.S. banking regulation would be deemed "banks" for purposes of section 3(a)(2). A recent staff letter confirmed that U.S. branches and agencies of foreign banks satisfying the standards of Release No. 6661, so that their securities would be exempt from Securities Act registration by virtue of section 3(a)(2), are treated as accredited investors under Rule 501(a)(1). Letter from Richard K. Wulff, Chief, Office of Small Business Policy, Division of Corporation Finance, SEC, to Lawrence R. Uhlick, Esq., Institute of International Bankers (Jan. 4, 1989). Therefore, these U.S. branches and agencies of foreign banks are included in the definition of U.S. institutional investor in the Rule.

[169] *See supra* note 168 regarding U.S. branches and agencies of foreign banks.

[170] New section 3(a)(50) of the Exchange Act, 15 U.S.C. 78c(a)(50), defines this term to mean "any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters." *See* Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 101-704, section 6(a), 102 Stat. 4677, 4681.

[171] Quayle, Union Bank of Switzerland, the Institute of International Bankers, the PSA, the SIA, James Capel, the ABA, Security Pacific, the NYSBA, and Sullivan & Cromwell.

Therefore, the Commission has retained these requirements in paragraph (a)(3), subject to an exception for information, documents, testimony, or assistance that the foreign broker-dealer has used its best efforts to provide, but has been prohibited from making available by foreign laws or regulations.[172] Moreover, the Commission would have the ability under paragraph (c) to remove the exemption for a foreign broker-dealer or class of foreign broker-dealers in circumstances where the Commission believes that its inability to obtain information, documents, testimony, or assistance because of foreign blocking statutes or secrecy laws raises serious investor protection or enforcement concerns. Under paragraph (c), the exemption under paragraph (a)(3) can be withdrawn only prospectively, and only by Commission order after notice and hearing, to which the usual procedural rights would attach.[173] In addition, Commission withdrawal of the exemption is discretionary, not mandatory, and it would be subject to the same review as other Commission orders.[174]

The requirements in paragraph (a)(3)(i)(B) of the Rule apply only to transactions effected under the provisions of paragraph (a)(3). As proposed by the Commission, these requirements would have applied to any transactions of a foreign broker-dealer with a U.S. institutional investor or the registered broker-dealer through which they were effected. The limitation in the Rule was suggested by several commenters.[175] The Commission does not wish to impose unnecessary burdens on foreign broker-dealers seeking to claim this exemption, and the Commission believes that it will be able to obtain the information necessary to carry out its enforcement responsibilities, with respect to a foreign broker-dealer's activities outside the Rule, through cooperation with foreign securities authorities.[176]

Paragraph (a)(3)(ii) of the Rule imposes requirements on foreign associated persons of the foreign broker-dealer. Paragraph (b)(2) of the Rule defines "foreign associated person" to mean any natural person resident outside the United States who is an associated person, as defined in section 3(a)(18) of the Exchange Act,[177] of a foreign broker-dealer, and who participates in the solicitation of a U.S. institutional investor or a major U.S. institutional investor under paragraph (a)(3) of the Rule. The Commission has adopted this definition from paragraph (b)(3) of the proposed rule, with the addition of the phrase "under paragraph (a)(3) of this rule" for clarification.

Paragraph (a)(3)(ii)(A) of the Rule requires foreign associated persons of the foreign broker-dealer effecting transactions with U.S. institutional investors or major U.S. institutional investors to conduct all their securities activities from outside the United States,[178] with one exception. This exception allows a foreign associated person to conduct visits to U.S. institutional investors and major U.S. institutional investors within the United States, provided that the foreign associated person is accompanied on these visits by an associated person of a registered broker-dealer that accepts responsibility [179] for the foreign associated person's communications with these investors, and that transactions in any securities discussed by the foreign associated person are effected only through that registered broker-dealer pursuant to the provisions of paragraph (a)(3), not by the foreign broker-dealer. This exception has been added to the proposed rule in response to several comments that foreign associated persons should be allowed to visit U.S. institutions in this country, to create and sustain business relationships with these investors.[180] The proposed rule prohibited any U.S. activities by foreign associated persons, but the Commission believes that, where a registered broker-dealer is present and acts as an intermediary in the execution of orders, visits to these investors should be permitted.

Paragraph (a)(3)(ii)(B) of the Rule requires that foreign associated persons not be subject to a statutory disqualification specified in section 3(a)(39) of the Exchange Act,[181] or any substantially equivalent foreign (i) expulsion or suspension from membership, (ii) bar or suspension from association, (iii) denial of trading privileges, (iv) order denying, suspending, or revoking registration or barring or suspending association, or (v) finding with respect to causing any such effective foreign suspension, expulsion, or order; not have been convicted of any foreign offense, enjoined from any foreign act, conduct, or practice, or found to have committed any foreign act substantially equivalent to any of those listed in section 15(b)(4) (B), (C), (D), or (E) of the Exchange Act; [182] and not have been found to have made or caused to be made any false foreign statement or omission substantially equivalent to any of those listed in section 3(a)(39)(E) of the Exchange Act.[183] This language is a more complete description of the applicable disciplinary disqualifications cited in paragraph (a)(1)(ii) of the proposed rule and paragraph (b)(2)(ii) of the expanded rule, both of which referred to violations of substantially equivalent foreign statutes or regulations.[184]

Finally, paragraph (a)(3)(iii) of the Rule requires the use of a registered broker-dealer as an intermediary in effecting trades between U.S. institutional investors or major U.S. institutional investors and the foreign broker-dealer as a condition for this exemption. Paragraph (a)(3)(iii)(A) first requires that transactions with these investors be effected through the

---

[172] If the Commission requested testimony of a foreign associated person who no longer was associated with the foreign broker-dealer, or who terminated association with the foreign broker-dealer after the Commission made its request, the Commission would consider the foreign broker-dealer to have complied with the Rule if it then used its best efforts to assist the Commission in taking the evidence of those persons.

[173] *See* 5 U.S.C. 554.

[174] *See* 5 U.S.C. 701–706.

[175] The Bank of America, Quayle, the PSA, the SIA, the ABA, Security Pacific, and Sullivan & Cromwell.

[176] *See* note 170 *supra*.

[177] 15 U.S.C. 78c(a)(18).

[178] Paragraph (b)(6) of the Rule defines the term "United States" to mean the United States of America, including the states and any territories and other areas subject to its jurisdiction. This definition has been adopted from paragraph (c)(6) of the expanded rule, and the term is not defined in the Exchange Act or the rules thereunder. Section 3(a)(16) of the Exchange Act, however, already defines "State" to mean "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States." 15 U.S.C. 78c(a)(16).

[179] The Commission would expect the associated person to be familiar with the foreign broker-dealer's research reports discussed during these visits, to conduct a prior review of any written materials to be distributed during the visits, along with summaries or outlines of the foreign associated person's oral presentation, and to know whether the foreign associated person's statements were consistent with the foreign broker-dealer's current recommendations. In general, the Commission's expectations regarding the responsibility imposed on the registered broker-dealer and discharged through its associated person during these visits would be the same as those regarding the responsibility of a registered broker-dealer in connection with the distribution of research to U.S. institutional investors. *See supra* note 116.

[180] Quayle, the PSA, Chase Manhattan Government Securities, the ABA, the SIA, Security Pacific, the NYSBA, Sullivan & Cromwell, and Merrill Lynch.

[181] 15 U.S.C. 78c(a) (39).

[182] 15 U.S.C. 78o(b)(4) (B), (C), (D), or (E).

[183] 15 U.S.C. 78c(a)(39)(E).

[184] *See* proposed International Securities Enforcement Cooperation Act of 1989, H.R. 1396, 101st Cong., 1st Sess., 135 Cong. Rec. 790 (1989), sections 3 and 4.

registered broker-dealer. This means that the registered broker-dealer must handle all aspects of these transactions except the negotiation of their terms,[185] which may occur between the investors and the foreign broker-dealer (through its foreign associated persons).

Paragraph (a)(3)(iii)(A) requires the registered broker-dealer through which transactions with these investors are effected to be responsible for carrying out specified functions, so as to make the performance of these functions subject to direct Commission oversight. The registered broker-dealer must issue all required confirmations [186] and account statements to the investors. These documents are significant points of contact between the investor and the broker-dealer, and they provide important information. Also, as between the foreign broker-dealer and the registered broker-dealer, the latter is required to extend or arrange for the extension of any credit to these investors in connection with the purchase of securities.[187] In addition, the registered broker-dealer is responsible for maintaining required books and records relating to the transactions conducted under paragraph (a)(3) of the Rule, including those required by Rules 17a–3 and 17a–4,[188] which facilitates Commission supervision and investigation of these transactions.[189] As adopted, the functions required of the registered broker-dealer in paragraph (a)(3)(iii)(A) are taken from the proposed rule, with some exceptions.[190]

Paragraph (a)(4)(iii)(B) of the Rule requires the registered broker-dealer to participate through an associated person in all oral communications between foreign associated persons and U.S. institutional investors. By virtue of this participation, the registered broker-dealer would become responsible for the content of these communications, and the Commission's statements regarding the nature and discharge of similar responsibilities regarding the distribution of research and U.S. visits by foreign associated persons would apply.[191]

The requirement in paragraph (a)(4)(iii)(C) of the Rule for the registered broker-dealer to obtain from the foreign broker-dealer, for each foreign associated person, the information specified in Rule 17a–3(a)(12),[192] including sanctions imposed by foreign securities authorities, exchanges, or associations (including without limitation those described in paragraph (a)(3)(ii)(B) of the Rule), also has been drawn from the proposed rule. In addition, paragraph (a)(3)(iii)(D) of the Rule requires the registered broker-dealer to obtain from the foreign broker-dealer and each foreign associated person written consent to service of process for any civil action brought by or proceeding before the Commission or any SRO, as defined in section 3(a)(26) of the Exchange Act,[193] stating that process may be served on the registered broker-dealer as provided on that broker-dealer's current Form BD. This language follows the text of the proposed rule. Some commenters argued that both the information provision and consent requirements as proposed were overbroad and would restrict use of the Rule,[194] but the Commission does not believe that it is desirable to draw the requirement to consent to service of process more narrowly to relate only to transactions effected in reliance on the Rule's intermediary exemption.

Further, paragraph (a)(3)(iii)(E) of the Rule requires the registered broker-dealer to maintain a written record of the information and consents required by paragraphs (a)(3)(iii) (C) and (D),[195] and all records in connection with trading activities of U.S. institutional investors or major U.S. institutional investors involving the foreign broker-dealer conducted under paragraph (a)(3) of the Rule, in an office of the registered broker-dealer located in the United States (thus, with respect to nonresident U.S. broker-dealers, pursuant to Rule 17a–7(a)) [196] and make these records available to the Commission upon request. This language follows the proposed rule, with the exception of the reference to nonresident registered broker-dealers. One commenter suggested that these broker-dealers should be allowed to serve as intermediary registered broker-dealers under the Rule,[197] and the Commission agrees, as stated above. The Commission attaches considerable importance, however, to preserving its access to records relating to activities conducted under paragraph (a)(3). These records will enable the Commission to carry out its enforcement responsibilities and exercise its supervision over the registered broker-dealer intermediary. This intermediary, therefore, whether resident or nonresident, must maintain all the records called for by the Rule in an office within the territorial limits of the United States.[198]

---

[185] Of course, the rules of foreign securities exchanges and over-the-counter markets may require the foreign broker-dealer, as a member or market maker, to perform the actual physical execution of transactions in foreign securities listed on those exchanges or traded in those markets. The Rule would permit the foreign broker-dealer to perform this function.

[186] *See* Rule 10b–10, 17 CFR 240.10b–10. The confirmation requirements imposed by Rule 10b–10 are a significant antifraud measure.

[187] The extensive U.S. regulation of these functions is intended to protect both U.S. investors and securities markets. *See, e.g.*, sections 7(c) and 11(d) of the Exchange Act, 17 U.S.C. 78g(c) and 78k(d), and the rules and regulations thereunder, *e.g.*, Regulation T, 17 CFR 220.1–220.18, and Rule 11d1–2, 17 CFR 240.11d1–2.

[188] 17 CFR 240.17a–3 and 17a–4. *But see* note 150 *supra* and accompanying text concerning delegation of data processing functions to the foreign broker-dealer.

[189] Of course, because the registered broker-dealer would "book" Rule 15a–6 trades as its own, it would be required to comply with the provisions of Rule 15c3–1, 17 CFR 240.15c3–1, the Commission's net capital rule, with respect to these transactions, and it would be responsible for receiving, delivering, and safeguarding funds and securities on behalf of the investors pursuant to Rule 15c3–3, 17 CFR 240.15c3–3. Merrill Lynch believed that it should be permissible for foreign custodian banks to handle the clearance and settlement of foreign securities transactions by the investors under the Rule. The Commission notes that Rule 15c3–3(c)(4), 17 CFR 240.15c3–3(c)(4), already permits the use of designated foreign control locations deemed satisfactory by the Commission for purposes of compliance with that rule. Sullivan & Cromwell spoke without elaboration of a registered broker-dealer that "introduced" its U.S. customers to a foreign broker-dealer. If this term signified the presence of an introducing-clearing relationship, where the foreign broker-dealer held U.S. customers' funds and securities, registration of the foreign broker-dealer would be required. *See* Part III.B. *supra*.

[190] Like paragraph (b)(3) of the expanded rule, the Rule deletes as unnecessary the express requirement that the registered broker-dealer effect transactions "with or for" the U.S. institutional investor or the major U.S. institutional investor. As explained above, paragraph (a)(4)(i)(A) of the Rule already requires the foreign broker-dealer to effect transactions "through" the registered broker-dealer. The phrase "as between the foreign broker or dealer and the registered broker or dealer" in paragraph (a)(3)(iii)(A)(*3*) concerning extension of credit, found in paragraph (b)(3)(i)(B) of the expanded rule, has been added for clarification.

[191] *See supra* notes 116 and 179. This requirement for "participation" under the Rule would be satisfied if the associated person of the registered broker-dealer was present, either physically or telephonically, during these oral communications, and was able to take part in them as they occurred.

[192] 17 CFR 240.17a–3(a)(12). Rule 17a–3(a) also requires that this information be kept current. 17 CFR 240.17a–3(a).

[193] 15 U.S.C. 78c(a)(26).

[194] The SIA, the ABA, Security Pacific, and Sullivan & Cromwell.

[195] The Commission notes that SROs exercising their authority to inspect their members performing the intermediary function under the Rule should examine the records of the information and the consents required by the Rule. The Commission would encourage these SROs to consider whether it would be more efficient for them to adopt specific rules requiring those members to file these records with the SROs soon after obtaining the required information and consents.

[196] 17 CFR 240.17a–7(a).

[197] Quayle.

[198] Nonresident registered broker-dealers still could maintain other records outside the United

Continued

b. Transactions with Certain Persons. Paragraph (a)(4) of the Rule provides an exemption for a second type of direct contact by broker-dealers. It exempts foreign broker-dealers that effect any transactions in securities with or for, or induce or attempt to induce the purchase or sale of any securities by, the following defined classes of persons.[199]

(1) Registered broker-dealers and banks. Paragraph (a)(4)(i) includes registered brokers or dealers, whether acting as principal for their own account or as agent for others. This exemption was in paragraph (a)(1)(iii) of the expanded rule. Commenters argued that, while the proposed interpretive statement said that a foreign broker-dealer could purchase U.S. securities from a registered broker-dealer for resale to foreign investors without registering with the Commission,[200] it created a misimpression by not also stating that foreign broker-dealers could sell securities to registered broker-dealers without registration[201] In response, the Commission expressly has exempted trades of foreign broker-dealers with registered broker-dealers and with banks acting in a broker or dealer capacity.[202] The Commission notes that the staff has taken no-action positions regarding foreign broker-dealers effecting transactions with or for both registered broker-dealers and banks acting in a broker or dealer capacity as permitted by U.S statutory and regulatory provisions,[203] and it has reflected this position in the Rule.

The Commission does not intend this exemption to permit the foreign broker-dealer to act as a dealer in the United States through an affiliated registered broker-dealer.[204] The Commission recognizes that dealers in foreign markets may transmit securities positions to U.S. broker-dealer affiliates after the foreign markets close, so that the U.S. affiliates can continue trading those securities. If, however, the foreign broker-dealer controlled the registered broker-dealer's day-to-day market making activities by explicit restrictions on the U.S. broker-dealer's ability to execute orders against the foreign broker-dealer's positions or to take independent positions, the foreign broker-dealer could be considered a dealer subject to U.S. broker-dealer registration requirements.[205]

(2) International organizations. Paragraph (a)(4)(ii) of the Rule exempts foreign broker-dealers that deal with certain international organizations, regardless of their location or whether the U.S. jurisdictional means are implicated. They include the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations, and their agencies, affiliates, and pension funds. These are the same international organizations specified in proposed Regulation S,[206] together with their pension funds, as suggested by several commenters.[207]

(3) Foreign persons temporarily present in the United States. Paragraph (a)(4)(iii) of the Rule includes any foreign person temporarily present in the United States, with whom the foreign broker-dealer had a bona fide, pre-existing relationship before the foreign person entered the United States. This paragraph codifies part of the proposed interpretive statement,[208] and is taken from paragraph (a)(1)(v) of the expanded rule, with one exception. The phrase "before the foreign person entered the United States" has been added to clarify the nature of the relationship. The Commission is of the view that a foreign broker-dealer that solicits or engages in securities transactions with or for these persons while they are temporarily present in this country need not register with the Commission.[209]

One commenter asked the Commission to define U.S. residency for purposes of compliance with this and other exemptions in the Rule.[210] The Commission does not believe that it would be appropriate to establish a separate standard of residency for the purpose of claiming this exemption different from those generally established under state or federal law.[211] As stated in Release 34–25801, questions regarding the temporary nature of a person's presence in this country would be fact-specific.[212] The Commission would take the position, however, that a foreign person not otherwise deemed a resident of the United States under applicable law would be presumed to be temporarily present in this country for the purpose of paragraph (a)(3) of the Rule. This presumption, of course, would be subject to rebuttal in light all of the facts and circumstances surrounding that

States, provided that the conditions of Rule 17a–7(b) were met. *See* 17 CFR 240.17a–7(b).

[199] The Division of Investment Management generally would expect to respond favorably to no-action requests regarding registration as an investment adviser from foreign broker-dealers complying with the provisions of paragraph (a)(4) of the Rule. *See supra* notes 123–26 and accompanying text.

[200] Release 34–25801, 53 FR at 23646.

[201] The Institute of International Bankers, the ABA, the SIA, Security Pacific, and Sullivan & Cromwell.

[202] The exemption allows foreign broker-dealers to effect transactions with or for certain banks or registered broker-dealers; direct contact by the foreign broker-dealers with the U.S. customers of the registered broker-dealers or banks, however, would not be covered by this exemption.

[203] Security Pacific Corporation and National Westminster Bank letters, *supra* note 68.

[204] *See* note 205 *infra*.

[205] *See, e.g.*, the Vickers da Costa/Citicorp order, *supra* note 131, which exempted several related foreign broker-dealers from U.S. broker-dealer registration requirements. Because of Glass-Steagall Act restrictions applicable to the U.S. affiliate, *see* 12 U.S.C. 24 and 378, the foreign broker-dealers agreed to provide the U.S. affiliate with standing orders to buy and sell the securities in which the U.S. affiliate previously had acted as a market maker. Thus, the U.S. affiliate's quote in NASDAQ always would reflect a previously entered firm order from the foreign broker-dealers. The U.S. affiliate's activities would be limited to executing, on a riskless principal basis, any orders received from U.S. customers against these orders. This arrangement was approved by the Comptroller of the Currency. Letter from Judith A. Walter, Senior Deputy Comptroller, to Ellis E. Bradford, Vice President, Citibank, N.A. (June 13, 1986).

In its exemptive order, the Commission allowed the foreign broker-dealers to buy and sell simultaneously on a continuing basis through the U.S. affiliate without registering in the United States as broker-dealers. However, the Commission imposed a number of limitations to provide additional regulatory safeguards. The foreign broker-dealers' control over the price and size of their standing orders was limited in order to give the U.S. affiliate some discretion in its trading activities. The U.S. affiliate also agreed to satisfy additional net capital requirements intended to increase its ability to meet its settlement obligations upon failure of the foreign broker-dealers. In addition, the parent of the broker-dealers represented that information regarding the trading activities of the foreign broker-dealers would be made available to the Commission in connection with any investigation, and that it would attempt to obtain customer consent to release of information concerning their trading, if requested. Finally, the parent agreed that it would be designated as the foreign broker-dealers' agent for service of process in any proceeding or other action involving the foreign broker-dealers. The foreign broker-dealers also limited their securities activities in the United States to those enumerated in the letter, and the parent represented that the foreign broker-dealers would not engage in any securities business with U.S. citizens.

[206] Release 33–6779, 53 FR at 22677.

[207] The SIA, the ABA, and Sullivan & Cromwell.

[208] Release 34–25801, 53 FR at 23649. *See also* Security Pacific and National Westminster Bank letters, *supra* note 68.

[209] This position is consistent with the proposal of the American Law Institute that a nonresident broker-dealer that "does business with * * * a non-national of the United States who is present as a nonresident within the United States and was previously a customer or client" should not be subject to U.S. broker-dealer jurisdiction. *ALI Federal Securities Code* § 1905(b)(2)(B) (1980). Professor Loss, the reporter for the Code, uses the example of a "Canadian broker who uses the telephone to service a customer who is vacationing in Florida." *Id.* at Comment 9.

[210] The NYSBA.

[211] *See generally, e.g.*, section 911 of the Internal Revenue Code, 26 U.S.C. 911, which provides certain exclusions from the gross income of U.S. citizens resident abroad.

[212] 53 FR at 23649.

foreign person's presence in the United States.

(4) Foreign agencies or branches of U.S. persons. The proposed rule and the expanded rule both provided an exemption for foreign broker-dealers effecting or soliciting transactions by agencies or branches of U.S. persons, which were located outside the United States and were operated for valid business reasons. The Commission has retained this exemption in the Rule to clarify that foreign broker-dealers that deal outside the United States with branches and agencies having an established location outside the United States do not need to register with the Commission, provided that the transactions occur outside the United States.

Commenters suggested that the presence of a valid business purpose was unnecessary in the broker-dealer context.[213] The Commission agrees. The Rule's exemption for unsolicited trades reflects the view that U.S. persons seeking out unregistered foreign broker-dealers outside the U.S. cannot expect the protection of U.S. broker-dealer standards. The Commission believes that this rationale applies equally to U.S. branches and agencies established overseas that choose to deal with unregistered foreign broker-dealers.[214]

(5) Nonresident U.S. citizens. Finally, paragraph (a)(4)(v) of the Rule includes U.S. citizens resident outside the United States, provided that the foreign broker-dealer does not direct its selling efforts toward identifiable groups of U.S. citizens resident abroad.[215] Like the exemption regarding foreign branches and agencies of U.S. persons, all transactions must occur outside the United States. As discussed above in Part III.B., neither U.S. citizens resident abroad nor foreign broker-dealers normally would expect that the U.S. broker-dealer registration requirements would be triggered by non-U.S. securities transactions between them.

V. Conclusion

The Commission believes that the conditional exemptions in Rule 15a–6 for foreign broker-dealers engaging in certain activities involving U.S. investors and securities markets will reduce the costs and increase the efficiency of international securities transactions as well as facilitate the international flow of information. The differing procedures in the Rule for nondirect and direct contacts by foreign broker-dealers with U.S. investors also will facilitate the access of U.S. investors to foreign securities markets through those foreign broker-dealers and the research that they provide, consistent with the regulatory safeguards afforded by broker-dealer registration. In light of the importance that the Commission attaches to broker-dealer registration and regulation in the international context, the Commission believes that the exemptions in Rule 15a–6 are in the public interest and consistent with the protection of U.S. investors.

VI. Effects on Competition and Regulatory Flexibility Act Certification

Section 23(a)(2) of the Exchange Act[216] requires that the Commission, when adopting rules under the Exchange Act, consider the anticompetitive effects of those rules, if any, and balance any anticompetitive impact against the regulatory benefits gained in terms of furthering the purposes of the Exchange Act. The Commission believes that adoption of the Rule will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, especially since the Rule provides exemptions for eligible foreign broker-dealers from the broker-dealer registration requirements under the Exchange Act.

Pursuant to section 3(b) of the Regulatory Flexibility Act,[217] when the Commission proposed Rule 15a–6 Chairman Ruder certified that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[218] The Commission did not receive any comments on the Chairman's certification.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

VII. Statutory Basis and Text of Amendments

The Commission hereby amends Part 240 of Chapter II of Title 17 of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 is amended by adding the following citation:

Authority: Sec. 23, 48 Stat. 901, as amended (15 U.S.C. 78w) * * * § 240.15a–6, also issued under secs. 3, 10, 15, and 17, 15 U.S.C. 78c, 78j, 78o, and 78q;

* * * * *

2. By adding § 240.15a–6 after the undesignated heading as follows:

Registration of Brokers and Dealers

§ 240.15a–6 Exemption of certain foreign brokers or dealers.

(a) A foreign broker or dealer shall be exempt from the registration requirements of sections 15(a)(1) or 15B(a)(1) of the Act to the extent that the foreign broker or dealer:

(1) Effects transactions in securities with or for persons that have not been solicited by the foreign broker or dealer; or

(2) Furnishes research reports to major U.S. institutional investors, and effects transactions in the securities discussed in the research reports with or for those major U.S. institutional investors, provided that:

(i) The research reports do not recommend the use of the foreign broker or dealer to effect trades in any security;

(ii) The foreign broker or dealer does not initiate contact with those major U.S. institutional investors to follow up on the research reports, and does not otherwise induce or attempt to induce the purchase or sale of any security by those major U.S. institutional investors;

(iii) If the foreign broker or dealer has a relationship with a registered broker or dealer that satisfies the requirements of paragraph (a)(3) of this section, any transactions with the foreign broker or dealer in securities discussed in the research reports are effected only through that registered broker or dealer, pursuant to the provisions of paragraph (a)(3) of this section; and

(iv) The foreign broker or dealer does not provide research to U.S. persons pursuant to any express or implied understanding that those U.S. persons will direct commission income to the foreign broker or dealer; or

(3) Induces or attempts to induce the purchase or sale of any security by a U.S. institutional investor or a major U.S. institutional investor, provided that:

(i) The foreign broker or dealer:

(A) Effects any resulting transactions with or for the U.S. institutional investor or the major U.S. institutional investor through a registered broker or dealer in

---

[213] The SIA, the ABA, and Sullivan & Cromwell.

[214] The Commission has deleted the exemption in the proposed rule that referred to affiliates or subsidiaries of U.S. persons that were located outside this country and organized or incorporated under the laws of any foreign jurisdiction. The Commission has decided that this exemption is unnecessary, since these entities should not properly be regarded as U.S. persons.

[215] *See supra* note 51 and accompanying text.

[216] 15 U.S.C. 78w(a)(2).

[217] 5 U.S.C. 603(b).

[218] Release 34–25801, 53 FR at 23655.

the manner described by paragraph (a)(3)(iii) of this section; and

(B) Provides the Commission (upon request or pursuant to agreements reached between any foreign securities authority, including any foreign government, as specified in section 3(a)(50) of the Act, and the Commission or the U.S. Government) with any information or documents within the possession, custody, or control of the foreign broker or dealer, any testimony of foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the Commission requests and that relates to transactions under paragraph (a)(3) of this section, except that if, after the foreign broker or dealer has exercised its best efforts to provide the information, documents, testimony, or assistance, including requesting the appropriate governmental body and, if legally necessary, its customers (with respect to customer information) to permit the foreign broker or dealer to provide the information, documents, testimony, or assistance to the Commission, the foreign broker or dealer is prohibited from providing this information, documents, testimony, or assistance by applicable foreign law or regulations, then this paragraph (a)(3)(i)(B) shall not apply and the foreign broker or dealer will be subject to paragraph (c) of this section;

(ii) The foreign associated person of the foreign broker or dealer effecting transactions with the U.S. institutional investor or the major U.S. institutional investor:

(A) Conducts all securities activities from outside the U.S., except that the foreign associated persons may conduct visits to U.S. institutional investors and major U.S. institutional investors within the United States, provided that:

(*1*) The foreign associated person is accompanied on these visits by an associated person of a registered broker or dealer that accepts responsibility for the foreign associated person's communications with the U.S. institutional investor or the major U.S institutional investor; and

(*2*) Transactions in any securities discussed during the visit by the foreign associated person are effected only through the registered broker or dealer, pursuant to paragraph (a)(3) of this section; and

(B) Is determined by the registered broker or dealer to:

(*1*) Not be subject to a statutory disqualification specified in section 3(a)(39) of the Act, or any substantially equivalent foreign

(*i*) Expulsion or suspension from membership,

(*ii*) Bar or suspension from association,

(*iii*) Denial of trading privileges,

(*iv*) Order denying, suspending, or revoking registration or barring or suspending association, or

(*v*) Finding with respect to causing any such effective foreign suspension, expulsion, or order;

(*2*) Not to have been convicted of any foreign offense, enjoined from any foreign act, conduct, or practice, or found to have committed any foreign act substantially equivalent to any of those listed in sections 15(b)(4) (B), (C), (D), or (E) of the Act; and

(*3*) Not to have been found to have made or caused to be made any false foreign statement or omission substantially equivalent to any of those listed in section 3(a)(39)(E) of the Act; and

(iii) The registered broker or dealer through which the transaction with the U.S. institutional investor or the major U.S. institutional investor is effected:

(A) Is responsible for:

(*1*) Effecting the transactions conducted under paragraph (a)(3) of this section, other than negotiating their terms;

(*2*) Issuing all required confirmations and statements to the U.S. institutional investor or the major U.S. institutional investor;

(*3*) As between the foreign broker or dealer and the registered broker or dealer, extending or arranging for the extension of any credit to the U.S. institutional investor or the major U.S. institutional investor in connection with the transactions;

(*4*) Maintaining required books and records relating to the transactions, including those required by Rules 17a–3 and 17a–4 under the Act (17 CFR 2410.17a–3 and l7a–4);

(*5*) Complying with Rule 15c3–1 under the Act (17 CFR 240.15c3–1) with respect to the transactions; and

(*6*) Receiving, delivering, and safeguarding funds and securities in connection with the transactions on behalf of the U.S. institutional investor or the major U.S. institutional investor in compliance with Rule 15c3–3 under the Act (17 CFR 240.15c3–3);

(B) Participates through an associated person in all oral communications between the foreign associated person and the U.S. institutional investor, other than a major U.S. institutional investor;

(C) Has obtained from the foreign broker or dealer, with respect to each foreign associated person, the types of information specified in Rule l7a–3(a)(12) under the Act (17 CFR 240.17a–3(a)(12)), provided that the information required by paragraph (a)(12)(d) of that Rule shall include sanctions imposed by foreign securities authorities, exchanges, or associations, including without limitation those described in paragraph (a)(3)(ii)(B) of this section;

(D) Has obtained from the foreign broker or dealer and each foreign associated person written consent to service of process for any civil action brought by or proceeding before the Commission or a self-regulatory organization (as defined in section 3(a)(26) of the Act), providing that process may be served on them by service on the registered broker or dealer in the manner set forth on the registered broker's or dealer's current Form BD; and

(E) Maintains a written record of the information and consents required by paragraphs (a)(3)(iii) (C) and (D) of this section, and all records in connection with trading activities of the U.S. institutional investor or the major U.S. institutional investor involving the foreign broker or dealer conducted under paragraph (a)(3) of this section, in an office of the registered broker or dealer located in the United States (with respect to nonresident registered brokers or dealers, pursuant to Rule 17a–7(a) under the Act (17 CFR 240.17a–7(a))), and makes these records available to the Commission upon request; or

(4) Effects transactions in securities with or for, or induces or attempts to induce the purchase or sale of any security by:

(i) A registered broker or dealer, whether the registered broker or dealer is acting as principal for its own account or as agent for others, or a bank acting in a broker or dealer capacity as permitted by U.S. law;

(ii) The African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations, and their agencies, affiliates, and pension funds;

(iii) A foreign person temporarily present in the United States, with whom the foreign broker or dealer had a bona fide, pre-existing relationship before the foreign person entered the United States;

(iv) Any agency or branch of a U.S. person permanently located outside the United States, provided that the transactions occur outside the United States; or

(v) U.S. citizens resident outside the United States, provided that the transactions occur outside the United States, and that the foreign broker or

dealer does not direct its selling efforts toward identifiable groups of U.S. citizens resident abroad.

(b) When used in this rule,

(1) The term "family of investment companies" shall mean:

(i) Except for insurance company separate accounts, any two or more separately registered investment companies under the Investment Company Act of 1940 that share the same investment adviser or principal underwriter and hold themselves out to investors as related companies for purposes of investment and investor services; and

(ii) With respect to insurance company separate accounts, any two or more separately registered separate accounts under the Investment Company Act of 1940 that share the same investment adviser or principal underwriter and function under operational or accounting or control systems that are substantially similar.

(2) The term "foreign associated person" shall mean any natural person domiciled outside the United States who is an associated person, as defined in section 3(a)(18) of the Act, of the foreign broker or dealer, and who participates in the solicitation of a U.S. institutional investor or a major U.S. institutional investor under paragraph (a)(3) of this section.

(3) The term "foreign broker or dealer" shall mean any non-U.S. resident person (including any U.S. person engaged in business as a broker or dealer entirely outside the United States, except as otherwise permitted by this rule) that is not an office or branch of, or a natural person associated with, a registered broker or dealer, whose securities activities, if conducted in the United States, would be described by the definition of "broker" or "dealer" in sections 3(a)(4) or 3(a)(5) of the Act.

(4) The term "major U.S. institutional investor" shall mean a person that is:

(i) A U.S. institutional investor that has, or has under management, total assets in excess of $100 million; provided, however, that for purposes of determining the total assets of an investment company under this rule, the investment company may include the assets of any family of investment companies of which it is a part; or

(ii) An investment adviser registered with the Commission under section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of $100 million.

(5) The term "registered broker or dealer" shall mean a person that is registered with the Commission under sections 15(b), 15B(a)(2), or 15C(a)(2) of the Act.

(6) The term "United States" shall mean the United States of America, including the States and any territories and other areas subject to its jurisdiction.

(7) The term "U.S. institutional investor" shall mean a person that is:

(i) An investment company registered with the Commission under section 8 of the Investment Company Act of 1940; or

(ii) A bank, savings and loan association, insurance company, business development company, small business investment company, or employee benefit plan defined in Rule 501(a)(1) of Regulation D under the Securities Act of 1933 (17 CFR 230.501(a)(1)); a private business development company defined in Rule 501(a)(2) (17 CFR 230.501(a)(2)); an organization described in section 501(c)(3) of the Internal Revenue Code, as defined in Rule 501(a)(3) (17 CFR 230.501(a)(3)); or a trust defined in Rule 501(a)(7) (17 CFR 230.501(a)(7)).

(c) The Commission, by order after notice and opportunity for hearing, may withdraw the exemption provided in paragraph (a)(3) of this section with respect to the subsequent activities of a foreign broker or dealer or class of foreign brokers or dealers conducted from a foreign country, if the Commission finds that the laws or regulations of that foreign country have prohibited the foreign broker or dealer, or one of a class of foreign brokers or dealers, from providing, in response to a request from the Commission, information or documents within its possession, custody, or control, testimony of foreign associated persons, or assistance in taking the evidence of other persons, wherever located, related to activities exempted by paragraph (a)(3) of this section.

By the Commission.

Jonathan G. Katz,

Secretary.

July 11, 1989.

[FR Doc. 89-16725 Filed 7-17-89; 8:45 am]

BILLING CODE 8010-01-M

UNITED STATES INFORMATION AGENCY

22 CFR Part 514

Exchange-Visitor Program; Extension of Stay—Exchange Visitors From the People's Republic of China

AGENCY: United States Information Agency.

ACTION: Temporary rule.

SUMMARY: This notice amends the regulations found at 22 CFR 514.23, General limitations of stay, to permit the extension of the authorized duration of stay for one year for exchange visitors from the People's Republic of China who entered the United States on or before June 6, 1989, and whose authorized period of stay will expire before June 6, 1990. This action is taken in consonance with the current foreign policy of the United States as evidenced by the White House of June 5.

EFFECTIVE DATES: This temporary rule is effective from June 6, 1989, and shall remain in effect until June 6, 1990.

ADDRESS: Merry Lymn, Assistant General Counsel, Office of the General Counsel, Room 700, United States Information Agency, 301 4th Street SW., Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: Merry Lymn, Assistant General Counsel, Office of the General Counsel, Room 700, United States Information Agency, 301 4th Street SW., Washington, DC 20547, (202) 485-8829.

SUPPLEMENTARY INFORMATION: In furtherance of the foreign policy, the Agency amends the prescribed duration of stay in 22 CFR 514.23 to permit a one-year extension for exchange visitors from the People's Republic of China whose authorized period of stay will expire before June 6, 1990.

This modification of the rule will enable exchange visitors from the People's Republic of China to maintain their current J-visa status by applying to the Immigration and Naturalization Service for an extension. It does not apply to exchange visitors from the People's Republic of China arriving in the United States after June 6, 1989. Changes of category or program objective will not be permitted for exchange visitors whose stay is extended under this rule.

Program sponsors may issue a new IAP-66 form to exchange visitors from the People's Republic of China to permit the one-year extension of the J-1 status in accordance with this temporary rule.

This action is taken without regard to the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553, as it comes within the exception at 5 U.S.C. 553(a)(1), a "foreign affairs function of the United States." Further, because of the immediacy of the problem of exchange visitors from the People's Republic of China whose authorized stay will expire momentarily, notice and public comment thereon are impracticable and unnecessary.

Findings and Conclusions

For the reasons stated above, the Agency finds that the maximum period of stay prescribed in 22 CFR 514.23 for exchange visitors from the People's Republic of China who entered the United States on or before June 6, 1989, and whose authorized stay will expire before June 6, 1990, should be extended for one year.

This decision does not significantly affect the quality of the human environment and is not a major or regulatory action under the Energy Conservation Act of 1975.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation or on the ability of the United States-based enterprises in domestic or export markets.

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. .

Paperwork Reduction Act

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (42 U.S.C. 3501–3520) and have been assigned OMB Control Number 3116–0009.

List of Subjects in 22 CFR Part 514

Cultural Exchange Programs, Reporting and recordkeeping requirements.

Accordingly, 22 CFR Part 514 is amended as follows:

PART 514—[AMENDED]

1. The authority citation for 22 CFR Part 514 continues to read:

Authority: U.S. Information and Educational Exchange Act of 1948, as amended, Pub. L. 80–402, as amended (22 U.S.C. 1431–1442); Mutual Educational and Cultural Exchange Act of 1961, as amended, Pub. L. 87–256, 75 Stat. 527, 534, 535 (8 U.S.C. 1101, 1104, 1182, 1258 and 22 U.S.C. 2451–2460); Pub. L. 97–241, 96 Stat. 1291; 66 Stat. 166, 182, 184, 204 (8 U.S.C. 1101(a)(15)(j), 1182(e), 1182(j), 1258); Pub. L. 91–225, 84 Stat. 116, 117 (8 U.S.C. 1101, 1102); Pub. L. 97–116, 95 Stat. 1611, 1612, 1613 (8 U.S.C. 1101, 1182); Reorg. Plan No. 2 of 1977; E.O. 12048 of March 27, 1978; USIA Delegation Order No. 85–5 (50 FR 27393).

2. Section 514.23 is amended by adding the following sentence to the end of the introductory text of paragraph (a):

§ 514.23 General limitations of stay.

* * * Except that for all exchange visitors from the People's Republic of China who entered the United States on or before June 6, 1989 and whose authorized stay will expire before June 6, 1990, the prescribed period is extended an additional year.

* * * * *

Dated: July 13, 1989.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 89–16856 Filed 7–14–89; 11:15 am]

BILLING CODE 8230–01–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 05–89–50]

Special Local Regulations for Marine Events; Defenders' Day Celebration; Patapsco River, Fort McHenry, Baltimore, MD

AGENCY: Coast Guard, DOT.

ACTION: Notice of implementation of 33 CFR 100.515.

SUMMARY: This notice implements 33 CFR 100.515 for the Defenders' Day Celebration held annually for the past twenty years. The regulations in 33 CFR 100.515 are needed to control vessel traffic in the immediate vicinity of this event. The regulations restrict vessel traffic in the area for the safety of life and property on the navigable waters during the event.

EFFECTIVE DATE: The regulations in 33 CFR 100.515 are effective from 5:30 p.m. to 9:30 p.m., September 10, 1989.

FOR FURTHER INFORMATION CONTACT: Billy J. Stephenson, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004 (804) 398–6204.

SUPPLEMENTARY INFORMATION:

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.

Discussion of Regulations

The Mayor's Office of the City of Baltimore is sponsoring this celebration, which will consist of a fireworks display launched from a barge anchored in the Patapsco River approximately 180 yards south of Fort McHenry Channel Range Front Light. A portion of the river will be closed to waterborne traffic for a brief period during this fireworks display. Traffic should not be severely disrupted.

Date: June 20, 1989.

A.D. Breed,

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

[FR Doc. 89–16720 Filed 7–17–89; 8:45 am]

BILLING CODE 4910–14–M

---

33 CFR Part 100

[CGD 05–89–17]

Special Local Regulations for Marine Events; Defenders' Day Celebration; Patapsco River, Fort McHenry, Baltimore, MD

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: Permanent special local regulations are adopted for the Defenders' Day Celebration held annually on the Patapsco River in the vicinity of Fort McHenry, Baltimore, Maryland. These regulations restrict vessel navigation in the regulated area during the event. Notice of the precise date and times these regulations are effective will be published in the Local Notice to Mariners and by **Federal Register** Notice. These special local regulations are considered necessary to control vessel traffic and to provide for safety of life and property on the navigable waters in the immediate vicinity of this event.

EFFECTIVE DATE: This rule is effective July 18, 1989.

Compliance with these regulations will be required on different dates and times. The Fifth Coast Guard District Commander will publish notices in the Local Notice to Mariners and **Federal Register** announcing the date and times when these regulations are in effect.

FOR FURTHER INFORMATION CONTACT: Billy J. Stephenson, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004, (804) 398–6204.

SUPPLEMENTARY INFORMATION: The Coast Guard published a notice of

proposed rulemaking concerning these regulations in the **Federal Register** on April 12, 1989 (54 FR 14663). Interested persons were requested to submit comments. No comments were received, however an error was discovered in § 100.515(b)(2)(ii). The requirement stated in this paragraph should have been limited to persons on board vessels displaying the Coast Guard ensign, as in § 100.515(b)(2)(i). Several editorial changes also have been made in § 100.515(c).

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.

Discussion of Comments and Final Rule

No comments were received in response to the notice of proposed rulemaking. The area covered is the same as that covered by the special local regulations issued for the Fourth of July Celebration held on July 4, 1988. The Defenders' Day Celebration has been held annually for the past twenty years, but has not been regulated before. The celebration includes a fireworks display launched from a barge anchored in the Patapsco River approximately 180 yards south of Fort McHenry Channel Range Front Light. A portion of the river will be closed to waterbone traffic during the display.

Economic Assessment and Certification

These regulations are not considered to be major under Executive Order 12291 on Federal Regulation nor significant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact is expected to be so minimal that a full regulatory evaluation is unnecessary. Since the impact of this rule is expected to be minimal, the Coast Guard certifies that these regulations 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 final rule does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Impact

This final rule 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 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).

Final Regulations

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

PART 100—[AMENDED]

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

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

2. A new § 100.515 is added to read as follows:

§ 100.515 Patapsco River, Baltimore, Maryland.

(a) *Definitions.* (1) *Regulated area.* The waters of the Patapsco River bounded by the arc of a circle with a radius of 1,000 feet and with its center located at latitude 39°15'44.5" North, longitude 76°34'40.0" West.

(2) *Coast Guard Patrol Commander.* The Coast Guard Patrol Commander is a commissioned, warrant, or petty officer 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 on board a vessel displaying a Coast Guard ensign.

(3) Any spectator vessel may anchor outside the regulated area specified in paragraph (a)(1) of these regulations but may not block a navigable channel.

(c) *Effective Period.* The Commander, Fifth Coast Guard District will publish a Notice in the **Federal Register** and in the Fifth Coast Guard District Local Notice to Mariners announcing the date and times this section is in effect.

Dated: June 20, 1989.

A.D. Breed,

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

[FR Doc. 89-16721 Filed 7-17-89; 8:45 am]

BILLING CODE 4910-14-M

---

33 CFR Part 100

[CGD1 89-026]

Great Kennebec River Whatever Race, Gardiner, ME

AGENCY: Coast Guard; DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing permanent special local regulations for the Great Kennebec River Whatever Race. The event, sponsored each year by the Kennebec Valley Chamber of Commerce, is a marine parade to celebrate the cleanup of the Kennebec River. During the one day event, the regulations will place operating restrictions on watercraft operating on the Kennebec River between Augusta and Gardiner, Maine. Public notice of the exact dates of the regatta will be published each year in a **Federal Register** Notice and in the Coast Guard Local Notice to Mariners.

DATES: These regulations are effective at 6:00 a.m. on July 2, 1989 and terminate at 6:00 p.m. on July 2, 1989 and will be in effect each year thereafter during the same time period on the first Sunday of July or as published in a **Federal Register** Notice and the Coast Guard Local Notice to Mariners.

FOR FURTHER INFORMATION CONTACT: Captain Ronald L. Blake, (617) 223-8310.

SUPPLEMENTARY INFORMATION: On May 5, 1989, the Coast Guard published a notice of proposed rulemaking in the **Federal Register** (54 FR 19410) for this regulation. Interested parties were requested to submit comments and no comments were received. Accordingly, no changes are being made to the regulations as proposed. These regulations are being made effective in less than 30 days from the date of publication as there was not sufficient time in advance of the event to provide for a delayed effective date.

Drafting Information

The drafters of these regulations are Lt. L. Brown, project officer, First Coast Guard District Boating Affairs Branch and Lt. J.B. Gately, project attorney, First Coast Guard District Legal Office.

Discussion of Regulations

The Great Kennebec River Whatever Race is a marine parade sponsored by the Kennebec Valley Chamber of Commerce and is held annually to celebrate the cleanup of the Kennebec River. Approximately 3,000 people and 250 unpowered watercraft of all description are expected to participate along with some 100 spectator craft. The only requirement placed by the sponsor on participants is that all entries be unpowered: traditionally the event attracts a great number of homemade rafts of unique design. The race will start at the U.S. Route 201–202 bridge in Augusta, Maine and finish at the Maine Route 126 bridge connecting Randolph and Gardiner, Maine. The event will be patrolled by the Coast Guard, Coast Guard Auxiliary, state and local law enforcement organizations, and sponsor provided patrol craft. The regulations will serve to restrict the operating speed of vessels in the race area and require race participants (those persons on unregistered and undocumented vessels) to wear Coast Guard approved personal flotation devices.

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 have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Economic Assessment and Certification

These proposed regulations are considered to be nonmajor under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. The event will draw a number of spectators and participants into the area which will aid the local economy. The effective period of regulation is short and the only adverse impact to uninterested and commercial vessels is that navigation on the regulated area (approximately five (5) miles of the river) will be reduced to five (5) mph or "NO WAKE" speed, whichever is less. 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.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (Water).

Regulations

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

PART 100—[AMENDED]

1. The authority citation continues to read as follows:

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

2. A new § 100.108 is added to read as follows:

§ 100.108 Great Kennebec River Whatever Race.

(a) *Regulated Area.* That portion of the Kennebec River, extending bank to bank, between the Maine Route 126 bridge (at latitude 44–14 North, longitude 69–46–15 West connecting Randolph and Gardiner, Maine) to the U.S. Route 201–202 bridge (at latitude 44–18–43 North, longitude 69–46–26 West in Augusta, Maine).

(b) *Special Local Regulations.* The following requirements will be placed on vessels operating within the regulated area during the effective period of regulation:

(1) All persons on board any vessel which does not possess a valid state registration or federal documentation shall at all times wear a Coast Guard approved Type I, II, or III personal flotation device (lifejacket).

(2) Spectator and/or transiting vessels shall not exceed five (5) mph or "NO WAKE" speed, whichever is slower.

(3) All vessels shall exercise extreme caution when operating near parade participants and shall be alert for disabled craft and persons possibly falling overboard.

(4) All vessel operators shall immediately follow any instruction given by Coast Guard patrol personnel.

(5) Coast Guard Auxiliarists will be patrolling the regatta to advise participants, spectators, and transiting vessels of the content of these regulations.

(6) For any violations of this regulation, the following maximum penalties are authorized by law:

(i) $500 for any persons in charge of the navigation of a vessel.

(ii) $500 for the owner of a vessel, if he or she is actually on board.

(iii) $250 for any other person.

(iv) Suspension or revocation of a license for a licensed officer.

(c) *Effective Dates.* These regulations are effective at 6:00 a.m. on July 2, 1989 and terminate at 6:00 p.m. on July 2, 1989 and will be in effect each year thereafter during the same time period on the first Sunday of July or as published in a **Federal Register** Notice and the Coast Guard Local Notice to Mariners.

Dated: June 27, 1989.

R.I. Rybacki,

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

[FR Doc. 89–16722 Filed 7–17–89; 8:45 am]

BILLING CODE 4910–14–M

---

33 CFR Part 100

[CGD1 98–027]

Ray Catena Mercedes Benz Offshore Grand Prix, Manasquan, NJ

AGENCY: Coast Guard, DOT.

ACTION: Final Rule.

SUMMARY: The Coast Guard is establishing permanent special local regulations for the Ray Catena Mercedes Benz Offshore Grand Prix. The event, sponsored each year by the New Jersey Offshore Powerboat Racing Association, is an Indy 500 type power boat race held on the coastal Atlantic waters between Spring Lake, NJ and Seaside Heights, NJ. The regulations will place restrictions on vessels operating in the Manasquan Inlet area during the effective period of regulation. Within the regulated area there will be a race course, a spectator area, and a transiting lane for those vessels wishing to exit Manasquan Inlet. Public notice of the exact dates of the regatta will be published each year in a **Federal Register** Notice and in the Coast Guard Local Notice to Mariners.

DATES: These regulations are effective at 9:00 a.m. on July 11, 1989 and terminate at 3:00 p.m. on July 11, 1989 and will be in effect each year thereafter during the same time period on the second Tuesday of July or as published in a **Federal Register** Notice and the Coast Guard Local Notice to Mariners.

FOR FURTHER INFORMATION CONTACT: Captain Ronald L. Blake, (617) 223–8310.

SUPPLEMENTARY INFORMATION: On 27 April 1989 the Coast Guard published a notice of proposed rulemaking in the **Federal Register** for this regulation. Interested parties were requested to submit comments and no comments were received. Accordingly, no changes are being made to the regulation as proposed. These regulations are being made effective in less than 30 days from the date of publication as there was not sufficient time in advance of the event to provide for a delayed effective date.

Drafting Information: The drafters of this notice are Capt. R.L. Blake, project officer, First Coast Guard District Boating Safety Division, and Lt. J.B. Gately, project attorney, First Coast Guard District Legal Division.

Discussion of Regulations: The Ray Catena Mercedes Benz Offshore Grand Prix is a high speed Indy 500 type power boat race around a rectangular course. The race course is situated on the coastal waters of the Atlantic Ocean extending from Spring Lake, NJ to Seaside Heights, NJ. Sponsor provided patrol craft will mark the spectator area which will be established from Manasquan Inlet northward for one half (½) mile. Vessels exiting Manasquan Inlet and wishing to transit the area will be directed to proceed north along the shore until clear of (north of) the regulated area. No vessels will be allowed to exit Manasquan Inlet in a southerly direction during the effective period of regulation. The regulated area will be patrolled by the U.S. Coast Guard, the Coast Guard Auxiliary, state and local law enforcement agencies, and the sponsor.

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 have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Economic Assessment and Certification: These proposed regulations are considered to be nonmajor under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. The event will draw a number of spectators and participants into the area which will aid the local economy. The effective period of regulation is short and the only adverse impact to uninterested and commercial vessels is that southerly navigation upon exit from Manasquan Inlet will not be allowed. Those vessels will have to endure the minor inconvenience of a northward detour before heading south. 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.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

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

PART 100—[AMENDED]

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

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

2. A new § 100.109 is added to read as follows:

§ 100.109 Ray Catena Mercedes Benz Offshore Grand Prix, Manasquan, NJ.

(a) Regulated Area. The regulated area is the coastal Atlantic waters of New Jersey between the towns of Spring Lake and Seaside Heights. Specifically, the boundaries of the regulated are:

(1) Northerly: An east to west line at latitude 40–10–00 North.

(2) Southerly: An east to west line at latitude 39–55–00 North.

(3) Easterly: A line drawn parallel to, and one and one-half (1½) miles seaward from, the New Jersey coast between the north and south boundaries of the regulated area.

(4) Westerly: The New Jersey shoreline between the north and south boundaries of the regulated area.

(b) Special Local Regulations. The following regulations will be in effect:

(1) The regulated area will be closed to all traffic except participants, patrol craft, and those vessels authorized by the sponsor. The Coast Guard patrol commander may, at his discretion, allow vessels to enter the regulated area between races. Transiting and spectating vessels are exempted from this requirement as follows:

(i) Transiting Vessels. Vessels exiting Manasquan Inlet may transit the regulated area in a northerly direction only: navigation in any other direction is prohibited. Coast Guard patrol vessels will be present to direct transiting vessels to proceed north within one-quarter (¼) mile of the shore until clear of the regulated area in the vicinity of Spring Lake, NJ.

(ii) Spectating Vessels. The spectator fleet will be held behind (west of) a line running parallel to, and one-quarter (¼) mile from, the coast between the tip of the Manasquan Inlet north jetty and a point approximately one-half mile north of the jetty. The sponsor shall provide readily identifiable banners to mark the spectator area. Vessels will not be allowed to observe the race from any other area.

(2) No vessel shall proceed at a speed greater than six (6) knots while in Manasquan Inlet during the effective period of regulation.

(3) Should race participants find themselves within the spectator fleet at any time during the event, they shall immediately reduce speed, come "off plane," and not return to racing speed until clear of spectator vessels.

(4) All persons and vessels shall comply with the instructions of U.S. Coast Guard personnel. Upon hearing five or more blasts from a U.S. Coast Guard vessel, the operator of a vessel shall stop immediately and proceed as directed. U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard. Members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation and other applicable laws.

(5) Any violations of these regulations, by either the sponsor or participants, shall be sufficient grounds for the Coast Guard patrol commander to terminate the event.

(6) For any violations of this regulation, the following maximum penalties are authorized by law:

(i) $500 for any persons in charge of the navigation of a vessel.

(ii) $500 for the owner of a vessel, if the owner is actually onboard.

(iii) $250 for any other person.

(iv) Suspension or revocation of a license for a licensed officer.

(c) Effective Dates. These regulations are effective at 9:00 a.m. on July 11, 1989 and terminate at 3:00 p.m. on July 11, 1989 and will be in effect each year thereafter during the same time period on the second Tuesday of July or as published in a **Federal Register** Notice and the Coast Guard Local Notice to Mariners.

Dated: June 27, 1989.

R.I. Rybacki,

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

[FR Doc. 89–16723 Filed 7–17–89; 8:45 am]

BILLING CODE 4910–14–M

---

33 CFR Part 100

[CGD1 89–058]

Windjammer Days, Boothbay Harbor, ME

AGENCY: Coast Guard, DOT.

ACTION: Final Rule.

SUMMARY: The Coast Guard is establishing permanent special local regulations for the Windjammer Days sail parade. The display of classic schooners, without auxiliary power, is sponsored by the Boothbay Harbor Region Chamber of Commerce. An

aerial demonstration and fireworks will also be part of the celebration. The regulations will be in effect from July 11 to 12, 1989 and will place operating restrictions on watercraft operating in the vicinity of the parading sail vessels, fireworks, and an aerial display. The regulations are constructed such that free navigation is restricted only while each of the events is taking place. These regulations are needed to provide for the safety of life on the navigable waters of the United States.

DATES: These regulations are effective at 2:00 p.m. on July 11, 1989 and terminate at 10:00 p.m. on July 12, 1989 and will be in effect each year thereafter during the same time period commencing on the second Tuesday of July or as published in a **Federal Register** Notice and the Coast Guard Local Notice to Mariners.

FOR FURTHER INFORMATION CONTACT: Captain Ronald L. Blake, (617) 223–8310.

SUPPLEMENTARY INFORMATION: On May 22, 1989 the Coast Guard published a notice of proposed rulemaking in the **Federal Register** (54 FR 21982) for this regulation. Interested parties were requested to submit comments and no comments were received. Accordingly, no changes are being made to the regulation as proposed. These regulations are being made effective in less than 30 days from the date of publication as there was not sufficient time in advance of the event to provide for a delayed effective date.

Drafting Information: The drafters of this notice are Capt. R.L. Blake, project officer, First Coast Guard District Boating Safety Division, and Lt. J.B. Gately, project attorney, First Coast Guard District Legal Division.

Discussion of Regulations: The Windjammer Days is a sail parade of classic schooners which are restricted in their ability to maneuver since none of the yachts are equipped with auxiliary power. The vessels will be parading under sail from the Tumbler Island area to the Boothbay Inner Harbor. The regulations will require all vessels to maintain a separation of 100 yards or more from the parading vessels to ensure that parade participants have ample maneuvering room. The 100 yard stand-off area will move with the parading vessels; once the last sailing vessel has passed, spectating and transiting vessels will be allowed unrestricted navigational freedom. In conjunction with the parade, there will be aircraft acrobatic stunts and fireworks and no vessels will be permitted to enter the waters under the aerial display or around the fireworks barge.

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 have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Economic Assessment and Certification: These proposed regulations are considered to be nonmajor under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. The event will draw a number of spectators and participants into the area which will aid the local economy. Navigation will be restricted intermittently within the regulated area during the effective period of regulation and all vessels, commercial and recreational, will have access to all portions of Boothbay Harbor and the Atlantic Ocean with minimal inconvenience and little delay. 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.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

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

PART 100—[AMENDED]

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

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

2. A new section 100.107 is added to read as follows:

§ 100.107 Windjammer Days, Boothbay Harbor, Maine

(a) Regulated Area. The Boothbay Harbor entrance and harbor channel extending from the Tumbler's Island Buoy #8 area to Boothbay Inner Harbor. Specifically, the regulated area is enclosed as follows: a line drawn due east from the southwest (43–50–10 North; 069–38–20 West to the Spruce Point Shore; thence following the shore north along Spruce Point and around the Boothbay Harbor to Railway Point (43–50–54 North; 069–38–20 West); thence extending seaward in a southerly direction back to the southwest boundary of the regulated area.

(b) Special Local Regulations.

(1) Between the hours of 2:30 p.m. and 4:00 p.m. on July 11, 1989 an aircraft aerobatic demonstration will take place in the southern portion of the regulated area. All transiting and spectating vessels shall remain clear of the waters below the flight area. Coast Guard vessels will be present to direct marine traffic and to establish exact spectator boundaries.

(2) When operating within the regulated area during the sail parade, all vessels with the exception of official regatta patrol vessels, shall maintain a separation of at least 100 yards from the parade participants. The 100 yard area will move with each vessel in the parade as they transit to Boothbay Inner Harbor.

(3) Between the hours of 8:00 p.m. and 10:30 p.m. on July 12, 1989, a fireworks barge will be anchored southwest of McFarland Island in approximate location 43–50–35 North; 38–30–00 West. All vessels must maintain a clearance of 300 yards from the barge or as directed by Coast Guard patrol vessels.

(4) All vessels shall exercise extreme caution when operating in the regulated area.

(5) Coast Guard Auxiliarists will be patrolling the regatta to advise participants, spectators, and transiting vessels the content of these regulations.

(c) Effective Dates. These regulations become effective at 2:00 p.m. on July 11, 1989 and terminate at 10:00 p.m. on July 12, 1989 and will be in effect each year thereafter during the same time period commencing on the second Tuesday of July or as published in a **Federal Register** Notice and the Coast Guard Local Notice to Mariners.

Dated: June 27, 1989.

R.I. Rybacki,

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

[FR Doc. 89–16724 Filed 7–17–89; 8:45 am]

BILLING CODE 4910–14–M

---

33 CFR Part 117

[CGD 5–89–43]

Drawbridge Operation Regulations: Elizabeth River-Eastern Branch, Norfolk, VA

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This amendment revokes the regulations for the Campostella (U.S. 460) drawbridge across the Eastern

Branch of the Elizabeth River, mile 1.8, at Norfolk, because the bascule bridge has been removed. A notice of proposed rulemaking has not been issued for this regulation because removal of the bridge eliminates all need for regulation.

EFFECTIVE DATE: August 17, 1989.

FOR FURTHER INFORMATION CONTACT: Ann B. Deaton, Bridge Administrator, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704, (804) 398–6222.

SUPPLEMENTARY INFORMATION:

Drafting Information

The drafters of this notice are Linda L. Gilliam, Project Officer, and LCDR Robin K. Kutz, Project Attorney.

This action has no economic consequences. It merely revokes regulations for a bascule bridge that no longer exists. Consequently, this action is not considered major under Executive Order 12291 on Federal Regulation nor significant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). Since there is no economic impact, a full regulatory evaluation is unnecessary. Because no notice of proposed rulemaking is required under 5 U.S.C. 553, this action is exempt from the Regulatory Flexibility Act (5 U.S.C. 605(b)). Nevertheless, the Coast Guard certifies that this action will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

In consideration of the foregoing, Part 117 of Title 33, Code of Federal Regulations is amended to read as follows:

PART 117—DRAWBRIDGE 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).

§ 117.1007 [Amended]

2. In § 117.1007, paragraph (a) is removed and paragraphs (b) and (c) are redesignated as paragraphs (a) and (b) respectively.

Dated: July 3, 1989.

P.A. Welling,

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

[FR Doc. 89–16719 Filed 7–17–89; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF EDUCATION

34 CFR Part 222

RIN 1810–AA52

Assistance for Local Educational Agencies in Areas Affected by Federal Activities and Arrangements for Education of Children Where Local Educational Agencies Cannot Provide Suitable Free Public Education

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the Impact Aid maintenance and operations program (Pub. L. 81–874). These amendments are needed to implement changes in eligibility determinations for certain local educational agencies (LEAs) that apply for assistance under section 2 of this program, and to make technical amendments to existing regulations governing the Impact Aid program.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**. The changes made by these regulations will affect Impact Aid payments beginning with payments made from the fiscal year 1989 appropriations.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Hansen, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue SW., Room 2107, Washington, DC 20202–6272. Telephone: (202) 732–3637.

SUPPLEMENTARY INFORMATION: On February 24, 1988, the Secretary published a notice of proposed rulemaking (NPRM) for the Impact Aid program in the **Federal Register** (53 FR 5565). The NPRM was published contemporaneously with new final regulations governing the Impact Aid maintenance and operations assistance program (53 FR 5552). Those final regulations were preceded by an NPRM published in the **Federal Register** on May 1, 1987, 52 FR 16144 (May 1 NPRM).

The May 1 NPRM contained a provision in § 222.102(b)(1) stating that an LEA that was formed by the consolidation of school districts could establish eligibility under section 2 of Pub. L. 81–874, 20 U.S.C. 237 (section 2), on the basis of a former school district only if that former district contained some section 2-eligible Federal property at the time of consolidation. The basis for this requirement is the legislative history of the statute, which indicates that one of the purposes for allowing LEAs formed by the consolidation of school districts to qualify for section 2 eligibility and entitlement on the basis of former school districts is to avoid discouraging consolidation. If a former school district had no Federal property before consolidation, little—if any—disincentive is created by requiring the consolidated district to qualify as a whole.

The May 1 NPRM did not indicate that this requirement was a change from current policy. However, the Department subsequently discovered that the requirement would be a change from a practice under which some applicants were granted eligibility on the basis of a former school district that did not contain section 2-eligible Federal property at the time of consolidation but in which Federal property was acquired after consolidation. Therefore, although not required to do so as a matter of law, the Secretary republished this provision as a part of the February 24, 1988, NPRM to provide further opportunity for public comment.

There are no differences between this provision as published in the NPRM and these final regulations. Because the provision was also published erroneously as a final regulation on February 24, 1988 (53 FR 5552, 5558), it is not republished here.

The Secretary has determined not to issue as a final regulation the additional provision published in the February 24, 1988, NPRM that proposed the use of a proximity standard in selecting comparable properties to establish an estimated current assessed value for Federal property under section 2. The Department has since determined that such a standard would be difficult to apply and could unduly restrict the program in its selection of the properties most comparable to the Federal property.

These final regulations also make certain technical amendments to the existing section 2 regulations published in final on February 24, 1988, and to the regulations implementing changes made to Pub. L. 81–874 by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100–297, which were published in the **Federal Register** on October 4, 1988 (53 FR 39019).

Public Comment

In the NPRM, the Secretary invited comments on the proposed regulations.

The Secretary did not receive any comments. The Secretary has made no changes in the provision regarding consolidated districts, which is made final in these regulations.

Waiver of Proposed Rulemaking

In accordance with section 431(b)(2)(A) of the General Education Provisions Act [20 U.S.C. 1232(b)(2)(A)], and the Administrative Procedure Act, 5 U.S.C. 533, it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. Because the changes made in these regulations since publication of the NPRM are merely minor editorial and technical revisions, however, public comment could have no effect. Therefore, the Secretary has determined that publication of a proposed rule for these amendments is unnecessary and contrary to the public interest under 5 U.S.C. 553(b)(B).

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order (EO) 12291. They are not classified as major because they do not meet the criteria for major regulations established in that order.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

List of Subjects in 34 CFR Part 222

Education, Education of the handicapped, Elementary and secondary education, Federally affected areas, Grant program—education, Public housing.

Dated: July 6, 1989.

(Catalog of Federal Domestic Assistance No. 84-041, School Assistance in Federally Affected Areas—Maintenance and Operations)

Lauro F. Cavazos,

Secretary of Education.

The Secretary amends Part 222 of Title 34 of the Code of Federal Regulations as follows:

PART 222—ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES AND ARRANGEMENTS FOR EDUCATION OF CHILDREN WHERE LOCAL EDUCATIONAL AGENCIES CANNOT PROVIDE SUITABLE FREE PUBLIC EDUCATION

1. The authority citation for Part 222 continues to read as follows:

Authority: 20 U.S.C. 236–241–1 and 242–244, unless otherwise noted.

§ 222.3 [Amended]

2. In § 222.3, the definition of "Applicant" is amended by removing the comma at the end of the sentence, and the definition of "Current Expenditures" is amended by removing the parenthetical "[20 U.S.C. 3801–3876)", and adding, in its place, "[20 U.S.C. 2701–2976)".

§ 222.99 [Amended]

3. Section 222.99(b)(3)(ii)(B) is amended by removing the word "total" in both places that it appears in the phrase "total assessed value of real property in the same tax classification as the Federal property and the total assessed value of all real property * * *", and adding, in its place, the word "average".

[FR Doc. 89–16772 Filed 7–17–89; 8:45 am]

BILLING CODE 4000–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–3617–2]

Approval of the District of Columbia's Stack Height Declarations; EPA Docket No. AM018DC

AGENCY: Environmental Protection Agency (EPA).

ACTION: Approval of SIP declaration.

SUMMARY: EPA is approving a declaration by the District of Columbia that the recent revisions to EPA's stack height regulations do not require revisions to any emission limitations in the State Implementation Plan (SIP). The intent of this action is to formally document that the District has satisfied part of its obligation under Section 406 of the Clean Air Act (CAA). This action announces the results of the District's review of all existing potential sources. The remaining obligations under Section 406 are covered by another notice.

EFFECTIVE DATE: August 17, 1989.

ADDRESSES: Copies of the submittal are available for public inspection during normal business hours at the following locations.

U.S. Environmental Protection Agency, Region III, Air Management Division, 841 Chestnut Building, Philadelphia, PA 19107, ATTN: Ed Cobbs (3AM13).

Dr. Joseph K. Nwude, Chief, Air Quality, Control Branch, Environmental Control Division, 5010 Overlook Ave., SW., Washington, DC 20032.

FOR FURTHER INFORMATION CONTACT: Mr. Denis Lohman at the EPA Region III address above or call (215) 597–8375.

SUPPLEMENTARY INFORMATION: On November 18, 1987, (52 FR 44151), EPA published a Notice of Proposed Rulemaking (NPR) for the District of Columbia. The NPR documented the District's review of sources that were potentially affected by the revised Federal stack height regulations. The District concluded that none of the sources were affected by the amended regulations. A detailed District analysis was provided in the NPR and will not be restated here.

The EPA's stack height regulations were challenged in *NRDC* v. *Thomas*, 838 F.2d 1224 (D.C. Cir. 1988). On January 22, 1988, the U.S. Court of Appeals for the DC Circuit issued its decision affirming the regulations in large part, but remanding three provisions to the EPA for reconsideration.

These are:

1. Grandfathering pre-October 11, 1983 within-formula stack height increases from demonstration requirements (40 CFR 51.100(kk)(2));

2. Dispersion credit for sources originally designed and constructed with merged or multiflue stacks (40 CFR 51.100(hh)(2)(ii)(A)); and

3. Grandfather pre-1979 use of the refined H+1.5L formula (40 CFR 51.100 (ii)(2)).

EPA has examined the District's review of sources and determined that none of the sources are affected by any of the remanded issues.

Conclusion: As discussed in the summary, the District has satisfied part of its obligation under section 406 of the CAA, by reviewing sources to determine compliance with the July 8, 1985, GEP stack height regulation. The District has also addressed its obligations under Section 406 to adopt and submit State Implementation Plan revisions for complying with 40 CFR 51.116 and 51.164. The District's regulations intended to review sources constructed, reconstructed or modified subsequent to December 31, 1970 are covered in another Notice.

EPA has reviewed the District's submission and finds that the documentation adequately supports its position. Therefore, EPA is approving the District's declaration that no revisions to emission limitations for existing sources are required under EPA's final stack height regulations or the terms of the District's SIP adopting these stack height regulations.

The Office of Management and Budget has exempted this action 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 September 15, 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, Sulfur dioxide, Reporting and recordkeeping requirements.

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

Date: June 26, 1989.

Edwin B. Erickson,

Regional Administrator.

[FR Doc. 89-16682 Filed 7-17-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 2

[DA 89-722]

Amendment of Part 2 of the Commission's Rules to Revise Footnotes G27 and G30 as Requested by the National Telecommunications and Information Administration

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: By this action the Commission is amending § 2.106, 47 CFR Part 2 by revising Government footnotes G27 and G30. This revision will better reflect the intent and practice of limiting the fixed and mobile services in the 225.0-328.6 and 335.4-399.9 MHz bands to the military services. Non-Government entities are not affected by the revised footnotes.

EFFECTIVE DATE: July 18, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Damon C. Ladson, Frequency Allocations Branch, Office of Engineering and Technology, (202) 653-8106.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, DA 89-722, adopted June 19, 1989, and released July 7, 1989.

The full text of the Commission decisions are available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, Northwest, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, Northwest, Suite 140, Washington, DC 20037.

Summary Of Order

List of Subjects Affected in 47 CFR Part 2

Radio.

1. At the request of the National Telecommunications and Information Administration, the Commission is amending § 2.106, 47 CFR Part 2, by revising Government footnotes G27 and G30 to better reflect the intent and practice of limiting the fixed and mobil services in the 225.0-328.6 and 335.4-399.9 MHz bands to the military services. The affected bands are exclusive Government allocations for fixed and mobile services. There are no non-Government entities affected by the revised footnotes.

Federal Communications Commission.

Thomas P. Stanley,

Chief Engineer.

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

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

Authority: Secs. 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by removing footnote G30 and adding footnote G27 to column 4 for the 225-328.6 and 335.4-399.9 MHz bands and substituting the amended text for footnotes G27 and G30 to the list of footnotes at the end of the table as follows:

§ 2.106 Table of frequency allocations.

United States Table Government Allocation (MHz) (4)
* * * * *
225.0-328.6 FIXED. MOBILE. 501 592 642 644 G27 G100
* * * * *
335.4-399.9 FIXED. MOBILE. G27 G100
* * * * *

Government (G) Footnotes

* * * * *

G27—In the bands 225-328.6, 335.4-399.9, and 1350-1400 MHz, the fixed and mobile services are limited to the military services.

* * * * *

G30—In the bands 138-144, 148-149.9, 150.05-150.8, 1427-1429, and 1429-1435 MHz, the fixed and mobile services are limited primarily to operations by the military services.

* * * * *

[FR Doc. 89-16471 Filed 7-17-89; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-575; RM-6405]

Radio Broadcasting Services; Englewood, OH

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of LC Communications, allots Channel 233A to Englewood, Ohio, as the community's first local FM service. Channel 233A can be allotted to Englewood in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.6 kilometers (2.2 miles) north to avoid a short-spacing to Stations WLAP-FM, Channel 233C1, Lexington, Kentucky, and WOFX, Channel 235B, Fairfield, Ohio. The coordinates for this allotment are North Latitude 39-54-34 and West Longitude 84-17-37. Canadian concurrence has been received since Englewood is located within 320 kilometers of the U.S.-Canadian border. With this action, this proceeding is terminated.

DATES: Effective August 28, 1989. The window period for filing applications will open on August 29, 1989, and close on September 28, 1989.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 88-575, adopted June 26, 1989, and released July 12, 1989. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230),

1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

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

PART 73—[AMENDED]

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

§ 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments is amended by adding the following entry, Englewood, Ohio, Channel 233A.

Federal Communications Commission.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89–16712 Filed 7–17–89; 8:45 am]

BILLING CODE 6712–01–M

---

47 CFR Part 73

[MM Docket No. 88–541; RM–6472]

Radio Broadcasting Services; Grinnell, IA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Blair Broadcasting Corporation, substitutes Channel 294C2 for Channel 294A at Grinnell, Iowa, and modifies its construction permit for Station KICL–FM to specify operation on the higher powered channel. Channel 294C2 can be allotted to Grinnell with a site restriction of 8.1 kilometers (5.1 miles) northeast to avoid a short-spacing to the Channel 295C2 allotment at Osceola, Iowa, and the outstanding construction permit of Station KJJC for the Osceola allotment. The coordinates for this allotment are North Latitude 41–47–59 and West Longtide 92–39–29. With this action, this proceeding is terminated.

EFFECTIVE DATE: August 28, 1989.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 88–541, adopted June 21, 1989, and released July 12, 1989. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments, is amended for Grinnell, Iowa, by adding Channel 294C2 and removing Channel 294A.

Federal Communications Commission.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89–16711 Filed 7–17–89; 8:45 am]

BILLING CODE 6712–01–M

---

47 CFR Part 73

[MM Docket No. 88–369; RM–6282, RM–6453, RM–6580]

Radio Broadcasting Services; Mt. Morris and Savanna, Illinois, Belle Plaine, Maquoketa, Webster City, and Winterset, IA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: At the request of Carroll County Communications, Inc., *See* 53 FR 29927, August 9, 1988, this document substitutes Channel 262B1 for Channel 261A at Savanna, Illinois, modifies its license for Station WCCI(FM) to specify operation on the higher powered channel, substitutes Channel 239A for Channel 263A at Mt. Morris, Illinois, and modifies accordingly the construction permit (BPH–870819NE) of Mason Broadcasting Company for Station WRMA(FM). In addition, the Commission substitutes Channel 239C2 for Channel 240A at Webster City, Iowa, and modifies its license for Station KQWC(FM) to specify operation on the higher powered channel, substitutes Channel 238A for Channel 239A at Belle Plaine, Iowa, and substitutes Channel 258A for Channel 239A at Winterset, Iowa. Channel 262B1 can be allotted to Savanna, Illinois, with a site restriction 4.8 kilometers (3 miles) west of the city to meet spacing requirements to Station WLOO(FM), Channel 262B, Chicago, Illinois. Channel 239A can be allotted to Mt. Morris at Mason's construction permit site in compliance with the minimum distance separation requirements. The coordinates for Savanna at the restricted site are North Latitude 42–07–49 and West Longitude 90–09–05. The coordinates for Mt. Morris are North Latitude 42–04–14 and West Longitude 89–27–04. Channel 239C2 can be allotted to Webster City, Iowa, in compliance with the minimum distance separation requirements with a site restriction of 4.7 kilometers (2.9 miles) west to avoid a short-spacing to Station KIFG, Channel 237A, Iowa Falls, Iowa. Channel 238A can be allotted to Belle Plaine in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.3 kilometers (1.4 miles) east to avoid a short spacing to Station KGGO, Channel 235C, Des Moines, Iowa. Channel 258A can be allotted to Winterset in compliance with the Commission's minimum distance separation requirement. The coordinates for Channel 239C2 at Webster City are North Latitude 42–27–20 and West Longitude 93–52–35. The coordinates for Channel 238A at Belle Plaine are North Latitude 41–54–15 and West Longitude 92–15–02. The coordinates for Channel 258A at Winterset are North Latitude 41–19–54 and West Longitude 94–00–54. In addition, the petition filed by Maquoketa Broadcasting Co., is denied. With this action, this proceeding is terminated.

EFFECTIVE DATE: August 28, 1989.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 88–369, adopted June 18, 1989, and released July 12, 1989. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended in the entry for Savanna, Illinois, by removing Channel 261A and adding Channel 262B1, in the entry for Mt. Morris, Illinois, by removing Channel 263A and adding Channel 239A, in the entry for Webster City, Iowa, by removing Channel 240A and adding Channel 239C2, in the entry for Belle Plaine, Iowa, by removing Channel 239A and adding Channel 238A, and in the entry for Winterset, Iowa, by removing Channel 239A and adding Channel 258A.

Karl A. Kensinger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 89-16713 Filed 7-17-89; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 74

[DA 89-756]

Editorial Amendments to the Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Order amends 47 CFR 74.502 and 74.561 regarding radio frequencies to correct minor errors in that text.

EFFECTIVE DATE: July 18, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rita McDonald, Policy and Rules Division, Mass Media Bureau (202) 254-3394.

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 74

Radio broadcasting.

Oversight of the Commission's Rules; Order

Adopted: June 30, 1989.

Released: July 12, 1989.

By the Chief, Mass Media Bureau:

1. By this Order, the Commission amends its Rules to correct oversights that occurred as a result of previous amendments made to Part 74 relating to aural broadcast auxiliary station rules. In the *Second Report and Order in Gen. Docket 82-334*, 50 FR 48599 (Nov. 26, 1985), the Commission amended, inter alia, § 74.561 relating to frequency tolerances for transmitters using bands 17.7-19.7 GHz and 31.0 to 31.3 GHz, and § 74.502 concerning frequency bands. In doing so, a footnote was inadvertently deleted from § 74.502. Additionally, the text of paragraph (a) in § 74.561, which specified the frequency tolerance applicable to the use of other bands for aural broadcast STL and intercity relay stations, was incorrectly deleted and paragraph (a) reserved. (Subsequently, in *Report and Order in MM Docket No. 85-36*, 102 FCC 2d 940 (1985), the designation of paragraph (a) in § 74.561 as reserved was removed). This Order amends the rules by reinserting the deleted footnote from § 74.502 and by specifying a frequency tolerance of 0.005 percent which previously appeared in § 74.561 of the rules for the frequency band 944-952 MHz. It also makes several editorial amendments to § 74.561, such as expressing the frequency band in MHz as opposed to GHz.

2. Because this Order corrects errors which currently appear in the Rules and thus is not intended to make any substantive changes which impose additional burdens or remove provisions relied upon by licensees or the public, we conclude for the reasons set forth above, that this revision will serve the public interest. Because it raises no issue upon which comment would serve a useful purpose, we conclude that compliance with the notice, comment, and effective date provisions, generally applicable to rule makings under the Administrative Procedure Act, as well as the requirements of the Regulatory Flexibility Act, is unnecessary here.

3. This amendment is implemented by authority delegated by the Commission to the Chief, Mass Media Bureau, under §§ 0.61 and 0.283 of the Commission's Rules.

4. Accordingly, *It is ordered*, That pursuant to §§ 4, 5, and 303 of the Communications Act of 1934, as amended, and §§ 0.61 and 0.283 of the Commission's Rules, §§ 74.502 and 74.561 of the FCC Rules and Regulations are hereby amended as set forth below, effective upon publication in the **Federal Register**.

5. For further information on this *Order*, contact Rita S. McDonald, (202) 632-5414, Mass Media Bureau.

Federal Communications Commission.

Alex D. Felker,

Chief, Mass Media Bureau.

Amendatory Text

47 CFR Part 74 is amended as follows:

PART 74—[AMENDED]

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

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

2. Paragraph (a) of § 74.502 is amended by adding a footnote designator 1 after "944-952 MHz" and a footnote 1 to read as follows:

§ 74.502 Frequency assignment.

(a) * * *

Note: In addition to this band, stations in Puerto Rico may continue to be authorized on 942.5, 943.0, 943.5, 944.0 MHz in the band 942-944 MHz on a primary basis to stations and services operating in accordance with the Table of Frequency Allocations.

* * * * *

3. Section 74.561 is revised to read as follows:

§ 74.561 Frequency tolerance.

In the bands above 944 MHz, the operating frequency of the transmitter shall be maintained in accordance with the following table:

Frequency band (MHz)	Tolerance as percentage of assigned frequency
944 to 952	0.005
17,700 to 19,700	0.003
31,000 to 31,300	0.03

[FR Doc. 89-16714 Filed 7-17-89; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF VETERANS AFFAIRS

48 CFR Parts 809, 810, 814, 816, 828, 852, and 870

RIN: 2900-AE04

Acquisition Regulation: Packaging Requirements; Estimated Quantities

AGENCY: Department of Veterans Affairs.

ACTION: Final Regulations.

SUMMARY: The Veterans Administration (VA) is amending the Veterans Affairs Acquisition Regulation (VAAR) to clarify VA's right to repackage shipments at the contractor's cost should noncompliance with packaging requirements occur, and to allow contractors to bid for the National Cemetery System's annual monument requirements at less than 75 percent of the annual estimated quantity. These amendments will enhance competition and increase supply sources which should lower costs. This regulation also contains certain technical amendments to correct erroneous references, reflect new organizational titles and Department of Veterans Affairs

nomenclature, correct erroneous terminology, and delete duplicative coverage already provided for in the Federal Acquisition Regulation (FAR).

EFFECTIVE DATE: July 7, 1989.

FOR FURTHER INFORMATION CONTACT: Mildred C. Shields, Acquisition Policy Staff (93), Office of Acquisition and Materiel Management, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233–3784.

SUPPLEMENTARY INFORMATION: The VA is revising two clauses in VAAR 852.210–76 and 852.216–70.

The clause at 852.210–76 is revised to clarify VA's right to either reject or repackage shipments that do not comply with specified packaging requirements and charge the contractor for the actual cost of the repackaging.

A new paragraph is added to the estimated quantities clause at 852.216–70 to allow bids from contractors for less than 75 percent of the National Cemetery System's annual requirements for monuments.

On June 27, 1988, there was published in the **Federal Register** a notice of proposed rulemaking (53 FR 24106). One comment was received about VA's rights to repackage shipments at the contractor's cost. The commenter believed that the proposed regulation would be overturned and declared illegal by any court because "the contractor has the right to receive a default notice and be given an opportunity to cure any problem." The contractor referred to the Uniform Commercial Code, which does not apply to Federal contracts. The clause found at 852.210–76, Noncompliance with Packaging, Packing, and/or Marking Requirements, reserves VA's right to repackage shipments and charge the contractor the actual cost. However, the contractor has the right, under the Contract Disputes Act of 1978 (41 U.S.C. 601–613), to submit a claim. The act establishes procedures and requirements for asserting and resolving claims by or against contractors arising under or relating to a contract subject to the act. The default clause would not apply to the situation referenced by the commentor. Therefore, the proposed regulation is adopted as final without change.

Executive Order 12291

Pursuant to the memorandum from the Director, Office of Management and Budget, to the Administrator, Office of Information and Regulatory Affairs, dated December 13, 1984, this final rule is exempt from sections 3 and 4 of Executive Order 12291.

Regulatory Flexibility Act (RFA)

Because this proposed regulation does not come within the term "rule" as defined in the RFA (5 U.S.C. 601(2)), it is not subject to the requirements of that act. In any case, this change will not have a significant impact on a substantial number of small entities because the provisions are primarily clarifications of existing procedures which will not significantly impact the private sector.

Paperwork Reduction Act

This proposed regulation requires no additional information collection or recordkeeping requirement upon the public.

List of Subjects in 48 CFR Parts 809, 814, 816, 828, 852 and 870

Government procurement.

Approved: July 7, 1989

Edward J. Derwinski,

Secretary.

48 CFR Parts 809, 810, 814, 816, 828, 852 and 870 are amended as follows:

PARTS 809, 810, 814, 816, 828, 852, 870—[AMENDED]

1. The authority citation for Parts 809, 810, 814, 816, 828, 852 and 870 continues to read as follows:

Authority: 38 U.S.C. 210 and 40 U.S.C. 486(c).

809.206, 809.270, 809.404, 809.405,. 810.007, 814.406, 816.7001, 828.7101, 852.233–2, 870.112 [Amended]

2. a. In sections 809.206, 809.405, 810.006, 810.007, 814.406, 816.7001, 828.7101, 852.233–2, and 870.112 remove the words "Director, Office of Procurement and Supply" wherever they appear, and insert in their place, the words "Deputy Assistant Secretary for Acquisition and Materiel Management".

b. In sections 809.206, 809.270, 809.404, 809.405, and 816.7001, remove the words "Office of Procurement and Supply" wherever they appear, and insert in their place, the words "Office of Acquisition and Materiel Management".

809.106–1 [Amended]

3. In 809.106–1(b), remove the words "the VA" and insert in their place, the word, "VA".

4. Section 809.106–1 is amended by revising the last sentence in paragraph (c) to read as follows:

809.106–1 Conditions for preaward surveys.

* * * * *

(c) * * * On-site evaluation will be made at least annually and recorded on VA Form 10–2079, Inspection Report of Bakery.

809.206 [Amended]

5. In 809.206, in paragraphs (b) and (b)(3), remove the words "the VA" wherever they appear and insert in their place, the word "VA".

810.006 [Amended]

6. In 810.006, in paragraph (c)(3), remove the words "The VA" and insert in their place, the word "VA", and in paragraph (c)(8), remove the words "the VA" and insert in their place, the word "VA".

7. Section 809.006 is amended by revising paragraph (e)(1) to read as follows:

810.006 Using specifications and standards.

* * * * *

(e) * * *

(1) All binding or rebinding of books, magazines, pamphlets, newspapers, slip cases and boxes will be procured in accordance with Government Printing Office (GPO) specifications and will be procured from the servicing GPO Regional Printing Procurement Office or, when appropriate, from commercial sources as prescribed in Subpart 808.8.

* * * * *

810.007 [Amended]

8. In 810.007(a)(1), remove the word "station." and insert in its place, the word "facility.", and in 810.007(a)(2) remove the words "the VA" and insert in their place, the word "VA".

814.201 [Amended]

9. In 814.201(c) remove the words "the VA" and insert in their place, the word "VA", and in 814.201(f)(3) remove the words "the VA's" and insert in their place, the word "VA's".

10. Section 814.201 is amended by revising paragraph (b) to read as follows:

814.201 Preparation of invitations for bids.

* * * * *

(b) Invitations for construction contracts will bear the applicable IFB number and project number, if assigned.

* * * * *

814.407–1 [Removed]

11. Section 814.407–1 is removed.

§ 814.407–71 [Amended]

12. In 814.407–71(a) remove the word "Administrator" and insert in its place, the word "Secretary", and in 814.407–71(b) remove the word "station", and insert in its place, the word "facility".

814.408 [Amended]

13. In 814.408 (a) and (b) remove the words "the VA" and insert in their place, the word "VA".

816.102 [Amended]

14. In 816.102(c) remove the words "the VA" and insert in their place, the word "VA".

15. Section 816.102 is amended by revising paragraph (b) to read as follows:

816.102 Policies.

* * * * *

(b) Contracts of the type specified in paragraph (a)(3) of this section which include an economic price adjustment provision other than those contracts awarded by the National Cemetery System for monuments or those contracts that contain the clause for service contracts (FAR 22.1006(c)) require the prior approval of the Deputy Assistant Secretary for Acquisition and Materiel Management (90). The request for approval shall clearly set forth the need for the provision.

* * * * *

16. Section 828.106–6 is added to read as follows:

828.106–6 Furnishing information.

The head of the contracting activity as defined in 802.100 shall be the agency designee referenced in FAR 28.106–6(c) to furnish copies of payment bonds to requestors except for contracts awarded by the Office of Facilities. For those contracts, Office of Facilities contracting officers shall be the Department designee.

17. Section 852.210–76 is amended by revising the clause to read as follows:

852.210–76 Noncompliance with packaging, packing, and/or marking requirements.

* * * * *

Failure to comply with the packaging, packing, and/or marking requirements indicated herein, or incorporated herein by reference, may result in rejection of the merchandise and request for replacement or repackaging, repacking, and/or marking. The Government reserves the right, without obtaining authority from the contractor, to perform the required repackaging, repacking, and/or marking services and charge the contractor at the actual cost to the Government for the same or have the required repackaging, repacking, and/or marking services performed commercially under Government order charge the contractor at the invoice rate. In connection with any discount offered, time will be computed from the date of completion of such repackaging, repacking, and/or marking services.
(End of Clause)

18. Section 852.216–70 is amended by adding paragraph (e) to read as follows:

852.216–70 Estimated quantities for requirements contracts.

* * * * *

(e) The following clause will be used for National Cemetery System contracts for monuments:

Estimated Quantities

(July 1989)

As it is impossible to determine the exact quantities that will be required during the contract term, each bidder whose bid is accepted wholly or in part will be required to deliver all articles that may be ordered during the contract term, except as he or she otherwise indicates in his or her bid and except as otherwise provided herein. Bids will be considered if made with the proviso that the total quantities delivered shall not exceed a certain specified quantity. The fact that quantities are estimated shall not relieve the contractor from filling all orders placed under this contract to the extent of his or her obligation. Also, the Department of Veterans Affairs shall not be relieved of its obligation to order from the contractor all articles that may, in the judgment of the ordering officer, be needed except that in the public exigency procurement may be made without regard to this contract.
(End of Clause)

870.112 [Amended]

19. In § 870.112, paragraph (b) is amended by removing the words "Data Management and Telecommunications", and adding in their place, the words "Information Systems and Telecommunications".

[FR Doc. 89–16637 Filed 7–17–89; 8:45 am]
BILLING CODE 3820–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 204 and 640

[Docket No. 90516–9116]

Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic

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

ACTION: Final rule; policy statement and notice of OMB control number.

SUMMARY: NOAA announces a change in policy regarding the issuance of numbers and color codes for the identification of traps, buoys, and vessels in the exclusive economic zone (EEZ) in the spiny lobster fishery of the Gulf of Mexico and South Atlantic. Henceforth, NOAA will issue a number and color code for the identification of traps, buoys, and vessels in the spiny lobster fishery in the EEZ to a person who is unable to obtain a spiny lobster permit number and color code issued by Florida. The intended effect of this policy is to avoid denying access to the spiny lobster trap fishery in the EEZ to any such person. This rule also informs the public of the approval by the Office of Management and Budget (OMB) of the information collection request (ICR) necessary to effect this policy and publishes the OMB control number for that ICR.

EFFECTIVE DATE: July 18, 1989.

ADDRESS: Forms for applying for Federally issued identification numbers and color codes for the spiny lobster fishery in the EEZ may be obtained from and completed forms should be sent to Michael E. Justen, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, FL 33702.

FOR FURTHER INFORMATION CONTACT: Michael E. Justen, 813–893–3722.

SUPPLEMENTARY INFORMATION: The spiny lobster fishery is managed under the Fishery Management Plan for Spiny Lobster in the Gulf of Mexico and South Atlantic (FMP), as amended, prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils), and its implementing regulations at 50 CFR Part 640 under the Magnuson Fishery Conservation and Management Act (Magnuson Act). The regulations require that traps, buoys, and vessels engaged in the spiny lobster trap fishery in the EEZ be identified by a number and color code issued by the Regional Director, Southeast Region, NMFS, or through Florida's identification system (§ 640.6(a)). In the preamble to the proposed rule to implement the FMP (47 FR 10880, March 12, 1982), NOAA recognized that a color code and number assigned to a vessel in the spiny lobster fishery by Florida was adequate to meet the FMP's requirements. NOAA announced that the Regional Director would issue necessary identifiers to a non-Florida-licensed vessel fishing in the EEZ, that is, a vessel not required to obtain a permit number and color code through Florida's identification system. That announced policy was in keeping with the FMP's stated desire to keep Federal costs to a minimum, avoid unnecessary duplication, and minimize burdens on fishermen in implementing the Federal identification measure. Further, that policy, in practice, did not deny any participant access to the fishery in the EEZ.

Florida recently enacted a three-year moratorium on the issuance of new spiny lobster trap licenses, thus limiting the number of participants in the spiny

lobster fishery in State waters. As a consequence, NOAA's past policy regarding issuance of Federally issued numbers and color codes could theoretically deny access to the spiny lobster trap fishery in the EEZ to Florida-based vessels unable to obtain State identifiers. Under the Magnuson Act, implementation of a system that limits entry to a fishery in the EEZ requires that the Secretary of Commerce and Councils take into account specified factors in a deliberative rulemaking process (16 U.S.C. 1853(b)(6)). Such a system is presently beyond the scope and intent of the FMP and may not be created by rule or administrative practice in the spiny lobster fishery in the EEZ.

To avoid the inadvertent potential for a limited entry system in the EEZ, the Regional Director will issue an identification number and color code for the spiny lobster trap fishery in the EEZ to an applicant who is not able to obtain a number and color code issued by Florida. A permit number and color code issued by Florida and valid in Florida's waters remains valid for use as an identifier in the EEZ. However, a Federally issued number and color code is valid only in the EEZ.

The proposed rule to implement the FMP (47 FR 10680, March 12, 1982) contained a requirement that an application for a Federal number and color code must be submitted to the Regional Director by a vessel owner or operator on a form available from the Regional Director and that an application must be submitted to the Regional Director 45 days prior to the date on which the applicant desires receipt of the number and color code. No public comments were received on this aspect of the proposed rule and it was adopted as a final rule, contained in § 640.6(b). Because of the aforementioned NOAA policy, applications for Federal numbers and color codes were not expected. Accordingly, OMB approval of the ICR for applications was not requested at that time. Subsequently, the Councils submitted and NOAA approved Amendment 1 to the FMP. One of the measures in Amendment 1 is a requirement for an annual vessel permit to engage in the commercial spiny lobster fishery in the EEZ. The permit system included application for and issuance of Federal numbers and color codes for identification of traps, buoys, and vessels in the permitted fishery. OMB approved the ICR of the permit system and issued OMB control number 0648-0205. The requirement for a Federal permit to engage in the commercial spiny lobster fishery has not been implemented because of incompatibilities between Florida and Federal management regimes. However, that part of the ICR addressing application for and issuance of a Federal number and color code is now implemented and the OMB control number applies.

Classification

This action is authorized by 50 CFR 204 and 640, and complies with E.O. 12291.

Pursuant to section 553 (b)(A) and (d)(2) of the Administrative Procedure Act (APA), notice and opportunity for public comment and the 30-day delay in effective date of this policy statement are not required because it is an interpretative rule and a general statement of policy. Relating to the Notice of OMB Control Number, the Assistant Administrator finds that because the notice of OMB Control Number portion of this rule is strictly a ministerial action required pursuant to the Paperwork Reduction Act, it is unnecessary to provide notice and opportunity for comment upon, or to delay for 30 days, the effective date of the notice of OMB control number, under the provisions of section 553 (b)(B) and (d)(3) of the APA. Because notice and opportunity for comment are not required by the APA or any other statute, the Regulatory Flexibility Act does not apply to this notice.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

List of Subjects in 50 CFR Part 204

Reporting and recordkeeping requirements.

James W. Brennan,
Assistant Administrator for Fisheries, National Marine Fisheries Service.

Dated: July 12, 1989.

For reasons set forth in the preamble, 50 CFR Part 204 is amended as follows:

PART 204—OMB CONTROL NUMBERS FOR NOAA INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 204 continues to read as follows:

Authority: Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520 (1982).

§ 204.1 [Amended]

2. In § 204.1(b), the table is amended by adding in the left hand column, in numerical order, "§ 640.6(b)" and adding in the right hand column, in a corresponding position "0205".

[FR Doc. 89-16731 Filed 7-17-89; 8:45 am]
BILLING CODE 3510-22-M

50 CFR Part 663

[Docket No. 81130-8265]

Pacific Coast Groundfish Fishery

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

ACTION: Notice of fishing restrictions.

SUMMARY: NOAA issues this notice modifying restrictions on fishing in 1989 for sablefish taken with nontrawl gear off the coasts of Washington, Oregon, and California. These actions are authorized under regulations implementing the Fishery Management Plan for the Groundfish Fishery off Washington, Oregon, and California, and are necessary to avoid exceeding the nontrawl sablefish quota and to accommodate small nontrawl fisheries that operate later in the year. These actions are intended to lower fishing rates, allow small but unavoidable catches to be landed, and avoid or reduce the probability of a fishery closure before the end of the year. This action supersedes fishing restrictions imposed on April 26, 1989, for sablefish caught with nontrawl gear.

DATES: Effective date: 0001 hours (Pacific Daylight Time) July 17, 1989, until modified, superseded, or rescinded. Comments will be accepted through August 2, 1989.

ADDRESSES: Submit comments on these actions to Rolland A. Schmitten, Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE., BIN C15700, Seattle, WA 98115; or E. Charles Fullerton, Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, CA 90731.

FOR FURTHER INFORMATION CONTACT: William L. Robinson at 206-526-6140, Rodney R. McInnis at 213-514-6199, or the Pacific Fishery Management Council at 503-221-6352.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for the Groundfish Fishery off Washington, Oregon, and California (FMP) and implementing regulations at 50 CFR 663.22(a) allow the Secretary of Commerce (Secretary) to reduce fishing levels, consistent with the objectives and priorities of the FMP, to prevent or reduce biological stress in any species or species complex. When landing rates have been projected to reach an acceptable biological catch (ABC) estimate or quota before the end of the year, trip limits have been recommended by the Pacific Fishery Management Council (Council) and imposed by the Secretary to prevent or reduce biological

stress while minimizing disruption of traditional fisheries. To achieve these objectives, the management measures have also been designed to extend the fishery as long as possible throughout the year, and to allow catches taken unavoidably while fishing for other species (incidental catches) to be landed to minimize the waste of fish that otherwise must be discarded once a quota is reached. By slowing the fishery and avoiding a premature fishery closure that must occur when a quota is reached, the discarding of incidental catches is minimized and the likelihood of biological stress from fishing above the optimum yield (OY) quota is lessened.

Pursuant to a recommendation of the Council, NOAA Fisheries announced in January 1989 that a trip limit of 100 pounds would be imposed on the date necessary to avoid reaching the nontrawl allocation for sablefish in 1989 (54 FR 299; January 5, 1989). Also announced was that the size and trip limit on sablefish smaller than 22 inches would be removed at the same time as the 100 pound trip limit was imposed. The Council confirmed these recommendations at its April 1989 meeting and determined that the date of implementation of the 100 pound trip limit should occur when the Council's Groundfish Management Team (GMT) determines that approximately 200 metric tons (mt) of the nontrawl allocation remains. This decision also was announced in the **Federal Register** (54 FR 18658; May 2, 1989). Public comments were requested after publication of both **Federal Register** notices. No comments were received relevant to this issue.

The best available scientific information, based on observed and expected rates of landings, indicates that the nontrawl landings of sablefish through June 17, 1989, were 2,758 mt. The GMT projects that 4,381 mt of the 4,581 mt quota for nontrawl gear will be taken by July 17, 1989. Accordingly, this action modifies the fishing restrictions imposed January 1, 1989 (54 FR 299; January 5, 1989) and April 26, 1989 (54 FR 18658; May 2, 1989) for sablefish caught with nontrawl gear off the coasts of Washington, Oregon, and California. Based upon the GMT's determinations, a 100 pound trip limit for sablefish caught by nontrawl gear will become effective on July 17, 1989.

The purpose of the 100 pound trip limit is to eliminate target fishing for sablefish with nontrawl gear, therefore drastically slowing the fishery while enabling small nontrawl fisheries that operate later in the year to continue landing small and often unavoidable catches of sablefish. The 100 pound trip limit will apply to sablefish of any size caught with nontrawl gear. Therefore, the revised trip limit replaces the current trip limit of 1,500 pounds or three percent of all sablefish on board (whichever is greater) for sablefish smaller than 22 inches (total length). The new 100 pound trip limit for sablefish caught with nontrawl gear, in conjunction with the management measures imposed earlier in the year (at 54 FR 299 and 54 FR 18658), is part of a management regime designed to prevent biological stress, avoid exceeding gear quotas, minimize discards, and provide for equitable use of the sablefish resource by the trawl and nontrawl fleets.

If the nontrawl quota of 4,581 mt is reached before the end of the year, all further nontrawl landings of sablefish will be prohibited for the rest of the year. If the 11,000 mt OY quota for sablefish is reached before the end of the year, all further landings of sablefish by all gear types will be prohibited for the remainder of 1989.

Only the provisions announced in paragraph 4(b) at 54 FR 18658 (May 2, 1989) are changed. All other provisions for sablefish caught with nontrawl gear announced in that notice, including the provision for inseason adjustments and the application of this limit to other fisheries, remain in effect.

Secretarial Action: Pursuant to 663.22(a)(3), the Secretary herein adjusts the management measures for sablefish at 50 CFR 663.27(b)(3) and at 54 FR 18658 (May 2, 1989) by replacing paragraph 4(b) with the following:

(b) Nontrawl gear.

(i) No more than 100 pounds (round weight or round weight equivalent) of sablefish caught with nontrawl gear may be taken and retained, possessed, or landed per vessel per fishing trip.

Classification

The determination to impose these fishing restrictions is based on the most recent data available. The aggregate data upon which the determination is based are available for public inspection at the Office of the Director, Northwest Region (see **ADDRESSES**) during business hours until the end of the comment period.

An Environmental Impact Statement (EIS) was prepared for the FMP in 1982 in accordance with the National Environmental Policy Act (NEPA). The alternative and environmental impacts of this Notice of Fishing Restrictions are not significantly different than those considered in the EIS for the FMP. Therefore this action is categorically excluded from the NEPA requirements to prepare an Environmental Assessment in accordance with paragraph 5a(3) of the NOAA Directives Manual 02-10, because the alternatives and their impacts have not changed significantly.

These actions are taken under the authority of 50 CFR 663.22 and 663.23, and are in compliance with Executive Order 12291. The actions are not subject to the Regulatory Flexibility Act because there is no notice and comment period preceding the effective date of this notice, and the actions do not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

Section 663.23 states that any notice issued under this section will not be effective until 30 days after publication in the **Federal Register**, unless the Secretary finds and publishes with the notice good cause for an earlier effective date. If unrestricted, catches unquestionably will exceed the nontrawl allocation and probably the OY for sablefish in 1989. Prompt action to limit these fishing rates is necessary to protect the sablefish resource and alleviate the necessity for fishery closures before the end of 1989. Delay in implementation of this action would result in an accelerated rate of landings by fishermen anticipating more restrictive limits. If landings are substantially increased, the projections made by the GMT will not be valid and the nontrawl allocation will be reached if not exceeded. As a result, nontrawl fishermen operating later in the year will be forced to discard their unavoidable catches of sablefish. If the nontrawl allocation is exceeded, the trawl allocation is lowered by the same amount, disrupting the equitable distribution of the resource intended by the Council. Failure to take action by the projected implementation date is likely to result in early achievement of OY, early closure of both nontrawl and trawl sablefish fisheries, and thus increased discards of the unavoidable catch of sablefish taken while fishing for other species. Consequently, further delay of these actions is impracticable and contrary to the public interest, and for good cause these actions are taken in final form effective July 17, 1989.

The public has had opportunity to comment on these management measures. The public participated in the Groundfish Select Group, GMT, Groundfish Advisory Subpanel, and Council meetings in November 1988, and March and April 1989 that generated the management actions endorsed by the

Council and the Secretary. Public comments were requested, and none relevant to this action were received, following publication of the **Federal Register** notices at 54 FR 299 (January 5, 1989) and 54 FR 18658 (May 2, 1989).

List of Subjects in 50 CFR Part 663

Administrative practice and procedures, Fisheries, Fishing.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 12, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management.

[FR Doc. 89-16737 Filed 7-17-89; 8:45 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 54, No. 136
Tuesday, July 18, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 40, 50, 60, 70, 72 and 150

RIN 3150-AD21

Preserving the Free Flow of Information to the Commission

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing a revision to its rules governing the conduct of all Commission licensees and license applicants. The proposed rule would require licensees and license applicants to ensure that neither they, nor their contractors or subcontractors, impose conditions in settlement agreements under section 210 of the Energy Reorganization Act, or in other agreements affecting employment, that would prohibit, restrict, or otherwise discourage an employee from providing the Commission with information on potential safety violations. This proposed rule is necessary to prohibit the use of provisions which would inhibit the free flow of safety information to the Commission in agreements related to employment.

DATES: The comment period expires September 18, 1989. Comments received after this date will be considered if it is practical to do so, but assurance of consideration is given only for comments filed on or before that date.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Docketing and Service Branch. Deliver comments to One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 5:15 p.m. weekdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street NW., Lower Level, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Stuart A. Treby, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-1636.

SUPPLEMENTARY INFORMATION: Section 210 of the Energy Reorganization Act of 1974, as amended, was added as a new section to that Act in 1978 (Pub. L. 95-601). Section 210 offers protection to employees of a Commission licensee, or of a contractor or a subcontractor of a Commission licensee or applicant. The protection afforded is to those who believe they have been fired or discriminated against as a result of the fact that, among other things, they have testified or given evidence on potential safety violations, or brought suit under section 210 of the Energy Reorganization Act. Employees who have been discriminated against for raising safety issues have the right to file complaints with the Department of Labor for the purpose of obtaining a remedy for the personal harm caused by the discrimination. Following the filing of a complaint, the Department of Labor performs an investigation. If either the employee or the employer is not satisfied with the outcome of the investigation, a hearing can be held before an Administrative Law Judge, with review by the Secretary of Labor. The Secretary of Labor can issue an order for the employee to be rehired, or otherwise compensated if the employee's case is justified.

In many cases, the employee and the employer reach settlement of the issues raised in the Department of Labor proceeding before completion of the formal process and a finding by the Secretary of Labor. In general the Commission supports settlements as they provide remedies to employees without the need for litigation. However, a recent case has brought to the Commission's attention the potential for settlement agreements negotiated under section 210 to impose restrictions upon the freedom of employees or former employees protected by section 210 to testify or participate in NRC licensing and regulatory proceedings, as amended, or to otherwise provide information on potential safety violations to the Commission or the NRC staff. See *Texas Utilities Electric Co.*, Comanche Peak Steam Electric Station (Units 1 and 2), CLI-88-12, 28 NRC 605 (1988); *Texas Utilities Electric Co.*, Comanche Peak Steam Electric Station (Units 1 and 2), CLI-89-06, _____ NRC _____ (1989)).

The Commission believes that a section 210 settlement agreement, or any other agreement affecting employment, which restricts the freedom of an employee or a former employee who is subject to its provisions, to freely and fully communicate with the Nuclear Regulatory Commission about nuclear safety matters is incompatible with the objectives of that section. These provisions would have a chilling effect on communications about nuclear safety matters, and would restrict, impede, or frustrate full and candid disclosure to the Nuclear Regulatory Commission about nuclear safety matters. Any such agreement under which a person contracts to withhold safety-significant information or testimony from the Nuclear Regulatory Commission could itself be a threat to safety and therefore jeopardize the execution of the Agency's overall statutory duties.

Accordingly, the Commission is proposing to amend its regulations to require licensees and license applicants to ensure that neither they, nor their contractors or subcontractors, impose conditions in settlement agreements under section 210 of the Energy Reorganization Act, or in other agreements affecting employment, that would prohibit, restrict, or otherwise discourage an employee from providing the Commission with information on potential safety violations. The proposed rule would also require licensees and license applicants to establish procedures to ensure that their contractors and subcontractors are informed of the prohibition, that they are notified of any complaints of discrimination by an employee of a contractor or subcontractor for providing such information related to work performed for the licensee or license applicant, and to require review by the licensee or license applicant of any settlement agreements related to any employee complaints of such discrimination by a contractor or subcontractor related to work performed for the licensee or license applicant.

The proposed rule would only apply to agreements that relate to the compensation, terms conditions, and privileges of employment, including section 210 settlement agreements, and not to agreements in general. The

proposed rule applies to all provisions which might discourage an employee from providing safety information to the Commission, to Commission adjudicatory boards, or to the NRC staff.

In addition to comments in general on the proposed rule, the Commission would specifically request comments on the following issues—

1. Should the rule prohibit all restrictions on providing information to the Commission, or should limitations on an individual appearing before a Commission adjudicatory board (e.g., requiring an individual to resist a subpoena) be permissible as long as other avenues for providing information to the Commission are available?

2. Should the rule impose an additional requirement that licensees and license applicants must ensure that all agreements affecting employment, including those of their contractors or subcontractors, contain a provision stating that the agreement in no way restricts the employee from providing safety information to the Commission?

Finally, the Commission would emphasize that it will not hesitate to take immediate action against a licensee who does not comply with these regulations when effective, notwithstanding the pendency of a Section 210 matter before the Department of Labor.

Separate Views of Commissioner Roberts

I continue to question the need to impose such broad restrictions on employers' options in negotiating settlement agreements with their employees. Agreements which do not foreclose a whistleblower's freedom to bring safety information to the Commission are legally permissible in my view. Therefore, I see no public health and safety justification for a rule that would prohibit the bargaining away of *any* avenues of access to the NRC. Such a rule will tend to promote unnecessary litigation before both NRC and DOL. Moreover, I believe the proposed rule constitutes government interference in the contractual relations between licensees and their contractors that is not needed to assure adequate protection of public health and safety or of whistleblowers' freedom to bring their safety concerns to the NRC.

Should a majority approve issuance of the proposed rule I request that my views be included for comment also.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule falls within the scope of the actions described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule amends information collection requirements that are subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This rule has been submitted to the Office of Management and Budget for review and approval of the paperwork requirements.

Regulatory Analysis

The proposed rule requires Commission licensees or license applicants to ensure that they, or their contractors or subcontractors, do not enter into agreements affecting employment that restrict employees from providing information to the Commission on potential safety violations, and to develop procedures to implement this requirement. The objectives of the proposed rule are to ensure that such agreements do not restrict the free flow of safety information to the Commission and that the intent of section 210 of the Energy Reorganization Act is not frustrated. The Commission believes that the clearest and most effective method of achieving these objectives, and avoiding potential uncertainty and conflict regarding the interpretation of specific provisions, is to prohibit provisions in these agreements that in any way restrict the flow of information to the Commission, the Commission's adjudicatory boards, or the NRC staff. The alternative of imposing an additional requirement on licensees and license applicants to require any agreement affecting employment to include a provision stating that the agreement in no way restricts the employee from providing information to the Commission was rejected as unnecessary to achieve the objectives of the rule. The rule, as proposed, will not impose any substantial costs on licensees or license applicants.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Although the proposed rule would apply to a wide range of Commission licensees of varying size, the proposed rule requires Commission licensees or license applicants to ensure that, they or their contractors, do not enter into agreements with employees that restrict employees from providing information to the Commission on potential safety violations and to prepare procedures to implement this requirement. The Commission believes that this will not impose a significant economic impact on Commission licensees who would be considered "small entities."

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and, therefore, that a backfit analysis is not required for this proposed rule because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects

10 CFR Part 30

Byproduct material, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Penalty, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40

Government contracts, Hazardous materials—transportation, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Hazardous materials—transportation, Nuclear materials, Packaging and containers, Penalty, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

10 CFR Part 150

Hazardous materials—transportation, Intergovernmental relations, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is proposing to adopt the following amendments to 10 CFR Parts 30, 40, 50, 60, 70, 72 and 150.

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

1. The authority citation for Part 30 is revised to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 30.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 30.61 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 30.3, 30.7(g), 30.34 (b), (c) and (f), 30.41 (a) and (c), and 30.53 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 30.6, 30.9, 30.36, 30.51, 30.52, 30.55, and 30.56 (b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 30.7, paragraph (g) is added to read as follows:

§ 30.7 Employee protection.

* * * * *

(g)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to Section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee and license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (g)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to Section 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganization Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (g)(1) of this section.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

3. The authority citation for Part 40 is revised to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95–604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97–415, 96 Stat. 2067 (42 U.S.C. 2022).

Section 40.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 40.3, 40.7(g), 40.25(d)(1)–(3), 40.35 (a)–(d) and (f), 40.41 (b) and (c), 40.46, 40.51 (a) and (c), and 40.63 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 40.5, 40.9, 40.25 (c), (d)(3), and (4), 40.26(c)(2), 40.35(e), 40.42, 40.61, 40.62, 40.64, and 40.65 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

4. In § 40.7, paragraph (g) is added to read as follows:

§ 40.7 Employee protection.

* * * * *

(g)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act of the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (g)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to section 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganization Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (g)(1) of this section.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

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

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

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13 and 50.54(dd) also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C.

5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 through 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237.

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 50.7(f), 50.46 (a) and (b), and 50.54(c) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.7(a), 50.10(a)–(c), 50.34 (a) and (e), 50.44(a)–(c), 50.46 (a) and (b), 50.47(b), 50.48 (a), (c), (d), and (e), 50.49(a), 50.54 (a), (i), (i)(1), (l)–(n), (p), (q), (t), (v), and (y), 50.55(f), 50.55a (a), (c)–(e), (g), and (h), 50.59(c), 50.60(a), 50.62(c), 50.64(b), and 50.80 (a) and (b) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.49 (d), (h), and (j), 50.54 (w), (z), (bb), (cc), and (dd), 50.55(e), 50.59(b), 50.61(b), 50.62(b), 50.70(a), 50.71 (a)–(c) and (e), 50.72(a), 50.73 (a) and (b), 50.74, 50.78, and 50.90 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

6. In § 50.7, paragraph (f) is added to read as follows:

§ 50.7 Employee protection.

* * * * *

(f)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act of the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt procedures to:

(i) Assure that its contractors and subcontractors are informed of the requrements of paragraph (f)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to section 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganization Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (f)(1) of this section.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

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

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

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 60.9(f), 60.10, 60.71 to 60.75 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

8. In § 60.9, paragraph (f) is added to read as follows:

§ 60.9 Employee protection

* * * * *

(f)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (f)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to Section 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganization Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (f)(1) of this section.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

9. The authority citation for Part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 70.3, 70.7(g), 70.19(c), 70.21(c), 70.22 (a), (b), (d)–(k), 70.24 (a) and (b), 70.32 (a) (3), (5), (6), (d), and (i), 70.36, 70.39 (b) and (c), 70.41(a), 70.42 (a) and (c), 70.56, 70.57 (b), (c), and (d), 70.58 (a)–(g)(3) and (h)–(j) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 70.7, 70.20a (a) and (d), 70.20b (c) and (e), 70.21(c), 70.24(b), 70.32 (a)(6), (c), (d), (e), and (g), 70.36, 70.51 (c)–(g), 70.56, 70.57 (b) and (d), and 70.58 (a)–(g)(3) and (h)–(j) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 70.5, 70.9, 70.20b (d) and (e), 70.38, 70.51 (b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58(g)(4), (k), and (l), 70.59, and 70.60 (b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

10. In § 70.7, paragraph (g) is added to read as follows:

§ 70.7 Employee protection.

* * * * *

(g)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to Section 210 of the Energy Reorganization Act of 1974, any

provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (g)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for a licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to Section 210 of the Energy Reorganization Act relating to discrimination from protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganization Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (g)(1) of this section.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

11. The authority citation for Part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); Secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 72.6, 72.10(f), 72.22, 72.24, 72.26, 72.28(d), 72.30, 72.32, 7244(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.72(b), (c), 72.74(a), (b), 72.76, 72.78, 72.104, 72.106 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140(b), (c), 72.148, 72.154, 72.156, 72.160, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.184, 72.186 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 72.10(a), (e), 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.90(a)–(d), 72.92, 72.94, 72.98, 72.100, 72.102(c), (d), (f), 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140(b), (c), 72.142, 72.144, 72.146, 72.148, 72.150, 72.152, 72.154, 72.156, 72.158, 72.160, 72.162, 72.164, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.182, 72.184, 72.186, 72.190, 72.192, 72.194 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 72.10(e), 72.11, 72.16, 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(b)(3), (c)(5), (d)(3), (e), (f), 72.48(b), (c), 72.50(b), 72.54(a), (b), (c), 72.56, 72.70, 72.72, 72.74(a), (b), 72.76(a), 72.78(a), 72.80, 72.82, 72.92(b), 72.94(b), 72.140 (b), (c), 72.144(a), 72.146, 72,148, 72.150, 72.152, 72.154 (a), (b), 72.156, 72.160, 72.162, 72.168, 72.170, 72.172, 72.174, 72.176, 72.180, 72.184, 72.186, 72.192 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

12. In § 72.10, paragraph (f) is added to read as follows:

§ 72.10 Employee protection

* * * * *

(f)(1) Each licensee and applicant for a Commission license shall assure that neither they nor their contractors or subcontractors impose, as a condition of any agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to Section 210 of the Energy Reorganization Act of 1974, any provision which would prohibit, restrict, or otherwise discourage, an employee from voluntarily providing to any person within the Commission information about possible violations of requirements imposed under the Atomic Energy Act or the Energy Reorganization Act, and NRC regulations, orders, and licenses.

(2) Each licensee or license applicant shall, within sixty days of the effective date of this regulation, adopt appropriate procedures to:

(i) Assure that its contractors and subcontractors are informed of the requirements of paragraph (f)(1) of this section;

(ii) Assure that it is informed by its contractors and subcontractors of each complaint, related to work performed for the licensee or license applicant, filed by an employee against the contractor or subcontractor pursuant to Section 210 of the Energy Reorganization Act relating to discrimination for protected activities as described in this section; and

(iii) Provide for prior review by the licensee or license applicant of settlement agreements negotiated under section 210 of the Energy Reorganization Act of 1974 by its contractors and subcontractors, to assure that such agreements contain no provisions of the type described in paragraph (f)(1) of this section.

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

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

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 2073). Section 150.15 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 150.20(b)(2)–(4) and 150.21 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 150.14 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 150.16–150.19 and 150.20(b)(1) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

14. In § 150.20, the introductory text of paragraph (b) is revised to read as follows:

§ 150.20 Recognition of agreement state licenses

* * * * *

(b) Notwithstanding any provision to the contrary in any specific license issued by an Agreement State to a person engaging in activities in a non-Agreement State or in offshore waters under the general licenses provided in this section, the general licenses provided in this section are subject to the provisions of §§ 30.7(a) through (f), 30.9, 30.14(d) and §§ 30.34, 30.41, and 30.51 to 30.63, inclusive, of Part 30 of this chapter; § 40.7(a) through (f), § 40.9, and §§ 40.41, 40.51, 40.61, 40.63 inclusive, §§ 40.71 and 40.81 of Part 40 of this

chapter; and § 70.7 (a) through (f), § 70.9, and §§ 70.32, 70.42, 70.51 to 70.56, inclusive, §§ 70.60 to 70.62, inclusive, and § 70.7 of Part 70 of this chapter; and to the provisions of Parts 19, 20 and 71 and Subpart B of Part 34 of this chapter. In addition, any person engaging in activities in non-Agreement States or in offshore waters under the general licenses provided in this section:

* * * * *

Dated at Rockville, MD, this 12th day of July, 1989.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 89-16792 Filed 7-17-89; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF THE TREASURY

Comptroller of the Currency

12 CFR Part 32

[Docket No. 89-7]

National Bank Lending Limits

AGENCY: Office of the Comptroller of the Currency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (the "OCC") is proposing to amend a temporary rule (the "Temporary Rule"), which revised the OCC's regulation concerning national bank lending limits with respect to the treatment of loan commitments. In issuing the Temporary Rule, the OCC emphasized in the preamble that it would provide relief for national banks that have experienced a decline in their capital, and hence, in their lending limits, after entering into loan commitments. Nonetheless, the substantive provisions of the Temporary Rule were applicable to *all* national banks.

In response to comments received which objected to the impact of the Temporary Rule on banks that have not experienced a capital decline, the OCC is proposing to amend the Temporary Rule. This amendment is intended to revise and clarify the effect of the rule on the loan commitments of national banks that have not experienced a decline in capital, by restoring some flexibility to banks in managing their loan commitments relative to their lending limits.

Although the Temporary Rule was effective when it was published, on June 24, 1988, this amendment proposes a modified transition period. As part of this transition period, the OCC proposes not to take administrative action to enforce the Temporary Rule against banks until the effective date of a final rule. However, this amendment does not propose any change to the effective date of the Temporary Rule or to the retroactive validation of loan commitments made prior to the effective date of the Temporary Rule, that were within a bank's lending limit when made. During this modified transition period, the OCC expects all national banks to become familiar with the Temporary Rule and its revisions and to amend their lending practices as necessary.

DATE: Comments must be received by September 18, 1989.

ADDRESSES: Comments should be directed to: Docket No. 89-7, Communications Division, Fifth Floor, Office of the Comptroller of the Currency, 490 L'Enfant Plaza East, SW., Washington, DC 20219; Attn: Jackie England. Comments will be available for public inspection and photocopying at the same location.

FOR FURTHER INFORMATION CONTACT: Ellen C. Starr or Deborah Katz, Attorneys, Legal Advisory Services Division, (202) 447-1880; or Jon A. Nagy or William C. Kerr, National Bank Examiners, Supervision Policy/Research Division (202) 447-1164.

SUPPLEMENTARY INFORMATION

Drafting Information

The principal drafters of this document were Ellen C. Starr, Attorney, Legal Advisory Services Division, and William C. Kerr, National Bank Examiner, Supervision Policy/Research Division.

Background

National banks are subject to a statutory limitation on the "total loans and extensions of credit * * * to a person outstanding at one time." 12 U.S.C. section 84. Section 84 defines "loans and extensions of credit" as including "all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person * * *." 12 U.S.C. section 84(b)(1). In addition, the term "loans and extensions of credit" includes, "to the extent specified by the Comptroller of the Currency,* * * any liability of a national banking association to advance funds to or on behalf of a person pursuant to a contractual commitment." *Id.*

Exercising the authority of section 84(b)(1), and the more general regulatory authority provided at 12 U.S.C. section 84(d)(1), the OCC issued a regulation on national bank lending limits. *See* 12 CFR Part 32 (1988). At Part 32, the OCC generally restated the statutory definition of "loans and extensions of credit," and included within that definition a "contractual commitment to advance funds." *See* 12 CFR 32.2(a). A "contractual commitment to advance funds" was separately defined, and excluded "undisbursed loan funds and loan commitments not yet drawn upon" which were not otherwise the equivalent of a contractual commitment to advance funds as defined in the regulation. *Id.* at § 32.2(d). Thus, prior to the Temporary Rule, a loan commitment that was not the equivalent of a "contractual commitment to advance funds" was not considered a loan or extension of credit, such that a national bank's lending limit was applicable to it, until funds were actually disbursed under the commitment.

The OCC adopted this definition of a "contractual commitment to advance funds" largely in response to comments which advocated that loan commitments and undisbursed loan funds should not be subject to the lending limit until the funds were disbursed. *See* 52 FR 15844 (April 12, 1983). Nonetheless, the OCC expressed some concern that banks might not monitor commitments to ensure that they were properly managed. 52 FR at 15845. For example, the OCC noted that there was no legal prohibition against a national bank's entering into a loan commitment with a borrower which, alone or in combination with other obligations of that borrower, would exceed the bank's lending limit if funded. *Id.* Further, the OCC noted that the opportunity to generate fee income or the desire to retain a large borrower as a customer may create an incentive for a bank to provide a loan commitment in excess of its lending limit, where the bank speculated that its future capital levels would increase or that it would be able to sell any overline to another bank at the time of funding the commitment. *Id.*

Unfortunately, a number of banks experienced problems under the definition of a "contractual commitment to advance funds" established by Part 32. These problems involved not only the question of *which* loan commitments constituted "contractual commitments to advance funds," and thus "loans and extensions of credit," subject to the limitations of section 84, but also *when*, a bank's lending limit was applied to such a loan commitment, to determine its legality under section 84.

Section 84 does not expressly address when a bank's lending limit is applied to a loan or extension of credit, to

determine its legality. However, the OCC has consistently interpreted an early Supreme Court case as establishing the principle that the lending limit is applied on the day that the loan is made. *See Corsicana National Bank* v. *Johnson.* 51 U.S. 68, 86, (1919). Thereafter, a loan which was within the bank's lending limit on the date it was made would not become a violation of § 84 even if subsequent changes in circumstances, *e.g.,* a reduction in the bank's lending limit, caused the loan to become nonconforming. The OCC also applied this principle to a loan commitment; as a result, a bank's lending limit was applied to a loan commitment only on the day, and then only to the extent, that funds were disbursed under the commitment.

This treatment of loan commitments resulted in a dilemma for a bank which entered into a loan commitment within its lending limit when made, but in excess of its lending limit at the time of funding because of an intervening reduction in the bank's capital. If the bank funded the loan in excess of its lending limit, it would violate section 84, perhaps exposing its directors to personal liability. Alternatively, if the bank did not fund the loan, in compliance with section 84, it could breach a legally binding loan commitment, thereby risking liability to its customer. The bank's dilemma was particularly acute when it was not able to sell a simultaneous participation to another lender at the time of funding the commitment. The OCC issued the Temporary Rule to provide relief for banks facing this dilemma, and to enable banks to avoid this dilemma when considering future loan commitments. *See* 53 FR 23752 (June 24, 1988).

Provisions of the Temporary Rule

In issuing the Temporary Rule, the OCC determined that it was equitable and convenient "to allow the lending limit to be applied on the date a binding, written commitment within the bank's limit is made, *i.e.,* to treat such an 'underline' commitment as a lawful 'loan and extension of credit' even if the bank's capital declines prior to funding that commitment." *Id.* Thus, "if the *total* of the proposed commitment *and* all other loans and commitments to a borrower are within the bank's lending limit at the time the commitment is made, the commitment is deemed a 'loan' and its legality under the lending limit is determined as of that time." *Id.* at 23753. In discussing "underline" commitments, the Preamble to the Temporary Rule concluded that "[o]nce a commitment is treated as a loan, it *must* be included by the bank in computing its lending limit for all subsequent loans to the borrower." *Id.* (Emphasis added.) The effect of the Temporary Rule, then, was to allow a bank to fully fund a loan commitment that was within the bank's lending limit when made, even if the bank's lending limit subsequently declined.

The Temporary Rule also addressed "overline" loan commitments, *i.e.,* those loan commitments which would exceed the bank's lending limit if funded when made. *Id.* The OCC stated that such commitments would still be permitted, because they would not be treated as "loans and extensions of credit" until funded. Thus, "if a bank has made a binding, written loan commitment to one borrower that, in combination with all other outstanding loans and commitments to that borrower, is in excess of its lending limit on the day of the commitment, the commitment is not a loan on that date.* * *" *Id.* In that event, "the lending limit must be calculated and applied on the date funds are advanced, even if capital subsequently is reduced." *Id.* A bank entering into such an "overline" loan commitment would violate section 84 if it subsequently funded the overline commitment in an amount which, alone or in combination with all other loans and extensions of credit outstanding to the borrower at the time of funding, exceeded the bank's lending limit. *Id.*

Even in issuing the Temporary Rule, however, the OCC cautioned that "[w]hen a bank is requested to enter into an outstanding binding commitment which may exceed its lending limit now or in the future, prudent banking practice would dictate that the bank take precautions to permit escape from such a dilemma." *Id.* at 23752. As an example, the OCC suggested including "a protective clause in the commitment which would release the bank from its obligation if funding the commitment would result in an overline." *Id.*

The Temporary Rule achieved its substantive purpose through an amendment to the definition of a "contractual commitment to advance funds." The Temporary Rule deleted that portion of the definition of a "contractual commitment to advance funds" which excluded "undisbursed loan funds and loan commitments not yet drawn upon" which were not otherwise the equivalent of a contractual commitment to advance funds. In its place, the Temporary Rule added in part: "A binding, written commitment to lend is a 'contractual commitment to advance funds' under this part if it and all other outstanding loans (including other binding commitments) to the borrower are within the bank's lending limit on the date of the commitment." *Id.* at 23753–54.

In order to provide the swiftest relief, the Temporary Rule was made effective on publication, *i.e.,* on June 24, 1988. *Id.* at 23752. In addition, the Temporary Rule was made retroactive, to permit "a bank to honor all legally binding commitments which were made in good faith prior to the effective date of the amendment and were within the bank's lending limit when made, even if the *advances* would cause the bank to exceed its present lending limit if they were treated as loans." *Id.* at 23753. The Preamble specifically stated, however, that the Temporary Rule would not "retroactively validate *advances* that were made prior to the effective date of the new rule and that exceeded the lending limit at that time." *Id.*

Summary of Comments Received on the Temporary Rule; Agency Action

Although the Temporary Rule was made effective on publication, the OCC requested comment on it, providing a 90-day comment period which ended on September 22, 1988. *Id.* at 23752. During the comment period, the OCC received only 13 comment letters from national banks and one trade association. Of these letters, only one opposed the intent of the Temporary Rule contending that it encouraged the perpetuation of poor management practices. This commenter suggested that banks make use of protective clauses in loan commitments. As an alternative, if the OCC chose to issue the Temporary Rule as a final rule, this commenter argued that all loan commitments should be treated consistently, *i.e.,* that an "overline" commitment should be treated as an illegal loan on the day it was entered into, rather than on the day it was funded.

The remaining 12 comment letters supported the intent of the Temporary Rule and expressed appreciation to the OCC for responding to the dilemma imposed upon banks which had experienced, or might experience, an unexpected decline in capital. Some commenters offered minor suggestions for amending the Temporary Rule. Most notable however, were four comments that addressed the effect of the Temporary Rule on banks which had not experienced a decline in capital; each of these comments objected to a perceived negative impact of the Temporary Rule on "healthy" banks. These comments are discussed below.

Three commenters suggested that the Temporary Rule be expanded, to apply to binding oral commitments in addition to binding written loan commitments. The OCC has considered this suggestion, but has chosen to retain the present scope of the Temporary Rule, which applies to binding *written* loan commitments only. Although the OCC recognizes that in some states, some oral commitments to lend may in fact be binding, the binding nature of these commitments is often determined only through litigation. With the Temporary Rule, the OCC has for the first time offered a bank a method of protecting itself and its outstanding loan commitments from a subsequent decline in the bank's capital. As a matter of prudent banking practice and for ease of monitoring compliance with section 84's lending limit, the OCC is requiring banks which would take advantage of the protection provided by the Temporary Rule to enter into binding written commitments to lend, rather than oral commitments, even where that oral loan commitment may be supported by bank documentation.

One commenter requested that any final rule be clarified to permit renewals of loan commitments, including unfunded commitments, that were within the bank's legal lending limit when made, even though the commitment may be greater than the lending limit at the time of its renewal. In response to this comment, the OCC has considered the effect of the Temporary Rule on renewals of loan commitments generally, whether funded or unfunded.

The OCC has previously recognized that the renewal of an existing outstanding loan is not an advance of funds for the purposes of section 84. Thus, the OCC has allowed a bank to renew an outstanding loan, even where the bank's lending limit has declined such that a new loan, if made as of the date of the renewal, would have resulted in a violation of the bank's lending limit. The renewal of a loan which is in excess of the bank's presently applicable lending limit, but which was legal when made, does not constitute a violation of section 84; rather, the loan is considered "nonconforming." As an integral part of the renewal of a loan in excess of the bank's presently applicable lending limit, however, the OCC has consistently required that the bank make every effort to bring the loan into conformance with its lending limit through the sale of participations or other loan restructuring prior to renewing the loan.

In that the Temporary Rule deems a loan commitment which is within a bank's lending limit when made to be a loan, a question was raised about the treatment of a renewal of an unfunded or partially funded loan commitment which was within the bank's lending limit when made but which would exceed the bank's lending limit if entered into on the date of renewal. An argument may be made that an underline loan commitment should be treated as a loan in all respects, allowing for a renewal of the commitment even after the bank's capital has declined. However, the OCC views the expiration of an unfunded or partially funded loan commitment, or any restructuring of the commitment, as an opportunity for a bank to bring that loan commitment into conformance with the bank's then-applicable lending limit.

Thus, where a bank has entered into and funded or partially funded a loan commitment which was within the bank's lending limit when made, and the bank's lending limit subsequently declines, the bank may renew that portion of the loan commitment which has been funded, as though the loan commitment were a term loan. Alternatively, the bank may enter into a new loan commitment, which, with all other outstanding obligations of the borrower, is within its new lower lending limit. As a loan commitment within the bank's lending limit when made, this commitment would be construed as a loan, which subsequently may be fully funded, even if the bank's capital and lending limit should again decline. The OCC has determined that an unfunded loan commitment, or the unfunded portion of any loan commitment, which would exceed the bank's lending limit if made on the date of renewal, may not be renewed.

If a bank renews an unfunded loan commitment, which renewal is in excess of its legal lending limit when made, the renewal will be construed as an overline commitment, not subject to the protections of the Temporary Rule. Such a renewal does not of itself constitute a violation of Section 84, however; the bank will violate Section 84 only when funds provided pursuant to an overline commitment exceed the bank's lending limit. If the bank renews the funded portion of a partially funded loan commitment which was within the bank's lending limit when made, but which now exceeds the bank's lending limit, the loan will be considered "nonconforming" to the extent that funds disbursed prior to the date of the renewal exceed the bank's lending limit as of the date of the renewal. If the bank advances additional funds, however, the bank will exceed its lending limit, and hence, violate Section 84.

Another commenter, while agreeing with the intent of the Temporary Rule, suggested that the OCC take action less formally, either through an interpretive ruling or through an internal advisory letter to national bank examiners. However, as the Temporary Rule amended the OCC's definition of a "contractual commitment to advance funds" stated at 12 CFR § 32.2(d), the OCC has determined that a regulation is the appropriate mechanism by which to implement the intention of the Temporary Rule. Further, issuing the Temporary Rule as a regulation is consistent with the OCC's continuing effort to consolidate its existing regulations and interpretive rulings on national bank lending limits into one comprehensive regulation.

As noted above, four comments addressed the effect of the Temporary Rule on a bank which had not experienced a decline in capital. Three of these comments, each from a national bank, specifically objected to the Temporary Rule, generally protesting that it restricted the flexibility of banks in managing their loan commitments relative to their lending limits. One national bank commenter stated that the Temporary Rule imposed "new and burdensome constraints on the ability of all national banks to manage their relationships with substantial borrowers." It is in response to these comments that the OCC is proposing a revision of the Temporary Rule.

Each of the three comment letters which specifically objected to the effect of the Temporary Rule on the lending practices of banks which had not experienced a decline in capital did so for the same reason, which may be described with an example. Thus, assume that a national bank has a lending limit of $10,000,000.00. The bank has one loan, in the amount of $5,000,000.00, outstanding to Borrower. At Borrower's request, the bank enters into a legally binding written commitment with Borrower for an additional $5,000,000.00, to be funded at a later date. After entering into the loan commitment, but before it is funded, Borrower requests a short term loan, of $10,000.00, from the bank. Prior to the Temporary Rule, the bank would have been allowed to extend the short term credit requested without exceeding its lending limit. Under the Temporary Rule, however, the $5,000,000.00 loan commitment must be counted as a loan when made, because as of that date it was within the bank's lending limit. By

entering into the commitment, the bank has reached its lending limit, and may not extend the additional short term credit Borrower requested without violating Section 84.

The example above demonstrates that, as a result of the Temporary Rule, healthy banks may not make some extensions of credit which they could have made prior to the Temporary Rule. Thus, the Temporary Rule has been seen as placing an additional and unnecessary burden on healthy banks. In response to these objections, the OCC is proposing to amend the Temporary Rule.

The proposed amendment is intended to allow a bank which has entered into a loan commitment with a borrower, which was within the bank's lending limit when made, to extend additional credit to that borrower, which when aggregated with all other funds *actually disbursed* to the borrower, does not exceed the bank's lending limit. In proposing this revision, the OCC has recognized that most banks do carefully and effectively monitor funds actually disbursed to a borrower, thereby avoiding a violation of Section 84, even though the nominal amount of credit available to that borrower, through loans or loan commitments, exceeds the bank's lending limit.

Summary of the Proposed Revision of the Temporary Rule, With Examples

Three of the commenters objecting to the impact of the Temporary Rule on banks which had not experienced a decline in capital proposed an alternative to the Temporary Rule's treatment of loan commitments. These commenters suggested that a bank not be *required* to consider a loan commitment which was within the bank's lending limit when made as a loan, which, when combined with all other outstanding obligations of the borrower *must* be within the bank's lending limit. Rather, these commenters proposed that the bank be allowed to make an election, choosing whether a loan commitment which is within the bank's lending limit when made should be treated as a loan as of the day it is entered into or as of the day it is funded.

Although the OCC considered that alternative, the OCC has rejected it in favor of this proposed revision. In rejecting the suggestion offered by the commenters, the OCC considered that a bank may not be in the best position, at the time of entering into an underline loan commitment, to determine whether that commitment should be treated as a loan or as an overline commitment. Such a decision may better be made after the loan commitment has been entered into, if and when the bank is called upon to make an additional extension of credit which, when aggregated with the total amount to be advanced under the loan commitment, would cause the bank to exceed its lending limit to the borrower. At that point, the bank may more accurately assess its potential increases or decreases in capital, to determine the prudence of extending the later-requested credit.

To achieve the flexibility desired, the OCC is proposing a method by which "underline" loan commitments, *i.e.*, those loan commitments which, with all other outstanding obligations of the borrower, are within the bank's lending limit when made, will qualify for the protection provided by the Temporary Rule. An "overline" loan commitment, *i.e.*, a loan commitment which, with all other outstanding obligations of the borrower, exceeds the bank's lending limit on the date it is entered into, will not qualify for the protection of the Temporary Rule. However, some underline commitments, which qualified for the protection of the Temporary Rule when made, may subsequently be disqualified.

An underline commitment will be disqualified from the protection of the Temporary Rule if, after entering into the underline commitment, the bank makes an additional loan or an extension of credit to the borrower, which exceeds the bank's lending limit when combined with the nominal amount of any underline loan commitments and all other loans outstanding to the borrower. Note that, as an overline commitment is not considered a loan or an extension of credit until it is funded, merely entering into an overline commitment subsequent to a qualifying underline commitment to lend will not, of itself, disqualify an earlier qualifying commitment to lend. Advances of funds under an overline commitment may result in the disqualification of an underline commitment to lend, however.

Once an underline commitment has been disqualified, it will be treated as if it had been an overline commitment. Thus, a disqualified loan commitment may be funded only to the extent that any advance under the commitment, combined with all other obligations outstanding to the borrower, does not exceed the bank's lending limit on the date of funding. Disqualification of a loan commitment may also result in a violation of Section 84, where the funds disbursed under the loan commitment, when combined with all other outstanding obligations of the borrower and the amount of the disqualifying credit, exceed the bank's lending limit on the date of the disqualifying credit.

Although a bank does not violate Section 84 when it fully funds a qualified underline loan commitment in excess of the bank's lending limit on the date of funding, funding the loan commitment may nonetheless result in total obligations outstanding to a borrower in excess of the bank's lending limit. This excess credit is "nonconforming" for the purposes of Section 84, and must be taken into account prior to any subsequent loans which the bank would make to the borrower. In other words, to the extent that a bank has nonconforming loans outstanding to a borrower, the bank may not make additional extensions of credit to that borrower. The requirement that a bank consider its nonconforming loans prior to extending any additional credit to a borrower is not new with this proposed revision of the Temporary Rule, nor was it imposed by the Temporary Rule.

The examples below illustrate (1) the disqualification of an underline commitment, and (2) a nonconforming, but not illegal, loan commitment.

Example I: This example illustrates the disqualification of an underline loan commitment. Assume that a national bank has a lending limit of $10,000,000.00. On June 1, 1988, the bank has one loan, in the amount of $5,000,000.00, outstanding to Borrower. On July 1, 1988, at Borrower's request, the bank enters into a legally binding written loan commitment with Borrower for an additional $5,000,000.00, to be funded at a later date. As this loan commitment, when combined with all other outstanding obligations of Borrower to the bank, is within the bank's lending limit when it is made, it qualifies for the protection of the Temporary Rule. Unless it is disqualified, this loan commitment may be fully funded, notwithstanding a subsequent decline in the bank's lending limit.

On August 1, 1988, after entering into the loan commitment, but before it is funded, Borrower requests an additional loan of $1,000,000.00 from the bank; this loan is not related to the qualifying loan commitment. Once the bank makes this loan, the total outstanding obligations of the Borrower, including the amount of the unfunded loan commitment, exceed the bank's lending limit. Under the Temporary Rule, as published and made effective June 24, 1988, the bank would have violated section 84 on making this $1,000,000.00 loan to Borrower. Under the proposed revision of the Temporary Rule, however, the bank would not violate section 84. Rather, in making the

$1,000,000.00 loan, the bank has effectively elected to disqualify its July 1, 1988, loan commitment. As a disqualified underline commitment, the loan commitment may subsequently be funded only to the extent of the bank's lending limit on the date of funding. Thus, if Borrower later seeks to have the loan commitment funded, the bank may provide only $4,000,000.00 without violating section 84. Of course, the bank may attempt to sell participations for the remaining $1,000,000.00 of the loan commitment.

Note that if Borrower had requested a second loan commitment of $1,000,000.00 on August 1, 1988, rather than a loan, the July 1, 1988, loan commitment would not have been disqualified. The proposed revision provides that a qualifying loan commitment may only be disqualified by a subsequent loan or extension of credit which would cause the bank to exceed its lending limit when combined with any underline commitments to lend and all other outstanding obligations of the borrower. A loan commitment of $1,000,000.00, entered into on August 1, 1988, would have been an overline commitment. Since an overline commitment is not considered a loan or an extension of credit until it is funded, the overline commitment could not have triggered the disqualification of the July 1, 1988, loan commitment.

Example II: This example illustrates the consideration that must be given to a nonconforming loan, in excess of the bank's lending limit as a result of the bank having fully funded a qualifying loan commitment, after the bank has experienced a decline in its capital, and hence, its lending limit. Assume that a national bank has a lending limit of $10,000,000.00. On June 1, 1988, the bank has one loan, in the amount of $5,000,000.00, outstanding to Borrower. On July 1, 1988, at Borrower's request, the bank enters into a legally binding written loan commitment with Borrower for an additional $5,000,000.00, to be funded at a later date. As this loan commitment, when combined with all other outstanding obligations of Borrower to the bank, is within the bank's lending limit when it is made, it qualifies for the protection of the Temporary Rule. Unless it is disqualified, this loan commitment may be fully funded, notwithstanding a subsequent decline in the bank's lending limit.

On October 1, 1988, Borrower requests that the bank fully fund its July 1, 1988, loan commitment. By this time, the bank's lending limit has declined to $7,000,000.00. As the loan commitment was within the bank's lending limit when made, and has not subsequently been disqualified from the protection of the Temporary Rule, the bank may fully fund this loan commitment without violating section 84. However, when the bank fully funds that commitment, it will have total extensions of credit outstanding to Borrower of $10,000,000.00, exceeding its lending limit by $3,000,000.00.

On November 1, 1988, Borrower requests a short term loan of $500,000.00 from the bank. As the bank has exceeded its lending limit to Borrower, and has nonconforming extensions of credit outstanding to Borrower, the bank may not make this loan without violating section 84.

On learning of the bank's inability to extend this credit to Borrower, Borrower notes that on November 15, 1988, it will repay the first of five $1,000,000.00 installments of principal on its $5,000,000.00 loan. Borrower further notes that its present outstanding obligations, at $10,000,000.00, do not result in a violation of section 84. Thus, Borrower asks whether, on receiving that $1,000,000.00 payment, the bank may then make the requested $500,000.00 available to Borrower, for total outstanding credit to Borrower of $9,500,000.00.

Notwithstanding a reduction in Borrower's outstanding obligations, to an amount less than the $10,000,000.00 which the bank has extended to Borrower without violating section 84, the bank may not make the requested $500,000.00 available to Borrower. Even though Borrower will reduce its total outstanding obligations to the bank, the reduction will not bring the total within or below the bank's lending limit on that day. Thus, the bank's total obligations outstanding to Borrower are still nonconforming for the purposes of section 84 and the bank may not make additional extensions of credit to Borrower at this time.

Proposed Revisions to the Temporary Rule

In order to achieve the results intended by this revision, the proposal would amend the definition of a "contractual commitment to advance funds," at 12 CFR 32.2(d), to include a "qualifying commitment to lend." The revision would also add a definition of a "qualifying commitment to lend" to the definitions provided by Part 32. The definition of a "qualifying commitment to lend" notes that all written legally binding loan commitments, which, when combined with all other outstanding obligations of the borrower, are within the bank's lending limit when made, are qualifying commitments to lend. The definition then describes the disqualification of an underline loan commitment. The specific language of the proposed definitional amendments to § 32.2 is fully set forth below.

In addition to the substantive revision of the Temporary Rule, the OCC is proposing a modified transition period, during which the OCC will not take administrative action to enforce the Temporary Rule against national banks. The provision for a transition period will not change the effective date of the Temporary Rule, or its validation, for the purposes of the Temporary Rule, of all legally binding commitments which were made in good faith prior to the effective date of the Temporary Rule, and which were within the bank's lending limit when made.

The OCC proposes that the transition period extend from the date the Temporary Rule became effective, on June 24, 1988, until 60 days after the date the Temporary Rule is made a final rule. This transition period recognizes that many banks may not have fully understood the requirements of the Temporary Rule, and its applicability to all national banks. The OCC intends that national banks use the transition period to become familiar with the provisions of the Temporary Rule, and any revisions of the Temporary Rule, and amend their lending practices as necessary. As the transition rule incorporates a policy of limited administrative forbearance, it is addressed in a new, separate section of Part 32, at § 32.9. The proposed language of this rule is also set forth below.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is certified that this notice of proposed rulemaking, if adopted as a final rule, will not have a significant economic impact on a substantial number of small banks.

Executive Order 12291

The OCC has determined that this proposed rule is not classified as a "major rule," and therefore does not require a regulatory impact analysis.

List of Subjects in 12 CFR Part 32

National banks, Lending limit, Loan commitments.

Authority and Issuance

For the reasons set forth in the preamble, Title 12, Chapter I, Part 32 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 32—LENDING LIMIT

1. The authority citation for Part 32—LENDING LIMIT continues to read as follows:

Authority: 12 U.S.C. 84 and 12 U.S.C. 93a.

2. Section 32.2, paragraph (d), is revised, and a new paragraph (f) is added, to read as follows:

§ 32.2 Definitions.

* * * * *

(d) "Contractual commitment to advance funds" means (1) an obligation to make payments (directly or indirectly) to a third party contingent upon default by the bank's customer in the performance of an obligation under the terms of that customer's contract with the third party or upon some other stated condition, (2) an obligation to guarantee or stand as a surety for the benefit of a third party, or (3) a qualifying commitment to lend (as defined at paragraph (f) of this section). The term includes, but is not limited to, standby letters of credit (as defined in paragraph (e) of this section), guarantees, puts or other similar arrangements. For the purposes of this part, undisbursed loan funds and loan commitments not yet drawn upon which are not "qualifying commitments to lend," or which are not otherwise equivalent to a contractual commitment to advance funds as defined herein are not considered a "contractual commitment to advance funds." This definition also does not include commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer, which do not "guarantee" payment of a money obligation, and which do not provide for payment in the event of default of the account party.

* * * * *

(f) "Qualifying commitment to lend" means a binding written commitment to lend which, when combined with all other outstanding loans (including other binding commitments) to the borrower, is within the bank's lending limit on the date of the commitment and which has not been disqualified. A qualifying commitment to lend will be disqualified by any loan or extension of credit made subsequent to the date of the qualifying commitment, which, when combined with all other outstanding loans (including other binding commitments) attributable to the borrower, would cause the total to exceed the bank's lending limit on the date of the loan or extension of credit. In determining whether the issuance of a commitment to lend would be within a bank's lending limit on the date of the commitment, the bank may deduct from the amount of the commitment the aggregate amount of legally binding written loan participations in that commitment by other financially responsible persons or institutions.

3. A new § 32.9, is added to read as follows:

§ 32.9 Modified transition period.

Where it is established to the satisfaction of the Comptroller of the Currency that a bank has exceeded its lending limit as the result of an unintentional misapplication of the definition of a "contractual commitment to advance funds," as amended by the Temporary Rule on National Bank Lending Limits, 53 FR 23752 (June 24, 1988), the Comptroller of the Currency will not take administrative enforcement action against the bank, its officers, directors, or employees for a violation of 12 U.S.C. § 84. This policy will apply to loans and extensions of credit made from the date the Temporary Rule on National Bank Lending Limits became effective, June 24, 1988, until [insert 60 days after the effective date of the final rule].

Date: July 11, 1989.

Robert L. Clarke,

Comptroller of the Currency.

[Fr Doc. 89-16704 Filed 07-17-89; 8:45 am]

BILLING CODE 4810-33-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 89-NM-101-AD]

Airworthiness Directives; Aerospatiale Model ATR42 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to revise an existing airworthiness directive (AD), applicable to Aerospatiale Model ATR42 series airplanes, which currently prohibits use of the autopilot when operating in icing conditions. That action was prompted by an incident in which a Model ATR42 airplane operating in icing conditions (believed to have been freezing rain) experienced roll excursions and autopilot disconnect. This condition, if not corrected, could result in loss of control of the airplane. This action would require installation of vortex generators on the upper wing surface as a terminating action to the prohibition of use of the autopilot when operating in icing conditions.

DATE: Comments must be received no later than September 8, 1989.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 89-NM-101-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Aerospatiale, 216 Route de Bayonne, 31060 Toulouse, Cedex 03, France. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Robert C. McCracken, Standardization Branch, ANM-113; telephone (206) 431-1979. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 89-NM-101-AD." The post card will be date/time stamped and returned to the commenter.

Discussion

On April 7, 1989, the FAA issued AD 89-09-05, Amendment 39-6197 (54 FR 15730; April 19, 1989), to prohibit use of the autopilot on Aerospatiale Model ATR42 series airplanes when operating in icing conditions. That action was prompted by an incident in which an Aerospatiale Model ATR42 airplane operating in icing conditions (believed to have been freezing rain) experienced roll excursions and autopilot disconnect. This condition, if not corrected, could result in loss of control of the airplane.

Since issuance of that AD, flight testing and analysis have demonstrated that installation of vortex generators on the upper surface of the Model ATR42 airplane wing significantly improves the effectiveness of the ailerons, which reduces the severity of the roll upset that can occur with asymmetric ice accumulations resulting from icing conditions, such as freezing rain.

Aerospatiale has issued Service Bulletin ATR42-57-0018, dated May 3, 1989, which describes procedures for installation of vortex generators on the upper surface of the wing.

This airplane model is 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 condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would revise AD 89-09-05 to require installation of vortex generators, in accordance with the service bulletin previously described, as terminating action to the prohibition of use of the autopilot in icing conditions.

The FAA has determined that long term continued operational safety will be better assured by design changes to remove the source of the problem, rather than by repetitive inspections or special operating procedures. Long term special operating procedures may not be providing the degree of safety assurance necessary for the transport airplane fleet. This, coupled with a better understanding of the human factors associated with numerous continual special procedures, has led the FAA to consider placing less emphasis on special procedures and more emphasis on design improvements. The proposed modification requirement is in consonance with that policy decision.

It is estimated that 43 airplanes of U.S. registry would be affected by this AD, that it would take approximately 4 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. The necessary modification parts would be provided by the manufacturer at no charge to operators. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $6,880.

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. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (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) 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. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39:

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend Part 39 of the Federal Aviation Regulations 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. Section 39.13 is amended by amending Amendment 39-6197 (54 FR 15730; April 19, 1989), AD 89-09-05, as follows:

Aerospatiale: Applies to Model ATR42 series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To minimize the potential hazards associated with operating in icing conditions including freezing rain, accomplish the following:

A. Within 10 hours time-in-service after May 3, 1989 (the effective date of Amendment 39-6197), incorporate the following into the Limitations Section of the FAA-approved Airplane Flight Manual (AFM). This may be accomplished by including a copy of this AD in the AFM.

When operating in icing conditions, as defined in the AFM, or when freezing rain is forecast or reported, use of the autopilot is prohibited.

Warning

Prolonged operation in freezing rain should be avoided. Ice accretion due to freezing rain may result in asymmetric wing lift and associated increased aileron forces necessary to maintain coordinated flight. Whenever the aircraft exhibits buffet onset, uncommanded roll, or unusual control wheel forces, immediately reduce angle-of-attack and avoid excessive maneuvering.

B. Within 60 days after the effective date of this amendment, install vortex generators, in accordance with Aerospatiale Service Bulletin ATR42-57-0018, dated May 3, 1989. This action constitutes terminating action for the AFM prohibition required in paragraph A., above, regarding use of the autopilot when operating in icing conditions, and the limitation may be removed from the AFM.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Standardization Branch, ANM-113.

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Aerospatiale, 216 Route de Bayonne, 31060 Toulouse, Cedex 03, France. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 10, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-16744 Filed 7-17-89; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 89-NM-106-AD]

Airworthiness Directives; Boeing Model 737-400 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD), applicable to Boeing Model 737-400 series airplanes, which would require repetitive inspections for chafing between the number two engine throttle cable and an adjacent right wing front spar bracket. This proposal is prompted by one report of a throttle cable failure and additional reports of a significant number of the cables inspected and found to be worn or frayed, on Boeing 737-300 series airplanes. In this area, the Model 737-400 is similar to the Model 737-300. This condition, if not corrected, could result in throttle cable separations and subsequent loss of engine throttle control.

DATE: Comments must be received no later than September 8, 1989.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 89-NM-106-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen S. Bray, Propulsion Branch, ANM-140S; telephone (206) 431-1969. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 89-NM-106-AD." The post card will be date/time stamped and returned to the commenter.

Discussion

One operator of a Boeing Model 737-300 series airplane reported a separation of the number two engine throttle cable after 4,215 flight hours. This report prompted Boeing to conduct a survey of control cable wear on Model 737-200 and 737-300 airplanes. During the course of this survey, several incidents of wear on the number two throttle cable were found on Boeing Model 737-300 airplanes. Sixteen operators responded to the Boeing survey with the inspection results on 96 airplanes. Twenty of the 96 airplanes, were reported to have number two engine throttle cable wear, and 9 cables were within acceptable wear limits. The remaining 76 airplanes showed no cable wear, although 11 airplanes were reported as showing evidence of contact/wear on the adjacent right wing front spar bracket. The FAA has recently issued AD 89-13-05, Amendment 39-6240 (54 FR 26021; June 21, 1989), to require inspection of Model 737-300 series airplanes.

Based on the similarity of the number two throttle cable systems on the Boeing Model 737-300 and 737-400, the FAA has determined that chafing between the number two throttle cable and adjacent right wing front spar bracket (Station 124) could also develop on the Model 737-400 airplane. This chafing is caused by air flow between the right leading edge flaps and front spar which produces a harmonic disturbance that excites the number two engine throttle cable. This condition, if not corrected, could eventually result in throttle cable separation and subsequent loss of throttle control.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require inspection for chafing between the number two engine throttle cable and adjacent right wing front spar bracket every 1,000 hours, and replacement of the cable, if necessary. Boeing Commercial Airplanes is preparing a service bulletin which will contain a structural design change to the number two engine throttle cable system. If this service bulletin is approved and available subsequent to the issuance of this NPRM, the FAA may consider referencing it in the final rule as an approved method of compliance. Further, the FAA may consider further rulemaking action to require a terminating modification after one has been developed and approved.

There are approximately 50 Model 737-400 series airplanes of the affected design in the worldwide fleet. It is estimated that 18 airplanes of U.S. registry would be affected by this AD, that it would take approximately 2 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $1,440.

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. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (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) 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. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator,

the Federal Aviation Administration proposes to amend 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. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Applies to Model 737–400 series airplanes, equipped with CFM International CFM56–3 series engines, certificated in any category. Compliance required as indicated, unless previously accomplished.

To minimize the potential for cable separation due to the number two engine throttle cable chafing against the right wing front spar bracket, accomplish the following:

A. Prior to the accumulation of 300 flight hours after the effective date of this AD, unless previously accomplished within the last 700 flight hours, and thereafter at intervals not to exceed 1,000 flight hours, gain access to the fuel shut-off cable pulley bracket near the right wing front spar Station 124 and inspect the number two engine throttle cable for wear. Replace the cable, before further flight, if cable wear exceeds acceptable wear limits specified in Section 20–20–31 of the Model 737 Maintenance Manual.

B. 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, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment, and then send it to the Manager, Seattle Aircraft Certification Office.

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 10, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–16743 Filed 7–17–89; 8:45 am]

BILLING CODE 4910–13–M

---

14 CFR Part 39

[Docket No. 89–NM–113–AD]

Airworthiness Directives; SAAB-Scania Model SF–340A Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD), applicable to certain SAAB-Scania Model SF–340A series airplanes, which would require inspection of the AC generators for modification status, and replacement of the AC generators, if necessary. This proposal is prompted by numerous reports of AC generator bearing failure. This condition, if not corrected, could result in the loss of ice protection for the engine inlet; and, when combined with the loss of the other AC generator output, could result in the loss of ice protection for both engine inlets, windshield, pitot systems, alpha systems, and propellers.

DATE: Comments must be received no later than September 8, 1989.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–103, Attention: Airworthiness Rules Docket No. 89–NM–113–AD, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168. The applicable service information may be obtained from SAAB-Scania AB, Product Support, S–581.88 Linkoping, Sweden. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Quam, Standardization Branch, ANM–113; telephone (206) 431–1978. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 89–NM–113–AD." The postcard will be date/time stamped and returned to the commenter.

Discussion

The Luftfartsverket (LFV), which is the airworthiness authority of Sweden, in accordance with existing provisions of a bilateral airworthiness agreement, has notified the FAA of an unsafe condition which may exist on SAAB Model SF–340A series airplanes. There have been numerous reports of failure of the AC generators due to inadequate anti-drive end bearing support. This condition, if not corrected, could result in loss of ice protection for the one engine inlet; and when combined with the loss of the other AC generator output [engine or generator system failure], could result in the loss of ice protection for both engine inlets, windshields, pitot systems, alpha systems, and propellers.

SAAB-Scania has issued Service Bulletin SF340–24–016, dated May 12, 1989, which describes procedures for replacement of AC generator, P/N 31342–001, with an AC generator with the same part number but modified to "Mod D" status (indicated by an "X" stamped in the D Modification Status block on the modification status label). The "Mod D" AC generator contains bearings and bearing support improvements that have been installed in accordance with Lucas Aerospace Power Equipment Corp (LAPEC) Service

Bulletin 31342-07, dated January 19, 1989. The LFV has classified the service bulletin as mandatory, and has issued Swedish Airworthiness Directive No. 1-033 addressing this subject.

This airplane model is manufactured in Sweden 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 condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would require inspection of AC generators, P/N 31342-001, for modification status and replacement, if necessary, in accordance with the service bulletin previously described.

It is estimated that 79 airplanes of U.S. registry would be affected by this AD, that it would take approximately 3 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $9,480.

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. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (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) 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. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend Part 39 of the Federal Aviation Regulations 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. Section 39.13 is amended by adding the following new airworthiness directive:

SAAB-Scania: Applies to Model SF-340A series airplanes, certificated in any category. Compliance is required within 30 days after the effective date of this AD, unless previously accomplished.

To prevent the loss of certain ice protection systems due to AC generator failures, accomplish the following:

A. Inspect the AC generators, P/N 31342-001, for the modification status.

1. If the modification status blocks are X-stamped in the D (or later) modification status block, no further action is required.

2. If the modification status blocks are X-stamped in the A, B, or C modification status block, prior to further flight, replace the AC generator with one X-stamped in the D (or later) modification status block, in accordance with SAAB Service Bulletin SF340-24-016, dated May 12, 1989.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Standardization Branch, ANM-113.

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to SAAB-Scania AB, Product Support, S-581.88 Linkoping, Sweden. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 10, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-16742 Filed 7-17-89; 8:45 am]

BILLING CODE 4910-13-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33-6838; File No. S7-9-88; International Series Release No. 103]

RIN 3235-AD23

Offshore Offers and Sales

AGENCY: Securities and Exchange Commission.

ACTION: Revised proposed regulation and request for comment.

SUMMARY: The Commission is published for comment a revised proposed Regulation intended to clarify the extraterritorial application of the registration provisions of the Securities Act of 1933.

DATE: Comments should be received on or before September 12, 1989.

ADDRESS: All communications on this matter should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments should refer to File No. S7-9-88. All comments 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: Sara Hanks, Anita Klein or Madison Barker, (202) 272-3246, Office of International Corporate Finance, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

On June 10, 1988, the Commission published for comment Regulation S,[1] which was intended to clarify the extraterritorial application of the registration requirements of the Securities Act of 1933 (the "Securities Act").[2] The Regulation contained both a general statement (the "General Statement"), providing that the registration requirements do not apply to offers and sales that occur outside the United States, and two non-exclusive safe harbors from those requirements for specified offers and sales.

After reviewing the comments received,[3] which supported the

[1] Securities Act Release No. 6779 (June 10, 1988) [53 FR 22661] (the "Proposing Release").

[2] 15 U.S.C. 77a *et seq.*

[3] Ninety-five comment letters on the Proposing Release were received. Those letters and a

Continued

Regulation's rationale but suggested changes to increase the utility of the Regulation, the Commission today is publishing a revised Regulation S for comment. The General Statement remains unchanged, and the proposed Regulation continues to include two safe harbors: one for issuers, securities professionals involved in the distribution process and their affiliates (the "issuer safe harbor") and the other for resales by all other persons (the "resale safe harbor").

As in the original proposal, the safe harbors would impose two general conditions. First, any offer or sale of securities must be made in an "offshore transaction." As reproposed, that definition would be broadened to cover sales on designated organized foreign securities markets. Second, "directed selling efforts" could not be made in the United States. The definition of "directed selling efforts" has been modified to emphasize that the prohibition relates only to activities that are intended, or that could reasonably be expected, to result in general preconditioning of the U.S. market.

Several significant changes have been made to the terms and conditions that must be satisfied under the safe harbors to assure that U.S. registration requirements do not apply. While the issuer safe harbor still would distinguish among three categories of issuers, the first category, which imposes no restrictions other than the two general conditions, would be broadened to include offerings by an expanded group of foreign issuers. As revised, the first category would extend to offerings by foreign issuers targeted at their home country markets and offerings by foreign issuers with no substantial U.S. market interest, whether or not the issuer had a continuous reporting obligation under the Securities Exchange Act of 1934 (the "Exchange Act").[4] In addition, the scope of the term "substantial U.S. market interest" in an issuer's securities would be narrowed to cover only equity securities for which the United States was a significant market and debt securities held in large amounts by a significant number of U.S. persons.

The second issuer safe harbor category, which originally was applicable to all reporting issuers in the proposed Regulation, has been extended in the reproposal to apply to offerings of debt securities of foreign issuers where there was a substantial U.S. market interest in the issuer's debt securities. The restricted period applicable to this safe harbor, during which offers and sales in the United States and to U.S. persons would be prohibited, has been shortened from 90 to 40 days. In addition, the Regulation as revised would no longer proscribe the deposit of securities in exchange for American depositary receipts ("ADRs") during a restricted period, but rather would focus on whether ADRs being sold to U.S. residents were traceable to the securities being offered and sold offshore.

The third issuer safe harbor category would be available to all issuers but would be of use primarily for offerings of non-reporting U.S. issuers and equity offerings of non-reporting foreign issuers with substantial U.S. market interest for the class of securities offered that would not qualify for the other two issuer safe harbor categories. This category would impose more restrictive procedures designed to guard against flowback of securities to the United States. As with the second category, the restricted period for debt securities has been reduced to 40 days.

The resale safe harbor also has been modified to distinguish between dealers and persons receiving selling concession, fees or other remuneration, and all other persons. As revised, the resale safe harbor would impose restrictions on resale beyond the general conditions only where the securities were sold by a dealer or other person receiving a selling concession, fee or other remuneration. Any security could be resold on an established foreign securities exchange or designated organized foreign securities market, if a selling dealer (or person receiving a selling commission, fee or other remuneration) or person acting on his behalf did not know that the buyer was a U.S. person.

The definition of "U.S. person" has been modified due to reconsideration of the Commission's decision to reverse the *Baer Securities* no-action letter.[5] The revised proposed definition of U.S. person would not include any discretionary custodial account or similar account held by a dealer or other professional fiduciary located in the United States if the beneficial owner was not a U.S. person. Any offer or sale to such person in reliance on the Regulation, however, would still be required to be made outside the United States to fall within the safe harbors of Regulation S.

II. Discussion of Revised Proposed Regulation S

A. General Statement

The General Statement,[6] which remains unchanged from the version initially proposed, would include a list of the considerations to be used in determining whether an offer or sale occurs outside the United States.[7] While various commenters criticized different aspects of the specified considerations, no clear consensus on any particular point was reflected. Because the list of factors was included in the original Regulation to provide assistance to persons relying on the General Statement to demonstrate an offer or sale was an offshore transaction, it has been retained in the revised Regulation. The Commission requests comment as to whether the entire list of relevent considerations should be deleted from the General Statement.

B. General Conditions

Under both the proposed Regulation and the revised version proposed today, two general conditions would apply to all offers and sales made in reliance on the Regulation.[8] Those conditions are a prohibition against "directed selling efforts" in the United States[9] and a requirement that the offer and sale of the securities be made in an "offshore transaction."[10]

1. "Directed Selling Efforts"

The prohibition against directed selling efforts in the United States have been modified in the revised proposed Regulation. The language of the definition[11] has been revised to conform to the explanation in the Proposing Release and preclude an overly broad interpretation that an isolated, limited contact with the United States would result in a loss of the safe harbor for the entire offering.[12] As revised, the definition of "directed selling efforts" includes only those activities that could reasonably be expected, or are intended, to condition the market with respect to the securities being offered in reliance upon the Regulation. As outlined in the Proposing Release, continuation of activities such as routine product advertising and routine corporate

summary of the comments are available for public inspection and copying in File No. S7-9-88 at the Commission's Public Reference Room in Washington, DC.

[4] 15 U.S.C. 78a *et seq.*

[5] *Bear Securities Corporation* (Oct. 12, 1979).

[6] Proposed Rule 901.

[7] Proposed Rule 901(b).

[8] *See* proposed Rule 904.

[9] Proposed Rule 904(b).

[10] Proposed Rule 904(a).

[11] Proposed rule 902(b).

[12] Such a contact could constitute an offer in the United States, however, which would preclude reliance on Regulation S for that specific transaction.

communications. (*e.g.*, press releases regarding the financial results of the issuer or the occurrence of material events with respect to the issuer, provided no reference is made to the offering of securities) generally would not be deemed to be "directed selling efforts" within the meaning of Regulation S.[13]

As an example of "directed selling efforts," the Proposing Release cited "placing of advertisments * * * in publications with a general circulation in the United States, which discuss the offering or are otherwise intended to condition the market for the securities purportedly being offered abroad * * *"[14] Commenters requested further explanation of this prohibition.

Publications with a general circulation in the United States, as defined in the revised Regulation,[15] would include all publications printed in the United States primarily for distribution in the United States, and all publications printed outside the United States that, on average during the preceding twelve months, either have a circulation in the United States of 15,000 copies or more per issue,[16] or have 50 percent or more of their circulation in the United States. Generally, foreign publications meeting such definition are produced as a separate edition for the United States. In such cases where the affiliated non-U.S. edition does not itself meet the definition, only the U.S. edition would be considered a publication of general circulation in the United States. An advertisment would not be deemed a directed selling effort in the United States if publication of the advertisment was required by foreign law, and contained no more information than legally required. The number of copies circulated per issue was set at 15,000 for purposes of the definition of "publications with a general circulation in the United States" by reference to the circulation figures for publications that are likely to contain advertisments that could precondition the U.S. market. Comment is solicited regarding whether that number is an appropriate indicator of general circulation in the United States and, if not, whether the number should be raised (*e.g.*, to 20,000) or lowered (*e.g.*, to 10,000). Commenters are also requested to address whether the percentage level set is appropriate, or should be higher (*e.g.*, 60 or 75 percent) or lower (*e.g.*, 35 or 40 percent), and whether a rolling twelve-month average is appropriate.

Some commenters expressed concern that the prohibition on directed selling efforts would interfere with offshore offerings of interests in real estate located in the United States. The "directed selling efforts" definition is not intended to preclude investigation of investment opportunities. Bona fide site visits to real estate, plants, or other facilities located in the United States and tours thereof conducted in the United States for a prospective investor by an issuer or persons acting on its behalf would not be directed selling efforts if the issuer had extended an offer of securities outside the United States to the prospective investor prior to the time of the visit or tour in the United States.

Several commenters expressed concern that, given the prohibition against directed selling efforts, U.S. broker-dealers would be unable to rely upon the Regulation if they initiated sales communications to non-U.S. persons from the United States. The Regulation's prohibition against directed selling efforts made in the United States is not intended to preclude such activities.

As noted in the Proposing Release,[17] the concept of directed selling efforts is not coextensive with activities constituting "solicitation," as that term is used in considering the need for registration as broker-dealer under the Exchange Act. In a recent Release regarding the applicability of U.S. broker-dealer registration requirements to foreign entities, and adopting Exchange Act Rule 15a–6,[18] the concept of solicitation was defined by the Commission as "including any affirmative effort by a broker or dealer intended to induce transaction business for the broker-dealer or its affiliates."[19] Among the examples of solicitation noted in that Release were efforts to induce a single transaction, telephone calls from a broker-dealer to a customer encouraging use of the broker-dealer to effect transactions, and transmission of information, opinions, or recommendations to particular investors in the United States, whether directed at individuals or groups. While activities directed at a single customer or prospective investor may be offers for purposes of Regulation S or solicitation for purposes of Rule 15a–6, because of their limited effect, they would not generally constitute prohibited directed selling efforts. Nonetheless, while solicitation encompasses a broader range of activities than directed selling efforts, some activities would constitute both. For example, the transmission by participants of information, opinions or recommendations to groups of investors in the United States with respect to securities being offered under the Regulation would be both directed selling efforts and offers for purposes of Regulation S and solicitation for purposes of Rule 15a–6.

Commenters stated that the dissemination in the United States of a broker-dealer's quotations for a security being offered and sold in reliance on the Regulation technically could violate the prohibition against directed selling efforts.[20] Questions regarding this aspect of "directed selling efforts" typically would be decided on an individual interpretive basis. At the present time, however, U.S. distribution of foreign broker-dealers' quotations by third-party systems, *e.g.*, systems operated by foreign marketplaces or by private vendors, that distributed such quotations primarily in foreign countries would not be deemed directed selling efforts or an offer, provided that: (i) Those systems did not enable securities transactions to be executed between foreign broker-dealers and persons in the United States through the systems; and (ii) the issuer, distributors, foreign broker-dealers and other participants in the systems did not initiate contracts with U.S. persons or persons within the United States, beyond those contracts exempted under Rule 15a–6. The direct dissemination of a foreign market maker's quotations to U.S. persons or persons within the United States, such as through a private quotation system controlled by a foreign broker-dealer, would, consistent with Rule 15a–6, be viewed as both an offer and a directed selling effort given the direct, exclusive inducement to purchase the securities.

---

[13] 53 FR at 22667. *See also* Securities Act Release Nos. 3844 (Oct. 4, 1957) [22 FR 8359] and 5009 (Oct. 7, 1969) [34 FR 16870]. However, where a company did not have a history of disseminating routine corporate communications or product advertising and disseminated such information shortly before or during an offshore offering, the activities might constitute directed selling efforts.

[14] 53 FR at 22667.

[15] *See* Proposed Rule 902(i).

[16] *The Financial Times* and *The Economist* are examples of foreign publications meeting this description.

[17] 53 FR at 22667, n. 84.

[18] 17 CFR 240.15a–6.

[19] Exchange Act Release No., 34–27017 (July 11, 1989).

[20] The Commission notes, however, that in the context of the broker-dealer registration requirements, Section 15(a)(1) of the Exchange Act [15 U.S.C. 78*o*(a)(1)], the staff has given assurances that enforcement action for failure to register would not be recommended when, absent such registration, there has been a collective distribution by organized foreign exchanges of foreign market makers' quotations. *See* Exchange Act Release No. 25801 (June 14, 1988) [53 FR at 23647 nn. 21–27 and accompanying text].

2. "Offshore Tranasaction"

As revised, the proposed definition of offshore transaction[21] has been expanded to encompass transactions executed on or through the facilities of a designated organized foreign securities market.[22] To qualify for that designation, a market would have to be organized under foreign law, have an established operating history, and be subject to oversight by a governmental or self-regulatory body to which securities transactions are reported on a regular basis.[23] Specific foreign markets that would meet the requirements of the definition are not individually identified in the definition.[24] Determination of "designated organized foreign securities market" status would be made on a case-by-case basis by the Division of Corporation Finance through the interpretive letter process. The designation process would not be used for established foreign securities exchanges.

While commenters responding to the request for comment endorsed the extension of "offshore transaction" to non-exchange markets, little specific suggestion was provided on the definition or the mechanism for implementation. Comment is specifically requested as to the sufficiency and appropriateness of the factors in the proposed definition of "designated organized foreign securities market" and the proposed implementation procedures. Comment is also solicited regarding whether the following characteristics also should be considered in making determinations regarding status as a designated organized foreign securities market: (i) A system for the quotation of securities; (ii) a clearance and settlement system; and (iii) oversight standards set by an existing body of law by the jurisdiction or organization.

The prohibition against pre-arranging with buyers in the United States transactions taking place on or through the facilities of a foreign securities exchange has been modified in the revised definition. As originally proposed, the seller had a duty of investigation. As revised, the prohibition would extend only to cases in which the seller (or a person acting on the seller's behalf) knew that the transaction was pre-arranged.

The proposed definition of "offshore transaction" required, for non-exchange transactions, that the buyer be outside the United States at the time the buy order was originated and that execution and delivery take place outside the United States. The definition would be modified to protect a seller that reasonably believed that the buyer was outside the United States at that time and that execution and delivery took place overseas.

C. Issuer Safe Harbor

The issuer safe harbor [25] would apply to issuers, securities professionals involved in the distribution process pursuant to contract, and their affiliates.[26] The proposed issuer safe harbor distinguished among three classes of securities, based on nationality and reporting status of the issuer and the degree of U.S. market interest in the issuer's securities. Varying procedural safeguards were imposed on the categories to ensure that the securities offered would come to rest offshore. The first issuer safe harbor category, with no procedural restrictions other than the offshore transaction requirement and directed selling efforts prohibition, would have been available under the original proposal for offerings of securities by non-reporting foreign issuers with no substantial U.S. market interest in any class of their securities. The second safe harbor category would have been available for offerings of securities by reporting issuers. The third safe harbor category, with the most procedural restrictions, would have been available for all issuers offering securities, including non-reporting U.S. issuers and non-reporting foreign issuers with substantial U.S. market interest.

The revised proposed issuer safe harbor would continue to distinguish among three categories of securities offerings, based on nationality and reporting status of the issuer and the degree of U.S. market interest in the issuer's securities. The scope of each of the three issuer safe harbor categories, however, would be changed substantially in the revised proposed safe harbor. Under the reproposal, the first category would extend to offers and sales of securities by all foreign issuers with no substantial U.S. market interest, regardless of their reporting status, and overseas domestic offerings by foreign issuers.[27] The revised second category would include securities offered and sold by reporting issuers and debt securities offered and sold by foreign issuers regardless of their reporting status.[28] The residual third issuer safe harbor category would be available for all issuers offering securities, including non-reporting U.S. issuers and non-reporting foreign issuers offering equity securities with a substantial U.S. market interest.[29] Appendix A is a chart showing which issuer safe harbor category would be available for any given Regulation S offering by the issuer, a distributor or an affiliate. Reference should be made to the text of the proposed Regulation for a full understanding.

1. Category 1: Foreign Issuers With No Substantial U.S. Market Interest; Overseas Domestic Offerings

Recognizing that securities issued by foreign issuers generally are likely to flow back to their major or home market, the Commission is now proposing that offers and sales of securities of foreign issuers for which the United States is not a primary market be subject to fewer restrictions than originally proposed. Three major revisions to the first of the issuer safe harbor categories have been made to implement that determination: the definition of the term "substantial U.S. market interest" has been narrowed, the first category has been extended to offerings by reporting as well as non-reporting foreign issuers with no substantial U.S. market interest, and "overseas domestic offerings" have been added to the first category.

a. *Revision to "Substantial U.S. Market Interest".* The definition of "substantial U.S. market interest" [30] has been revised [31] with respect to a class

[21] Proposed Rule 902(g).

[22] As with transactions "on or through the facilities of an established foreign securities exchange," designated organized foreign securities market transactions would include all transactions reported to such a market.

[23] *See* Proposed Rule 902(a).

[24] The Eurobond market, as regulated by the Association of International Bond Dealers, and the Unlisted Securities Market operated by the International Stock Exchange of Great Britain and the Republic of Ireland are two existing foreign securities markets that would meet the proposed definition of "designated organized foreign securities market."

[25] Proposed Rule 905.

[26] The original proposal defined the term "distributor" to mean any underwriter, prospective underwriter, dealer, or other person participating, pursuant to a contractual arrangement, in the distribution of securities sold in reliance on the Regulation. Clarification was requested regarding when a distributor would cease to be treated as a distributor under the Regulation. Distributors would remain distributors under the Regulation for the duration of the distribution and the subsequent restricted period (which includes all offers and sales by a distributor holding an unsold allotment or subscription).

[27] *See* proposed Rule 905(a).

[28] *See* proposed Rule 905(b).

[29] *See* proposed Rule 905(c).

[30] Proposed Rule 902(*l*).

[31] Citing the difficulty of determining the extent of holdings and the amount of trading in the United States, a significant number of commenters concluded that many foreign issuers would be unjustifiably forced to assume that they had a "substantial U.S. market interest."

of a foreign issuer's equity securities so that, to qualify for the first category, the issuer must establish at the commencement of the offering that either: (i) More than 50 percent of all recorded trading in that class of securities in the issuer's prior fiscal year took place on or through the facilities of a single established foreign securities exchange or designated organized foreign securities market;[32] or (ii) less than 20 percent of recorded trading in that class of securities in the issuer's prior fiscal year took place on or through the facilities of securities exchanges and inter-dealer quotation systems [33] in the United States and the U.S. markets [34] in the aggregate did not constitute the single largest market for such securities. Listing on a U.S. exchange, quotation on NASDAQ and sponsorship of an American depositary receipt ("ADR") facility would no longer determine U.S. market interest in an issuer's equity securities.

With respect to debt securities, substantial U.S. market interest would exist under the revised definition unless the issuer could establish at the commencement of the offering either that its debt securities [35] were held of record by fewer than 300 U.S. persons, or that less than $1 billion principal amount of its debt securities was held of record by U.S. persons. In response to public comment, the threshold principal amount held by U.S. persons has been raised from $100 million in the proposed definition to $1 billion in the reproposed definition. This revision should alleviate the expressed concern that the lower amount was too small a figure, without consideration of any other factor, to be a good indicator of market interest. The Commission requests comment on whether a lower thresehold (*e.g.*, $500 million) would provide a more appropriate test of substantial market interest, whether the threshold should be higher (*e.g.*, $2 billion), and whether the percentage of the issuer's outstanding debt securities held by U.S. persons should be considered. Issuers that had more than $1 billion of debt securities held in the United States would be able to rely on the existence of only a limited number of investors in the United States to demonstrate lack of substantial U.S. market interest for their debt securities. The addition of the number-of-holders test would minimize inequitable treatment of larger debt issuers.

Issuers of excluding issuers with substantial U.S. market interest in any class of their securities, as initially proposed, the revised first category of the issuer safe harbor would exclude foreign issuers of equity securities only if such market interest existed in the specific class of equity securities being offered and would exclude debt issuers only if there were substantial U.S. market interest in their debt securities. U.S. market interest in an issuer's debt would not be viewed as implying market interest in an issuer's equity and vice versa. Different factors are considered by investors in purchasing fixed income securities than in purchasing participating equity interests. Moreover, there is little empirical evidence that the investor base is necessarily the same for both types of securities.

b. *Extension to Foreign Reporting Issuers.* Rather than applying only to non-reporting foreign issuers with no substantial U.S. market interest as originally proposed, the first category with no substantial U.S. market interest, including reporting issuers. As noted above, the potential for flowback depends on the location of the primary market for the securities, and is unaffected by the reporting status of the issuer. Moreover, exclusion of reporting foreign issuers from this category could unfairly disadvantage foreign issuers that choose to subject themselves to U.S. reporting requirements.

c. Addition of "Overseas Domestic Offering". The third major revision to the first issuer safe harbor category is addition of "overseas domestic offerings" of foreign issuers.[36] Such offerings would be included in this category whether or not there was substantial U.S. market interest in the foreign issuer's securities. Several commenters suggested that offerings of securities by foreign issuers targeted to a particular foreign jurisdiction be subject to less restrictive safe harbor conditions than multijurisdictional offerings by foreign issuers. Consistent with the territorial approach of Regulation S, the primacy of the law governing an issuer's home market should be recognized when an offering of securities is closely targeted to the market. The principle of comity and the reasonable expectations of participants support reliance upon the disclosure requirements of the issuer's home market in those circumstances. To prevent an indirect distribution in the United States, however, as with all other categories of issuers, directed selling efforts in the United States would be prohibited and the offer and sale would have to be made offshore.

Under the proposal, "overseas domestic offering" would be defined to mean "an offering of securities by a foreign issuer directed to citizens or residents of the issuer's national jurisdiction of incorporation or organization or, if the issuer is a foreign government, to citizens or residents of the jurisdiction governed by the issuer, and made in accordance with customary local practices and documentation."[37] Of particular importance is the requirement that such offering be "directed" at the domestic market. Where the foreign issuer or distributor knew or was reckless in not knowing that a substantial portion of the offering would be immediately resold outside the domestic market, such an offering would not be "directed" at that market and the safe harbor would be unavailable in that situation.

2. Category 2: Reporting Issuers; Foreign Issuers' Debt

a. Addition of Foreign Issuer Debt. As originally proposed, the second issuer safe harbor category applied to securities offerings of all foreign and domestic reporting issuers. As discussed above, securities of foreign reporting issuers with no substantial U.S. market interest have been moved to the revised first category. The second category [38] has been expanded so that it would apply to offerings of debt securities of any foreign issuer, whether or not the issuer had continuous reporting obligations under the Exchange Act. The inclusion of debt of non-reporting foreign issuers in this category reflects the view that offering restrictions applicable to the category provide adequate protection against an indirect U.S. distribution because of the institutional nature of the market and the trading characteristics of

[32] *See supra* text accompanying nn. 22–24.

[33] "Inter-dealer quotation system" would mean any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers, as defined in Exchange Act Rule 15c–11(e)(2) [17 CFR 240.15c2–11(e)(2)].

[34] These markets would include the U.S. stock exchanges, the National Association of Securities Dealers Automated Quotation System ("NASDAQ"), and bid and asked questions in the current "pink sheets" of the National Quotation Bureau, Inc. To the extent an inter-dealer quotation system did not record all trading in a security, an issuer would take into account only the amount of trading that was recorded to the extent it is publicly available.

[35] Unlike measurement for equity securities, which would be by class, substantial U.S. market interest in debt would be measured by reference to all outstanding classes of debt securities. The all-encompassing measurement for debt would be appropriate because issuers may create different classes of debt with relative ease.

[36] Proposed Rule 905(a)(2).

[37] Proposed Rule 902(h).

[38] Proposed Rule 905(b).

debt. Moreover, because debt is usually issued in separate classes, debt securities can be tracked more easily if there are resales directed into the United States.

b. Reduction in Length of Restricted Period. In addition to the modifications in scope, the transactional and offering restrictions applicable to the second issuer safe harbor category have been amended. The restricted period applicable to securities in this category, during which offers and sale could not be made in the United States or to U.S. persons, would be reduced from 90 days to 40 days.[39] Commenters advocated this change, stating that it parallels the 40-day period in section 4(3) of the Act,[40] and that the shorter period is sufficient to protect against use of an offshore offering to make an indirect offering into the United States.

The Commission initially solicited comment on requiring a 40-day restricted period only for securities of issuers such as foreign governments and large issuers with a worldwide market following.[41] The modification made in the revised proposed Rule is not limited to such issuers in light of the experience recounted by commenters that all offerings tend to come to rest within 40 days. Comment is requested as to whether the securities of any group of issuers in the second category should be subject to a 90-day or longer period rather than a 40-day restricted period.

c. Treatment of ADR Programs. The analysis and treatment of sales of ADRs during a restricted period has been changed. Under the Regulation as originally proposed, deposit of securities into an ADR facility would have been absolutely precluded for the length of the restricted period applicable to securities in the second and third issuer safe harbor categories. The revised analysis would focus on the sale by a depositary of ADRs representing securities of the class distributed. Such sales would be permitted if (1) the ADRs represented securities acquired by the depositary prior to the distribution, or (2) the depositary determined by examination of the certificate or other evidence that the security to be deposited was not subject to a restricted period and was neither borrowed nor deposited with the intention that it be replaced with securities subject to the restricted period. Whether any sales could be made during the restricted period would depend in part on what steps the issuer of deposited securities would be willing or able to take to identify the securities it distributed.[42] Issuance of ADRs in exchange for underlying securities and withdrawal of deposited securities by ADR holders would not be precluded by the safe harbor provisions.

A single method of identifying the securities in question is not specified because a particular method may not be consistent with applicable rules in all countries. Examples of possible methods of identifying securities newly distributed, some of which were noted by commenters, would include the underlining of dates, the use of different colors for the certificates, the use of legends, the use of selected certificate numbers and the coding of securities by the transfer agent. Unlike the proposed Regulation, the revision does not contain any reference ot the treatment of sales of ADRs during a restricted period. Comment is requested as to whether the treatment of such ADR sales discussed above should be reflected in the Regulation.

d. *Changes to Confirmation Requirement.* As originally proposed, the Regulation would have required that distributors and dealers purchasing from distributors receive confirmations binding them to restrictions on offers and sales.[43] Commenters noted that the requirement that the confirmations be binding would raise difficult legal interpretative issues, and the Regulation as revised [44] would require only that the confirmation note the applicable restrictions. In addition, the rule has been revised to refer to delivery rather than receipt.[45]

e. *Changes to Offering Restrictions.* The definition of "offering restrictions" [46] would require that offering materials and documents include a statement to the effect that the securities have not been registered and may not be offered or sold in the United States or to U.S. persons (other than a distributor) within the restricted period absent registration or an exemption.[47] A provision has been added that would allow the statement to appear in abbreviated form on prospectus cover pages and in advertisements or press releases.[48] Since the underwriting section of the prospectus would still be required to include the full statement, a summary statement on the cover page would be adequate to serve as notice of the restrictions. The brief nature of advertisements and press releases would justify the condensed form of the statement while still providing the necessary notice of restrictions.

3. Category 3: Non-Reporting U.S. Issuers; Equity Offerings by Non-Reporting Foreign Issuers With Substantial U.S. Market Interest

As reproposed, the third category [49] remains the residual category. It would, however, generally be used only for offerings by non-reporting U.S. issuers and for equity offerings by non-reporting foreign issuers with substantial U.S. market interest. The restricted periods that would apply to securities offerings within this category would vary, as in the proposed rule, depending upon whether debt or equity were offered. The restricted period of 90 days for debt securities of non-reporting U.S. issuers has been reduced to 40 days.[50] The one-year restricted period for equity securities would be retained.[51] The revisions to the confirmation requirement [52] and the definition of "offering restrictions" [53] discussed above in connection with the second safe harbor category would also apply to this category.

The original proposal would have required that each subsequent purchaser of equity securities enter into an agreement that it would resell the securities only in accordance with the Regulation, or pursuant to registration or an exemption therefrom. Under the

[39] Proposed Rule 905(b)(2).

[40] 15 U.S.C. 77d(3)

[41] 53 FR at 22670.

[42] This would conform to current practice. Several commenters stated that, in their experience, issuers have assisted depositaries in identification of securities not involved in the distribution, at least in the case of sponsored ADR facilities. Those commenters further related that the current practice is to close ADR facilities when securities cannot be so identified.

[43] Commenters suggested that the confirmation requirement be modified in light of the movement towards paperless markets. Both the proposed definition and the revised proposed definition, by use of the phrasing "confirmation or other notice," would accommodate paperless transactions. The "other notice" could include a notice given on screen rather than on paper or a notice given on the telephone, provided that the seller kept written records of notices given.

[44] Proposed Rule 905(b)(3).

[45] As revised, the confirmation requirement would no longer be considered part of the offering restrictions, due to liability considerations. *See infra* Section II.G.

[46] Proposed Rule 902(f).

[47] The addition of "(other than a distributor)" to the requirement of a statement has been made in the revised proposed definition to clarify that the reference to the prohibition on sales in the United States or to U.S. persons was not intended to preclude U.S. persons from participating as underwriters or selling dealers.

[48] Proposed Rule 902(f)(2).

[49] Proposed Rule 905(c).

[50] Proposed Rule 905(c)(2).

[51] Proposed Rule 905(c)(3).

[52] Proposed Rule 905(c).

[53] Proposed Rule 902(f).

revised proposal, only a purchaser that bought from a distributor would be required to enter into such an agreement. Issuers would continue to be required, however, to refuse to register any transfer of the securities not made in accordance with the provisions of the Regulation.

D. Resale Safe Harbor

Under the original resale safe harbor, resales could have been made by either of two methods.[54] First, resales could have been made in the same manner that such securities could have been offered and sold pursuant to the issuer safe harbor, except that offering restrictions would not have applied (although purchasers would have been required to receive confirmations with the resale restrictions outlined). Under the second method, resale of securities encompassed by the first and second issuer safe harbor categories could have been made on or through the facilities of an established foreign securities exchange so long as the seller did not know that any counter-party was a U.S. person.

As reproposed, the resale safe harbor [55] would distinguish between two types of sellers: (1) dealers and persons receiving a selling concession, fee or other remuneration in respect of the securities offered or sold;[56] and (2) all other persons.[57] Persons receiving selling concessions, fees or other remuneration would be included in the same category as dealers so that securities professionals not encompassed by the definition in Section 2(12) of the Securities Act,[58] including subunderwriters, would be treated the same as dealers.

Persons who are not dealers and do not receive a selling concession, fee or other remuneration would be able to resell any securities with no restrictions other than the general conditions that the offer and sale be made offshore and without directed selling efforts.[59]

Resales by dealers and persons receiving selling concessions, fees or other remuneration also would be subject to the general conditions. If the securities resold were of a type within the second or third issuer safe harbor categories and the resale were made within any applicable restricted period, the seller or any person acting on his behalf could not knowingly offer or sell to a U.S. person. If the purchaser of the securities were a dealer or person receiving a selling concession, fee or other remuneration, the seller would in addition be required to deliver a confirmation or other notice of the applicable restrictions to the purchaser. Paralleling the issuer safe harbor, the confirmation requirement in the resale safe harbor has been revised to delete the requirement that it must be binding on the recipient and to require delivery rather than receipt.

To alleviate concerns of the commenters, the revised resale safe harbor would relieve persons who are not securities professionals from the requirement to deliver notices. The revised resale safe harbor also would permit resales of any securities on established foreign securities exchanges and designated organized foreign securities markets. The original proposal would have limited such resales to securities in the first and second issuer safe harbor categories. Although the safe harbor would no longer specifically refer to resales on established foreign securities exchanges, such resales (and resales on designated organized foreign securities markets) would be allowed. With respect to dealer resales on such foreign exchanges or markets in the revised safe harbor, notice delivery would be required only if the seller or other person acting on its behalf knew that the purchaser were a dealer or person receiving a selling concession, fee or other remuneration.

E. Definition of "U.S. Person"

The definition of "U.S. person" [60] has been changed in a number of respects in the revised Regulation. Unlike the original proposal, an entity organized under foreign law by a U.S. institution principally for the purpose of its investing in securities not registered under the Securities Act would not be treated as a U.S. person. A U.S. institutional investor should be able to choose to establish an entity outside the United States, and should not expect the registration provisions to apply to purchases made by that foreign entity. Treating such entities as U.S. persons would not be in accordance with comity and the reasonable expectations of the parties.[61]

In a reversal of the position taken in the *Baer Securities Corporation* letter,[62] the originally proposed definition of U.S. person would have included any discretionary or similar account held by a dealer or other fiduciary located in the United States, regardless of whether the beneficial owner of such account was a U.S. person. Citing competitive disadvantages and loss of efficiency for U.S. money managers, commenters vigorously opposed the proposed reversal, and urged that U.S. fiduciaries be treated as non-U.S. persons when acting with discretion for a non-U.S. person. A number of the commenters disagreed with the view, expressed in the Proposing Release, that concerns regarding competitiveness abroad would be adequately addressed by the safe harbor exemption from registration for certain institutional resales proposed in Rule 144A.[63]

The Commission is proposing to except from the conceptual framework of Regulation S U.S. professional fiduciaries acting for foreign investors,[64] in light of the serious competitive disadvantages that might be faced by U.S. professional fiduciaries, particularly by smaller U.S. advisers, even if proposed Rule 144A were adopted. Thus, under the revised proposal, U..S professional fiduciaries acting with discretion would be deemed U.S. persons for purposes of Regulation S only when they were acting for U.S. persons. Any offer or sale to a U.S. professional fiduciary acting for a foreign investor in reliance on the Regulation, however, would still be required to be made outside the United States.

Certain multinational organizations were specifically excluded from the proposed definition of "U.S. persons." Commenters on this aspect of the

[54] Several commenters on the proposed Regulation stated that the resale safe harbor might be interpreted as somehow altering the availability of Sections 4(1) and 4(3) of the Securities Act for the resale of securities. Neither the proposed Regulation nor the revised proposed Regulation is intended to affect the availability of the exemptions contained in those Sections.

[55] Proposed Rule 906.

[56] Proposed Rule 906(a).

[57] Proposed Rule 906(b).

[58] 15 U.S.C. 77b(12).

[59] Like the original proposal, the revised Regulation provides that a directed selling effort by a person other than the seller or any person acting on his behalf would not affect the seller's ability to rely on the resale safe harbor.

[60] Proposed Rule 902(m).

[61] The proposed definition of "U.S. person" would have excluded foreign branches and agencies of U.S. persons engaged in banking or insurance that are established outside the United States, substantively regulated in their countries of establishment, operated for valid business purposes, and not formed principally for investing in securities not registered under the Securities Act. A number of commenters recommended that this exclusion be extended to entities outside the banking and insurance industries. The Commission is not proposing such an extension because, outside the regulated industries, the concept of an "agency" or "branch" does not have an established meaning.

[62] *See supra* n. 5.

[63] *See* Securities Act Release No. 6839 (July 11, 1989) (reproposing Rule 144A); Securities Act Release No. 6806 (Oct. 25, 1988) [53 FR 44016] (proposing Rule 144A).

[64] *See* proposed Rule 902(m)(1).

proposed definition generally favored exclusion of such organizations, but also believed that the same treatment should be afforded to other entities. The definition has been revised to exclude from the definition of U.S. person the International Monetary Fund, the United Nations, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, and the African Development Bank and all similar multinational entities.[65] The staff interpretive letter process will be available for future questions regarding exclusion for specific multinational organizations. In response to commenters' recommendations and consistent with Exchange Act Rule 15a-6, [66] pension plans of such multinational organizations are also excluded from the revised proposed definition of U.S. person. Comment is solicited regarding whether use of the phrase "pension plans" is sufficient to exclude all existing retirement funds of such entities.

F. Continuous Offerings

Commenters on the Proposing Release raised strong objection to the timing of commencement of the restricted period in the case of continuous offerings of securities such as medium-term notes that are offered on a daily basis. They concluded that the proposed Regulation would impose an indefinite restricted period because such a distribution is never completed. Among the commenter's suggestions for resolution of this issue was a recommendation that separate tranches of medium-term note offerings be treated as separate offerings with distinct restricted periods.

In order to grant relief from the effective preclusion of such sales to U.S. persons, in the case of certain offerings of debt securities issued in clearly distinct and identifiable tranches or issues, the 40-day restricted period would commence upon completion of the distribution of that tranche or issue, as certified by the lead managing underwriter or person performing similar functions.[67] At the end of the restricted period, the issuer would be free to offer another tranche. In such cases, no integration of the tranches or issues would be required.

G. Safe Harbor Protections

A violation of a term or condition of an issuer safe harbor would have one of two results: Either the safe harbor would be lost by all persons for all offers and sales made in the offering, or the safe harbor would be lost only by the person failing to comply with the term or condition for the securities offered or sold in the non-complying transaction. As the Proposing Release stated, no one could rely upon the issuer safe harbor provisions of the Regulation if directed selling efforts were made in the United States by the issuer, a distributor, or an affiliate of either.[68] Thus, directed selling efforts by one distributor would eliminate the safe harbor protection of the Regulation for the issuer, all other distributors, and all affiliates of both for all securities offered and sold. Failure on the part of an issuer, distributor, or affiliate to comply with the offering restrictions likewise would result in the safe harbor not being available to all persons for offers and sales of securities in the offering.[69]

In contrast, if a particular offer or sale was not made in an offshore transaction, the safe harbor protection from a Section 5 violation would not be available to the offeror or seller who did not comply, but the safe harbor would still be available to any complying issuer, distributor, or affiliate. For failures to meet offshore transaction requirements, each offer and sale would be examined separately and a non-complying offer or sale would not eliminate the safe harbor protection for other offers and sales. Thus, if 10,000 shares were sold in the United States and 3,000,000 shares were sold in offshore transactions, the safe harbor protection would be lost only with respect to the 10,000 shares and only for the person that made the U.S. sales. Similarly, with respect to compliance with the prohibition against selling to U.S. persons during the restricted period, consistent with the original proposal,[70] the failure of the issuer, a distributor, or an affiliate of either to comply would not destroy the safe harbor protection for other offers and sales by that participant or any of the offers and sales of another participant. For example, a sale of 100 shares of stock of a non-reporting domestic issuer made by a participant to a U.S. person 5 days into the restricted period without the benefit of an exemption or registration would result in loss of the safe harbor only for that participant and only with respect to those 100 shares.

Because of its transactional and ongoing nature, the requirement that a confirmation or other notice be given has been moved out of the category of offering restrictions, into the transactional obligations mandated during the restricted period.[71] Thus, failure to comply with the notice requirement would not affect the availability of the safe harbor offering as a whole, and would affect only the non-complying sale.

Preliminary Note 2, which remains unchanged from the proposed Regulation, would state that the Regulation is not available to any transaction or series of transactions that, although in technical compliance with the rules, is part of a plan or scheme to evade the registration provisions of the Securities Act. Thus, a participant in a distribution, regardless of whether it literally took all steps required for reliance upon the protection of the Regulation, would lose the protection of the Regulation if it had knowledge or was reckless in not knowing that a person to whom it sold securities in reliance upon the Regulation would not comply with the requirements. Clearly, if an underwriter were told by a dealer to whom it intended to sell securities in reliance upon the Regulation that the dealer had a customer in New York waiting for the securities, that underwriter should not be able to rely upon the protection of the Regulation in connection with its sale to that dealer, even if the underwriter complied with all the Regulation's requirements. The same could be true if the underwriter knew or was reckless in not knowing that the dealer to whom it intended to sell had consistently sold to U.S. residents in violation of resale restrictions in other offerings made pursuant to the safe harbor provisions of the Regulation. If, on the other hand, an underwiter sold to a dealer and the dealer sold to a customer in the United States, and the underwriter did not know and was not reckless in failing to know that the non-conforming sale would occur, the underwriter would not lose the protection of the Regulation.

H. Interaction With U.S. Tax Law

The proposed Regulation would affect certain regulations of the Internal Revenue Service which impose sanctions on issuers of otherwise "registration-required" obligations in bearer form unless such obligations are issued pursuant to "arrangements reasonably designed" to ensure sales to persons who are not "U.S. persons." The regulations that prescribe procedures to be followed in the issuance, sale, and delivery of such obligations in order to

[65] Proposed Rule 902(m)(4).

[66] *See supra* n. 18.

[67] Proposed Rule 902(k).

[68] 53 FR at 22669. In contrast, the directed selling efforts of any person would result only in loss of the safe harbor protection for resales by that person.

[69] *Id.*

[70] 53 FR at 22671.

[71] *See* proposed Rules 905(b)(3) and 905(c)(4).

satisfy the "arrangements reasonably designed" test are based in part upon applicable securities laws. The effect of the proposed Regulation on the tax law and regulations has been extensively reviewed with the Department of the Treasury and the Internal Revenue Service. The Commission has been advised that the Department and the Service intend to publish, in proposed form, a revised regulation concerning the procedures for issuing foreign-targeted bearer debt obligations. The revised regulation will reflect the requirements of proposed Regulation S, but with two significant differences. First, the tax regulations will use the definition of "United States person" set forth in Section 7701(a)(30) of the Internal Revenue Code,[72] which includes citizens as well as residents of the United States. Second, the tax regulations generally will require a certificate stating that, as of the last day of the restricted period, the beneficial owner of the debt security is not a U.S. person.[73]

I. Other

References to Securities Act Release 4708 [74] in other rules under the Securities Act would be revised to make reference to Regulation S upon its adoption.

III. Request For Comments

Any interested persons wishing to submit written comments on revised proposed Regulation S, as well as other matters that might have an impact on the proposal, are requested to do so.

IV. Cost-Benefit Analysis

As in the Proposing Release, the Commission invites commenters to provide views and data as to the costs and benefits associated with the proposed revised Regulation intended to clarify the extraterritorial effect of the registration provisions of the Securities Act. It appears to the Commission that, while there may be some additional costs to issuers, distributors or other sellers associated with structuring a transaction in accordance with the requirements of a safe harbor or the General Statement, such costs may be outweighed by the savings of the costs of registration and the benefit derived from assurance that registration need not be undertaken. In addition, the Commission believes that the proposed streamlined method to assure that the securities come to rest outside the United States would also reduce costs. The Regulation, as reproposed, would further alleviate costs in comparison to the originally proposed Regulation in view of the changes made to the issuer safe harbor, including the fact that more issuers would be eligible to take advantage of the issuer safe harbor categorizes with fewer procedural restrictions. In addition, the liberalization of the resale provisions under the reproposed Regulation should result in further cost reductions to persons relying on that safe harbor.

V. Summary of Initial Regulatory Flexibility Analysis

An Initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. 603 has been prepared concerning the proposed Regulation. The analysis notes that the proposed Regulation is intended to clarify the extraterritorial application of the registration provisions of the Securities Act.

The proposed Regulation will not result in any significant increase in reporting, recordkeeping or compliance requirements. No alternatives to the proposed Regulation consistent with its objectives were found. Alternatives such as establishment of differing compliance or reporting requirements based on the size of the issuer alone were rejected as inconsistent with the goals of the Securities Act. Clarification, consolidation or simplification of compliance and reporting requirements for small entities under the Regulation was also rejected as an alternative since the Regulation is itself clarification and simplification and additional simplification would not be consistent with the statutory mandate. Small entities, like any other issuers, are entitled to the benefits of the guidance provided by the General Statement and the safe harbors.

A copy of the analysis may be obtained by contacting Sara Hanks, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

VI. Paperwork Reduction

OMB Number: 3235-0357. Expires: July 31, 1991. Estimated average burden hours per response.—1.0.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, securities.

VII. Text of Proposals

In accordance with the foregoing Title 17, Chapter II, Part 230 of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 is amended by adding the following citations: (Citations before * * * indicate general rulemaking authority).

Authority: Sec. 19, 48 Stat 815, as amended, 15 U.S.C. 77s * * * Section 230.901–906 also issued under Sections 2, 15 U.S.C. 77b, and 4, 15 U.S.C. 77d.

* * * * *

2. By adding new Regulation S consisting of Preliminary Notes and §§ 230.901 through 230.906, to read as follows:

Regulation S—Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933.

Preliminary Notes
§ 230.901 General statement.
§ 230.902 Definitions.
§ 230.903 Offers and sales deemed outside the United States.
§ 230.904 General conditions to be met.
§ 230.905 Offers or sales by the issuer, affiliates of the issuer, distributors, and affiliates of distributors: conditions relating to specific securities.
§ 230.906 Resales.

Preliminary Notes

1. The following rules relate solely to the application of section 5 of the Securities Act of 1933 (the "Act") [15 U.S.C. 77e] and not to antifraud or other provisions of the federal securities laws.

2. In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

3. Nothing in these rules obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act (the "Exchange Act") whenever such requirements are applicable.

4. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities.

5. Attempted compliance with any rule in Regulation S does not act as an exclusive election; a person making an offer or sale of securities may also claim the availability of any other applicable exemption from the registration requirements of the Act.

6. Regulation S is available only for offers and sales of securities outside the United States. Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are

---

[72] 26 U.S.C. 7701(a)(30).

[73] An exception will be provided for certain foreign currency obligations.

[74] Securities Act Release No. 4708 (July 9, 1964) [29 FR 9828].

registered under the Act or an exemption from registration is available.

§ 230.901 General statement.

(a) For the purposes only of Section 5 of the Act [15 U.S.C. 77e], the terms "offer," "offer to sell," "offer for sale," "sale," and "offer to buy" shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

(b) In determining whether an offer or sale occurs outside the United States, relevant considerations are:

(1) The locus of the constituent elements of the offer or sale, considering factors such as (i) whether the offer is directed only to persons outside the United States; (ii) whether the buyer is outside the United States at the time the buy order is originated; (iii) whether execution, payment and delivery take place outside the United States; and (iv) whether the sale is executed on or through the facilities of an established foreign securities exchange or a designated organized foreign securities market;

(2) The absence of any directed selling efforts in the United States;

(3) The likelihood of the securities coming to rest outside the United States, considering (i) the nationality of the issuer; (ii) the extent of the issuer's business presence in the United States; (iii) the type of securities being offered or sold; (iv) the absence of a substantial U.S. market interest for the same class of securities of the issuer, if equity, or any debt securities of the issuer, if debt; and (v) the terms of the transaction, including the use of any contractual or other restrictions on resale of the securities into the United States and to U.S. persons; and

(4) The justified expectations of the parties to the transaction concerning the applicability of the registration provisions of the Act.

(c) The provisions of this Regulation S shall not apply to offers and sales of securities issued by investment companies registered or required to be registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*].

§ 230.902. Definitions.

As used in Regulation S, the following terms shall have the meanings indicated.

(a) *Designated Organized Foreign Securities Market.* "Designated organized foreign securities market" means any market for trading of securities that:

(1) Is organized under foreign law;

(2) Has an established operating history;

(3) Is subject to oversight by a governmental or self-regulatory body to which securities transactions are reported on a regular basis; and

(4) Is designated by the Division of Corporation Finance.

(b) *Directed Selling Efforts.* (1) The term "directed selling efforts" means any activity undertaken by the issuer, a distributor, a seller, an affiliate of any of the foregoing, or any person acting on behalf of any of the foregoing, for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S. Such activity includes the placing of an advertisement in a publication with a general circulation in the United States that refers to the offering of securities being made in reliance upon this Regulation S.

(2) Notwithstanding paragraph (1) of this section, the placing of an advertisement required to be published under foreign law, which contains no more information than legally required, shall not be deemed to constitute "directed selling efforts" for purposes of this rule.

(c) *Distributor.* "Distributor" means any underwriter, prospective underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S.

(d) *Domestic Issuer.* "Domestic issuer" means any issuer other than a foreign issuer.

(e) *Foreign Issuer.* "Foreign issuer" means any issuer that is: (1) The government of any foreign country or of any political subdivision of a foreign country; (2) a national of any foreign jurisdiction; or (3) a corporation or other organization incorporated or organized under the laws of any foreign jurisdiction; *Provided, however,* that such issuer shall not be deemed a foreign issuer if: (i) more than 50 percent of the outstanding voting securities of such issuer is held of record, either directly or through voting trust certificates or depository receipts, by persons for whom a U.S. address appears on the records of the issuer, its transfer agent, voting trustee or depository; and (ii) any of the following factors are present: (A) the majority of the executive officers or directors of the issuer are U.S. citizens or residents; (B) more than 50 percent of the assets of the issuer are located in the United States; or (C) the business of the issuer is administered principally in the United States.

(f) *Offering Restrictions.* "Offering restrictions" means:

(1) Each distributor agrees in writing that all offers and sales of the securities during the restricted period shall be made only (i) in accordance with the provisions of § 230.903; (ii) pursuant to registration of the securities under the Act; or (iii) pursuant to an available exemption from the registration requirements of the Act; and

(2) Any offering materials and documents used in connection with offers and sales of the securities during the restricted period specified in § 230.905 (b) or (c), as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than a distributor) within the restricted period unless: (i) The Securities are registered under the Act; or (ii) an exemption from the registration requirements of the Act is available. Such statements shall appear:

(A) On the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;

(B) In the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and

(C) In any press release or advertisement made or issued by the issuer, any distributor, an affiliate of any of the foregoing, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in press releases and advertisements.

(g) *Offshore Transaction.* An offer or sale of securities is an "offshore transaction" if:

(1) The offer is not made to a person in the United States; and

(2) Either: (i) The seller reasonably believes that the buyer is outside the United States at the time the buy order is originated, and execution and delivery take place outside the United States; or (ii) the transaction is executed on or through the facilities of an established foreign securities exchange or a designated organized foreign securities market, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

(h) *Overseas Domestic Offering.* "Overseas domestic offering" means an offering of securities by a foreign issuer directed either to citizens or residents of

the issuer's jurisdiction of incorporation or organization or, if the issuer is a government, to citizens or residents of the jurisdiction governed by the issuer, and made in accordance with customary local practices and documentation.

(i) *Publication With a General Circulation in the United States.* "Publication with a general circulation in the United States" means any publication that:

(1) Is printed in the United States primarily for distribution in the United States;

(2) Has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue; or

(3) Has had, during the preceding twelve months, an average of 50 percent or more of its circulation per issue in the United States.

(j) *Reporting Issuer.* "Reporting issuer" means an issuer that (a) has a class of securities registered pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. 78*l*(b) or 78*l*(g)] or is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. 78*o*(d)], and (b) has filed all the material required to be filed pursuant to Sections 13(a) and 15(d) of the Exchange Act [15 U.S.C. 78m(a) and 78*o*(d)] for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (or for such shorter period that the issuer was required to file such material).

(k) *Restricted Period.* "Restricted period" means a period that commences on the later of the date upon which the securities were first offered to persons other than distributors in reliance upon this Regulation S or the closing of the offering and expires a specified period of time thereafter; *Provided, however,* that in a continuous offering the restricted period shall commence upon completion of the distribution, as determined and certified by the lead managing underwriter or person performing similar functions. All offers and sales by a distributor holding an unsold allotment or subscription shall be deemed to be made during the restricted period.

(l) *Substantial U.S. Market Interest.* (1) An issuer has a "substantial U.S. market interest" with respect to a class of equity securities unless it can be established at the commencement of the offering that:

(i) More than 50 percent of all recorded trading in such class of securities in the issuer's prior fiscal year occurred on or through the facilities of one established foreign securities exchange or designated organized foreign securities market; or

(ii) Less than 20 percent of all recorded trading in such class of securities in the issuer's prior fiscal year occurred in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States, and such U.S. markets, in the aggregate, did not constitute the largest single market for such securities.

(2) An issuer has a "substantial U.S. market interest" with respect to its debt securities unless one of the following can be established at the commencement of the offering:

(i) Its debt securities are held of record by fewer than 300 U.S. persons; or

(ii) Less than $1 billion principal amount of its debt securities is held of record by U.S. persons.

(3) An issuer does not have a substantial U.S. market interest if the only securities of the issuer that would otherwise result in such a determination are securities that qualify for the exemption provided by Section 3(a)(3) of the Act [15 U.S.C. 77c(a)(3)].

(m) *U.S. Person.* (1) "U.S. person" means any natural person resident in the United States; any partnership or corporation organized or incorporated under the laws of the United States, its territories or possessions or any state or the District of Columbia; any estate of which any executor or administrator is a U.S. person; any trust of which any trustee is a U.S. person; any agency or branch of a foreign entity located in the United States; any non-discretionary custodial account or similar account held by a dealer or other fiduciary for the account of a U.S. person; and any discretionary custodial account or similar account held by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States.

(2) Notwithstanding paragraph (m)(1) of this section, any custodial account or similar account held by a dealer or other fiduciary for a non-U.S. person shall not be deemed a "U.S. person."

(3) Notwithstanding paragraph (m)(1) of this section, any agency or branch of a U.S. person located outside the United States shall not be deemed a "U.S. person" if: (i) The agency or branch operates for valid business reasons and not principally for the purpose of investing in securities not registered under the Act; and (ii) the agency or branch is engaged in the business of banking or insurance and is subject to substantive banking or insurance regulation, as the case may be, in the jurisdiction where located.

(4) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations and their agencies, affiliates and pension plans, and any other similar international organization, its agencies, affiliates and pension plans are not U.S. persons for purposes of this Regulation.

§ 230.903 Offers and sales deemed outside the United States.

An offer, offer to sell, offer for sale, sale, or offer to buy that satisfies the applicable conditions of §§ 230.904 through 230.906 shall be deemed to occur outside the United States within the meaning of § 230.901.

§ 230.904 General conditions to be met.

The following conditions shall be applicable to any offer or sale made in reliance on § 230.903.

(a) *Requirement of Offshore Transaction.* The offer or sale shall be made in an offshore transaction.

(b) *Prohibition Against Directed Selling Efforts.* No directed selling efforts shall be made in the United States.

§ 230.905 Offers or sales by the issuer, affiliates of the issuer, distributors, and affiliates of distributors: Conditions relating to specific securities.

Any offer or sale of securities by the issuer, an affiliate of the issuer, a distributor, or an affiliate of a distributor may be made in accordance with the following requirements:

(a) *Securities of Foreign Issuers.* An offer or sale of securities of a foreign issuer may be made in reliance on § 230.903 with no conditions other than those set forth in § 230.904, *provided that:*

(1) The issuer has no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold), or no substantial U.S. market interest in any of its debt securities (if debt securities are offered or sold); or

(2) The securities are offered and sold by a foreign issuer in an overseas domestic offering.

(b) *Securities of Any Reporting Issuers; Debt Securities of any Foreign Issuers.* An offer or sale of any securities of any reporting issuer or debt securities of any foreign issuer may be made in reliance upon § 230.903, provided that the conditions set forth in § 230.904 are met and provided that:

(1) Offering restrictions are adopted;

(2) The offer or sale, if made during a 40-day restricted period, is not made in

the United States or to a U.S. person (other than a distributor) except pursuant to registration under the Act or an available exemption from registration; and

(3) A distributor selling securities to a distributor, a dealer or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, during a 40-day restricted period delivers a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(c) *Securities of any Issuer.* An offer or sale of securities of any issuer may be made in reliance on § 230.903, provided that the conditions set forth in § 230.904 are met and provided that:

(1) Offering restrictions are adopted;

(2) In the case of debt securities: (i) The offer or sale, if made during a 40-day restricted period, is not made in the United States or to a U.S. person (other than a distributor) except pursuant to registration under the Act or an available exemption from registration; and (ii) the securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day restricted period and certification of beneficial ownership of the securities by a non-U.S. person or a qualified institutional buyer as defined in Rule 144A [§ 230.144A of this chapter];

(3) In the case of equity securities, (i) the offer or sale, if made during a one-year restricted period, is not made in the United States or to a U.S. person (other than a distributor) except pursuant to registration under the Act or an available exemption from registration; and (ii) the offer or sale is made pursuant to the following conditions: (A) The purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not aqcuiring the securities for the account or benefit of any U.S. person, or that it is a qualified institutional buyer as defined in Rule 144A [§ 230.144A of this chapter]; (B) the purchaser of the securities (other than a distributor) agrees to resell such securities only: (1) in accordance with the provisions of this Regulation S; (2) pursuant to registration under the Act; or (3) pursuant to an available exemption from registration; and (C) the issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of this Regulation S; and

(4) A distributor selling debt securities to a distributor, a dealer or a person receiving a selling concession, fee or other remuneration, during a 40-day restricted period or selling equity securities to a distributor or a dealer during a one-year restricted period delivers a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

§ 230.906. Resales.

An offer or sale of securities by any person other than the issuer, an affiliate of the issuer, a distributor, or an affiliate of a distributor may be made in accordance with the following requirements, provided that a directed selling effort by any person other than the seller or any person acting on the seller's behalf shall not affect the seller's ability to rely on this section:

(a) *Resales by Persons Other than Dealers and Persons Receiving Selling Concessions.* An offer or sale of securities of any issuer by a person other than a dealer, as defined in section 2(12) of the Securities Act [15 U.S.C. 77b(12)], or any person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold, may be made in reliance on § 230.903 with no conditions other than those set forth in § 230.904.

(b) *Resales by Any Persons.* An offer or sale of securities of any issuer may be made in reliance on § 230.903, provided that the conditions set forth in § 230.904 are complied with and provided that, during the restricted period specified in § 230.905 (b) or (c), as applicable:

(1) Neither the seller not any person acting on his behalf knows that the offeree or buyer of the securities is a U.S. person; and

(2) If the seller or any person acting on his behalf knows that the purchaser is a dealer, as defined in section 2(12) of the Act [15 U.S.C. 77b(12)], or any person receiving a selling concession in respect of the securities sold, the seller delivers to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the restricted period only (i) in accordance with the provisions of this Regulation S; (ii) pursuant to registration of the securities under the Act; or (iii) pursuant to an available exemption from the registration requirements of the Act.

By the Commission.

Jonathan G. Katz,

Secretary.

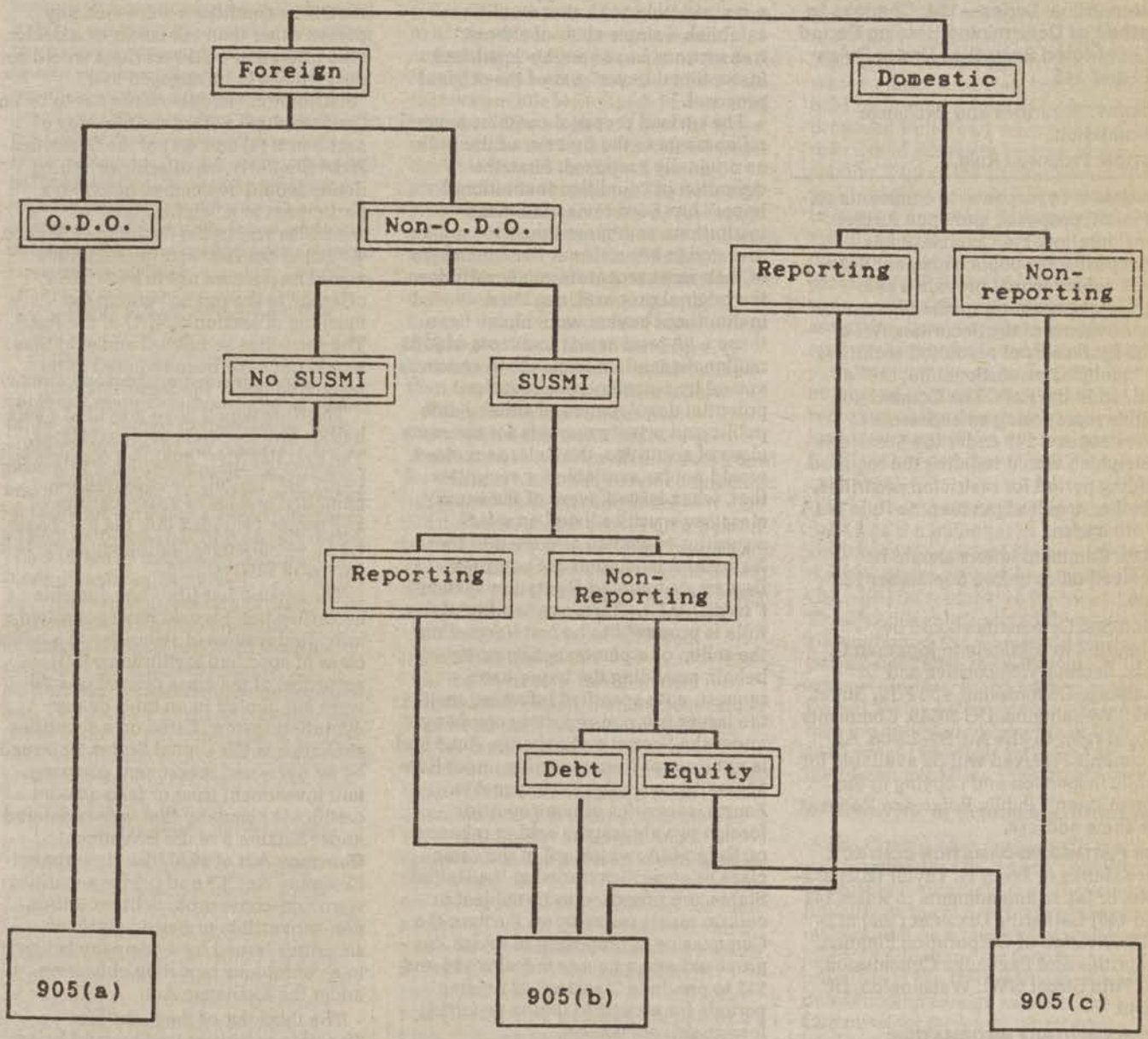
July 11, 1989.

Editorial note: Appendix A will not appear in the code of Federal Regulations.

BILLING CODE 8010-01-M

APPENDIX A

RULE 905 CATEGORIES



O.D.O. = Overseas Domestic Offering
SUSMI = Substantial US Market Interest

[FR Doc. 89-16632 Filed 7-17-89; 8:45 am]
BILLING CODE 8010-01-C

17 CFR Part 230

[Rel. No. 33-6839; File No. S7-23-88]

RIN 3235-AC65

Resale of Restricted Securities International Series—104; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145

AGENCY: Securities and Exchange Commission.

ACTION: Proposed Rule.

SUMMARY: In response to comments on its initial proposal, and upon further consideration, the Commission is reproposing for public comment Rule 144A, which would provide a safe harbor exemption from the registration requirements of the Securities Act of 1933 for resales of restricted securities to "qualified institutional buyers" as defined in the Rule. The Commission also is reproposing amendments to Rules 144 and 145 under the Securities Act, which would redefine the required holding period for restricted securities, whether acquired pursuant to Rule 144A or otherwise.

DATE: Comment letters should be received on or before September 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. Comments should refer to File No. S7-23-88. All comments received will be available for public inspection and copying in the Commission's Public Reference Room at the same address.

FOR FURTHER INFORMATION CONTACT: Sara Hanks or Brent H. Taylor (202) 272-3246, or (as to amendments to Rules 144 and 145) Catherine Dixon at (202) 272-2573, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

On October 25, 1988, the Commission proposed Rule 144A to provide a non-exclusive safe harbor exemption from the registration requirements of the Securities Act of 1933 (the "Securities Act") [1] for specified resales of restricted securities to institutional investors. As proposed, the Rule would have provided a safe harbor for three tiers of transactions. The first tier would have exempted only resales to "qualified institutional buyers," while the other two tiers would have provided an exemption for resales of restricted securities to a broader group of institutional investors. The Commission today is reproposing for public comment a revised Rule 144A that would establish a single class of exempt transactions based on the "qualified institutional buyer" tier of the original proposal.

The revised proposal contains several refinements to the first tier of the Rule as originally proposed. First, the definition of "qualified institutional buyer" has been revised to mean institutions with more than $100 million invested in securities at the conclusion of their most recent fiscal year. Under the original proposal, qualified institutional buyers would have been those with total assets in excess of $100 million. Second, in response to concerns voiced by commenters about the potential development of side-by-side public and private markets for the same class of securities, the Rule, as revised, would not be available for securities that, when issued, were of the same class as securities listed on a U.S. securities exchange or quoted in the National Association of Securities Dealers Automated Quotation system ("NASDAQ"). Third, availability of the Rule is proposed to be conditioned on the seller, or a person acting on its behalf, providing the buyer upon request, with specified information, if the issuer is a non-reporting company under the Securities Exchange Act,[2] and is not exempt from reporting under Rule 12g3-2(b) under the Exchange Act. Fourth, securities of non-reporting foreign private issuers sold in reliance on Rule 144A, which are of the same class as securities traded in the United States, are proposed to be subject to certain resale restrictions. Further, the Commission is proposing to revise the proposed amendments to Rules 144 and 145 to preclude "tacking" of holding periods for securities of non-reporting foreign private issuers.

II. Background

A. Proposed Rule 144A

On October 25, 1988, the Commission published for comment a Release (the "Proposing Release") proposing Rule 144A (the "Rule").[3] As proposed, the Rule would have provided a safe harbor exemption from the registration requirements of the Securities Act for several categories of resales of restricted securities to institutional investors. The proposed Rule provided that, if its conditions were met, any person other than the issuer or a dealer who offered or sold securities would be deemed not to be engaged in a "distribution" and therefore not to be an "underwriter" within the meaning of sections 2(11) and 4(1) of the Securities Act.[4] Similarly, an offering or selling dealer would be deemed not to be a participant in a "distribution" of securities within the meaning of Section 4(3)(C) of the Act, and the securities would be deemed not to have been offered "to the public" within the meaning of section 4(3)(A) of the Act.[5] The securities so offered and sold thus would not have been required to be registered under the Securities Act.

The Rule would have provided a safe harbor for three tiers of transactions. The first tier (the "qualified institutional buyer tier") would have permitted unlimited resales of any securities of any issuer, provided that the purchaser was a specified institution with assets in excess of $100 million.

The second tier (the "non-fungible securities tier") would have permitted unlimited resales of securities to a wider class of specified institutions, if (i) securities of the class offered or sold were not quoted in an inter-dealer quotation system, listed on a securities exchange in the United States, or issued by an open-end investment company, unit investment trust or face-amount certificate company that was registered under Section 8 of the Investment Company Act of 1940 (the "Investment Company Act"),[6] and (ii) the securities were non-convertible debt securities, non-convertible preferred stock, or securities issued by a company subject to a continuous reporting obligation under the Exchange Act.

The third tier of the Rule (the "fungible securities tier") would have covered resales of the same types of securities covered by the non-fungible securities tier to the same class of institutions, but would have extended to classes of securities traded in a public market in the United States.

The qualified institutional buyer and non-fungible securities tiers of the Rule, as proposed, would have imposed no

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

[3] Securities Act Release No. 6806 (Oct. 25, 1988) 53 FR 44016. Eighty-nine comment letters were received. These letters and a summary of such comment letters ("Comment Summary") are available for public inspection and copying at the Commission's Public Reference Room in Washington, D.C. (File No. S7-23-88).

[4] 15 U.S.C. 77b(11), 77d(1); *see* proposed Rule 144A(b).

[5] 15 U.S.C. 77d(3)(A), (C); *see* proposed Rule 144A(c).

[6] 15 U.S.C. 80a-8.

resale restrictions, requiring only that the seller or any person acting on its behalf take reasonable steps to ensure that the buyer was aware that the seller might rely on the exemption from the registration requirements of the Securities Act afforded by the proposed Rule. In contrast, the fungible securities tier would have required that the seller or any person acting on its behalf take reasonable steps to prevent the purchaser from reselling the securities in the United States unless the securities were registered under the Securities Act or an exemption from the registration requirements was available. The proposed Rule set forth a non-exclusive method by which that obligation could have been satisfied.

B. Response of Commenters to Rule 144A

In the Proposing Release, the Commission requested extensive comment regarding the potential impact of the Rule. Additional comment was elicted at a roundtable regarding the proposed Rule held on March 15, 1989, which was attended by representatives of the New York Stock Exchange, the American Stock Exchange, the National Association of Securities Dealers, the North American Securities Administrators Association, the Securities Industry Association, commercial and investment banks, issuers, market intermediaries, institutional investors, and the securities bar. The purpose of the roundtable was to examine the potential effects of Rule 144A on investors (both institutional and retail), the capital raising process, the trading markets, and the internationalization of the securities markets.[7]

Overall, commenters submitting letters to the Commission and those present at the roundtable endorsed the concept of Rule 144A. Commenters believed that the Rule would provide helpful and needed clarification of the exempt status of resales of privately placed securities in the secondary market, and would increase the liquidity and efficiency of the private placement market. These commenters noted that an increase in efficiency and liquidity could lower significantly the discount commonly associated with private placements, which in turn could attract an increasing number of issuers, both foreign and domestic, into the U.S. private placement market.

[7] The transcript of the roundtable ("Roundtable Transcript") and the agenda of issues that were discussed are available for public inspection and copying in the Commission's Public Reference Room in Washington, DC (File No. 4–345).

In response to the Commission's requests for comment regarding the implications of the proposed Rule with respect to the market for, and distribution of, securities, a number of commenters urged the Commission to proceed cautiously by adopting the Rule in stages. Most of the commenters suggesting a staged phase-in of the Rule favored proceeding initially with a rule that was available to large institutional buyers. A few suggested that the types of securities that could be traded under the Rule should be limited to non-convertible investment grade debt and preferred stock, securities of sovereign issuers, or securities of a class that were not fungible with publicly traded securities. Several suggested that a definition of "qualified institutional buyer" linked to securities investments would provide a better test of an institution's investment sophistication than the proposed total assets test.

While many agree with the Commission that some classes of institutional investors clearly could fend for themselves, a number of commenters expressed concerns about the documentation that would be provided and the ability of secondary investors to obtain disclosure concerning the issuer. These commenters supported including a requirement that the issuer provide, upon request, basic information concerning the issuer.

In the Proposing Release, the Commission requested comment on the likelihood that, under Rule 144A, an active, liquid private market would develop alongside a public market in the United States for the same class of securities. If such a development was viewed as likely, comment was requested on the nature of such markets, the consequences to the liquidity and efficiency of the public market for such securities, and to individual investors, and whether any steps should be taken to prevent such a development. In response, commenters were divided, some concurring with the Commission's view that significant side-by-side markets were unlikely. Others, however, stated that the proposed Rule might have the effect of diverting some securities away from the public market to the private market and expressed concern that public markets and investors in those markets might be disadvantaged by resulting reduced liquidity, differential pricing, and volatility. Several commenters also expressed the position that the Rule would decrease the quality and quantity of securities available to retail investors.

The Proposing Release noted that permitting tacking of holding periods under Rule 144, as proposed, could accelerate the movement of previously restricted securities into the public market.[8] In light of this potential, the Commission requested comment on the appropriateness of continuing the exemption from the Exchange Act reporting requirements provided by Rule 12g3–2(b) [9] for foreign private issuers whose equity securities become widely held by non-institutional investors, if proposed Rule 144A were adopted. In the case of domestic issuers, under section 12(g) of the Exchange Act,[10] the public markets would be protected because a company with more than $5 million in assets incurs reporting obligations when any class of its equity securities is held by 500 or more persons.[11] In the case of foreign securities, however, there would be no such protection because Rule 12g3–2(b) permits securities to be held by any number of shareholders, without reporting obligations being incurred, as long as the securities are not quoted in NASDAQ or listed on a U.S. securities exchange.

While recognizing that proposed Rule 144A has the potential to attract additional foreign issuers into the U.S. market, commenters urged that Rule 12g3–2(b) be retained in its current form. These commenters stated that elimination of the rule would be inconsistent with the policy of encouraging increased trading in the United States by foreign issuers, and that the anticipated benefits of Rule 144A would be offset by repeal or modification of Rule 12g3–2(b).

III. Overview of Reproposed Rule 144A

The Commission agrees with the commenters that Rule 144A is likely to improve substantially the efficiency and liquidity of the U.S. private placement market, and as a result may well have major implications for financing practices in the United States of both domestic and foreign issuers. The Commission, therefore, proposes to implement the Rule in stages, to allow market participants to gain experience and assess the effects of the Rule on the securities markets and on investors. Thus the Rule, as reproposed, would apply to offers and sales of securities to specified large institutions; essentially,

[8] Proposing Release, 53 FR at 44023.

[9] 17 CFR 240.12g3–2(b). A foreign private issuer exempt from the periodic reporting requirements of Section 12(g) under Rule 12g3–2(b) is required to furnish to the Commission all documents it is required to make public or file with regulatory authorities in its home jurisdiction.

[10] 15 U.S.C. 78*l*(g).

[11] Rule 12g–1 [17 CFR 240.12g–1].

the reproposal is a modified version of the first tier of the original proposed Rule. The Commission specifically invites comments regarding steps that can be taken to evaluate the performance of Rule 144A markets, if the Rule is adopted, and, eventually, to extend the scope of Rule 144A beyond the specific provisions contemplated in this reproposal.

When it initially proposed Rule 144A, the Commission noted that it did not expect that Rule 144A would give rise to any significant volume of private transactions in classes of publicly-traded securities. Notwithstanding the potential for increased efficiency in the private resale market and the ability to avoid costs and delays associated with registration, information currently available to the Commission suggests that it would not be financially advantageous for companies generally to sell securities in a market that was limited in its depth and liquidity compared to an existing public market for the same securities.[12] Nevertheless, the Commission requested comment on the likelihood that such trading would evolve and whether steps should be taken to preclude the development of such side-by-side markets.

Commenters were divided regarding the likelihood that side-by-side markets would develop. Several commenters, however, urged the Commission to take steps to preclude such markets from developing, although they did not explain why they believed substantial institutional markets would develop in publicly traded equities (which presumably would still trade at a discount to the same securities in the public market). The Commission remains of the opinion that development of significant side-by-side markets is unlikely. Nonetheless, the Rule, as reproposed by the Commission today, would not extend to transactions in securities of a class that is publicly traded in the United States.[13]

To address the potential of Rule 144A to increase substantially the amount of foreign securities being sold into the retail market without Exchange Act periodic reporting obligations being incurred, the Commission proposes to make two changes to the original proposal. First, as revised, tacking of holding periods in Rules 144 and 145 would be precluded for the securities of non-reporting foreign private issuers. Second, resale restrictions are proposed to be included in Rule 144A for transactions involving securites of non-reporting foreign private issuers traded in both a U.S. and foreign market. These changes should minimize the effect of Rule 144A on individual investors,[14] without the substantial problems inherent in restricting the current availability of Rule 12g3–2(b).

In response to concerns expressed by commenters regarding the need for a minimum level of disclosure about the issuer of securities to be resold under the Rule, the Commission proposes to require, as a condition to the availability of the Rule, that, where the issuer of the securities is a non-reporting company and is not exempt from Exchange Act reporting requirements under Rule 12g3–2(b), the seller of the securities or a person acting on its behalf provide the buyer upon request with specified basic information regarding the issuer.

Finally, the Commission wishes to reiterate its statement in the Proposing Release that proposed Rule 144A and the revisions proposed today are not intended to preclude reliance on traditional facts-and-circumstances analysis to prove the availability of an exemption outside the safe harbor Rule 144A would provide.

IV. Discussion of Revised Proposed Rule 144A

A. Eligible Purchasers

As reproposed, for a transaction to qualify under the safe harbor exemption provided by Rule 144A, the securities could be offered or sold only to a "qualified institutional buyer," or to an offeree or purchaser that the seller and any person acting on its behalf reasonably believed was a qualified institutional buyer.

Commenters addressing the definition of "qualified institutional buyer" in the initial proposal were divided as to whether the proposed eligibility threshold of $100 million of total assets should be used to define the class of participating institutions, some stating the threshold was appropriate, others arguing for a lower threshold, and others for a higher threshold. Commenters also suggested that qualified institutions should be required either to have at least $100 million invested in securities or to exercise investment discretion with respect to at least that amount of investment assets owned by others.

The revised proposal would define "qualified institutional buyer" to be an institution, acting for its own account, that at the conclusion of its most recent fiscal year had assets invested in securities purchased for a total of more than $100 million.[15] A definition focused on assets invested in securities should target, with more precision than the asset test originally proposed, sophisticated institutions with experience in investing in securities. Given this revision in the definition, the Rule, as reproposed, would extend to entities formed for the purpose of acquiring restricted securities if they satisfied this definitional standard. The change to a test based on investments in securities would substantially reduce the number of institutional investors that would be qualified institutional buyers for purposes of the Rule if the threshold remains $100 million. The table below shows for several classes of institutional investors the effect of various eligibility thresholds.[16]

	No. of investment companies [a]	No. of broker-dealer firms [b]	No. of insurance companies [c]	No. of commercial banks & trust companies	No. of FDIC-insured savings banks	No. of FSLIC-insured S&Ls and savings banks [d]
1. Total number institutions	3,507	9,204	5,770	12,971 [e]	492 [f]	2,949.
2. With $100 million total assets	1,725	192	1,097	2,808 [g]	318 [h]	1,486.

[12] Proposing Release, 53 FR at 44022.

As the Commission noted in the Proposing Release, public companies reportedly tend to issue equity securities privately only in special circumstances, such as in transactions involving debt securities with an equity component, a leveraged buy-out, a joint venture, or a restructuring. Proposing Release, 53 FR at 44020 n.43.

Moreover, securities in the institutional market would be likely to flow into the public market when the holding period requirement of Rule 144A was satisfied. Thus, it appears unlikely that the institutional market for such securities would grow larger than the public market for the same class of securities over time.

[13] Publicly traded securities would include securities listed on a national securities exchange or quoted in an automated inter-dealer quotation system. *See infra* n. 31 and accompanying text.

[14] Rule 906 of proposed Regulation S, permitting substantial access to foreign markets for resales, should also operate to assure that there will not be significant leakage into the U.S. public markets.

[15] The term "security" is defined in Section 2(1) of the Securities Act (15 U.S.C. 77b(1)).

[16] Information with respect to thresholds lower than $100 million was not always available in time to be included in the release.

	No. of investment companies [a]	No. of broker-dealer firms [b]	No. of insurance companies [c]	No. of commercial banks & trust companies	No. of FDIC-insured savings banks	No. of FSLIC-insured S&Ls and savings banks [d]
3. With $100 million invested in securities	1,725	102 (proprietary)	215	605 [j] (proprietary) 86 [l] (fiduciary)	87 (proprietary)	474 (proprietary) 6 (fiduciary)
4. With $75 million invested in securities	1,890	110 (proprietary)		846 [k] (proprietary) 97 [l] (fiduciary)	116 (proprietary)	
5. With $50 million invested in securities	2,095	142 (proprietary)		1,397 [m] (proprietary) 107 [n] (fiduciary)	150 (proprietary)	

[a] As of May 31, 1989. Source: SEC Division of Investment Management. Statistics regarding securities investments of investment companies assume such investments comprise total assets of such investment companies

[b] As of December 31, 1988. Source: SEC Office of Economic Analysis. Based upon Financial and Operational Combined Uniform Single ("FOCUS") reports that broker-dealers must file with U.S. self-regulatory organizations.

[c] As of December 31, 1988. Source: National Association of Insurance Commissioners ("NAIC") database. Some small insurance companies, most of which do business in only one state, and foreign domiciled insurance companies operating in the United States are not included.

[d] As of December 31, 1988 (except the number of institutions with $100 million of fiduciary accounts invested in securities is as of December 31, 1987). Source: Federal Home Loan Bank Board ("FHLBB"). Due to the presentation of investments on Thrift Financial Reports filed with the FHLBB, upon which the statistics regarding institutions in this category were based, the number of such institutions with securities investments at the levels indicated in the table may be overstated.

[e] Commercial banks and trust companies insured by the Federal Deposit Insurance Corporation ("FDIC") as of June 5, 1989. Source: FDIC.

[f] FDIC-insured savings banks (including 21 FDIC-insured federal savings banks) as of June 5, 1989. Source: FDIC.

[g] FDIC-insured commercial banks and trust companies as of March 31, 1989. Source: FDIC.

[h] Remaining totals in this column reflect FDIC-insured state-chartered savings banks (*i.e.*, excluding FDIC-insured federal savings banks) as of March 31, 1989. Source: FDIC.

[i] *See supra* n. g.

[j] Institutions supervised by the Federal Reserve Board as of December 31, 1988. Source: Federal Reserve Board. Includes state-chartered, Federal Reserve System member bank trust departments and non-insured, non-deposit trust company subsidiaries of bank holding companies. Does not include nationally-chartered banks or trust companies, or state-chartered banks that are not members of the Federal Reserve System.

[k] *See supra* n. g.

[l] *See supra* n. j.

[m] *See supra* n. g.

[n] *See supra* n. j.

The Commission requests comment on whether $100 million is the appropriate threshold, or whether in light of the change to a securities investment test, a lower threshold (*e.g.*, $25 million, $50 million or $75 million) would better define that class of institutional investors that should be included in the first stage in implementing proposed Rule 144A. Such a lower threshold would reflect the fact that the change from an "assets" test to an "investments in securities" test provides a more stringent standard with greater intrinsic safeguards.[17] The Commission also requests information regarding the number and types of institutions (*e.g.*, venture capital firms, industrial corporations, etc.) that would qualify if the threshold were $25 million, $50 million, $75 million, or $100 million invested in securities. Those commenters providing such information should specify whether the institutions satisfying the foregoing thresholds are currently participating in the U.S. private placement market. Comment is also requested as to the percentage of private placement investment accounted for by institutions with securities investments at each of the specified threshold levels. To what extent, if any, should the $100 million threshold be revised, or industry-specific standards used, to assure that the institutional investors in a particular industry can be said to be *per se* sophisticated? To what extent, if any, should the threshold be changed to avoid undue disruption of current restricted securities resale practices or markets? Comment is requested as to the threshold of eligible participants necessary to achieve the anticipated efficiencies in the private placement market.

The Commission also requests comment on whether it would be appropriate in this first stage to make the Rule available to a broader class of institutions (for example, those that have invested over $10 million, $25 million, $50 million or $75 million in securities), where the transaction involves securities of issuers filing periodic reports with the Commission under the Exchange Act. Using such a lower threshold would reflect the protections afforded by the availability of Exchange Act information, which provides access to the same issuer information provided in a Securities Act registration statement for purchasers of publicly traded securities. Commenters responding to the Proposing Release did not address the issue of why the availability of Exchange Act information did not justify making the Rule available to a wider group of institutional purchasers.

As was originally proposed, eligibility of an investment adviser would be determined by aggregating proprietary assets and discretionary assets under management, and eligibility of a registered investment company that is part of a "family of funds" would be determined by aggregating the assets of the family.[18]

Like the original proposal, the revised Rule permits a bank or savings and loan to purchase securities for accounts over which it exercises investment discretion, as well as for its own account. Due to the particular historical development of bank and savings and loan participation in the securities markets, however, proprietary and fiduciary investments in securities could not be aggregated in order to meet the $100 million threshold for eligibility. This qualification to the eligibility test reflects the separate management of proprietary assets and fiduciary accounts by banks and thrifts, as if the two classes of assets comprised separate entities.[19] The Commission

[17] On July 11, 1989, the Commission adopted Exchange Act Rule 15a-6, 17 CFR § 240.15a-6, concerning registration requirements for foreign broker-dealers. [Exchange Act Release No. 27017 (July 11, 1989)]. The definition of a "major U.S. institutional investor" under that rule parallels the total assets test used in the original proposal of Rule 144A to define a "qualified institutional buyer." The Commission requests comment on whether the definition in Rule 15a-6 should be amended to conform with the revised definition of a qualified institutional buyer included in revised Rule 144A.

[18] In the initial proposal, "family of funds" was defined to mean any two or more registered investment companies which share the same investment adviser *or* principal underwriter *and* hold themselves out to investors as related companies. This definition has been revised to include only registered investment companies that share the same investment adviser (or, in the case of unit investment trusts, the same depositor). *See* proposed Rule 144A[a](3)(i).

[19] This practice is followed by national banks because regulations issued by the Comptroller of the Currency require such banks to separate investments of fiduciary accounts from proprietary assets (12 CFR § 9.13). Additionally, such investments must "be placed in the joint custody or control of not less than two of the officers or employees of the bank designated for that purpose by the board of directors of the bank or by one or more officers designated by the board of directors of the bank * * *." *Id.* Savings and loan institutions also follow this practice (12 CFR § 550.6).

requests comment on whether the investment structure of these institutions warrants this treatment, or whether banks and savings and loan institutions should be permitted to aggregate the two types of portfolios in determining eligibility.

The reproposed Rule would permit aggregation of securities held by wholly-owned bank subsidiaries of a bank holding company, operating either in a state that prohibits or restricts branch banking or in more than one state, in determining the eligibility of the holding company and any such wholly-owned subsidiary to purchase under the Rule. The holding company structure in these cases is necessitated by provisions of federal and state law and should not operate to the disadvantage of these companies under Rule 144A, precluding them from being qualified institutional buyers. The Commission requests comment regarding whether allowing such aggregation is appropriate, and whether such treatment should be extended to savings and loan holding companies.

In determining whether an institution is a qualified institutional buyer, a seller would measure the value of that institution's securities portfolio by the total cost of the securities in the portfolio. The Commission is proposing that purchaser eligibility be determined on a fiscal year-end basis because this would provide a brightline test and, to the extent that information regarding the purchaser's securities investments is disclosed in its financial statements or regulatory reports, such information is most likely to be available on a year-end basis. The Commission requests comment on whether the eligibility of an institution should instead be based on its securities portfolio on a quarterly basis.

The original Rule proposal provided that sellers could rely upon information filed with the Commission in establishing the requisite reasonable belief that a prospective purchaser was a qualified institutional buyer.[20] In response to the proposal, several commenters suggested that sellers also should be able to rely on information filed with other federal or state regulatory agencies because not all eligible institutional buyers file information with the Commission. The proposal has been modified in response to such comments, and, in light of the likely use of Rule 144A for securities of foreign issuers, reliance on foreign government or self-regulatory organization filings would be permitted as well. Therefore, in determining whether a particular entity is a qualified institutional buyer, the seller and any person acting on its behalf could rely upon publicly available information regarding the securities investments of the entity appearing in financial statements or other material filed with the Commission or another United States federal, state, or local governmental agency or self-regulatory organization, or with a foreign governmental agency or foreign self-regulatory organization. The seller and any person acting on its behalf could rely upon such filings as a non-exclusive means of satisfying the reasonable belief standard if the information is disclosed in the filings.[21]

Additionally, the Commission has added as a *per se* reasonable basis of belief of eligibility, information published in the "recognized securities manual." Where a publication like Moody's includes financial information that would provide the requisite information concerning securities investments, reliance on such information would be a basis for reasonable belief as to the institution's eligibility. The scope of the term "recognized securities manual" would be a matter of interpretation. Many states have exemptions based on publication in a recognized securities manual. The Commission would recognize similar manuals, such as Standard & Poor's Corporation Records; Moody's publications, including the Industrial, Transportation, OTC Industrial, the Bank and Finance, the Public Utility, and the International manuals and Best's Insurance Reports. Questions as to any other particular publication would be answered by the staff.

Several commenters stated that adoption of Rule 144A would necessitate a reevaluation of the limits currently placed on investments in restricted securities by certain types of investment companies. Open-end management investment companies ("mutual funds") and unit investment trusts ("UITs") issue redeemable securities,[22] and are required by section 22(e) of the Investment Company Act to make payment to shareholders for securities tendered for redemption within seven days of their tender.[23] These investment companies must maintain a high degree of liquidity to assure that portfolio securities can be sold and the proceeds used to meet redemptions in a timely manner. Guide 13 to Form N-1A [24] states the staff position that the usual limit on aggregate holdings by mutual funds of illiquid assets is ten percent of the value of the company's assets. Generally, an "illiquid security" is any security that cannot be disposed of promptly and in the ordinary course of business within taking a reduced price.[25] The Commission has taken the

[20] The term "reasonable belief" as used in Rule 144A would have the same meaning as it does in Regulation D (17 CFR 230.501-.506).

[21] Given the change in the purchaser eligibility test from total assets to investments in securities, such filings may not disclose such information specifically for all classes of issuers. Regulation S-X specifies the form and content of investment portfolio disclosures for companies that file financial statements with the Commission. *See* 17 CFR 210.1-01 *et seq.* All such companies are required to present, on at least an annual basis, marketable securities separately on the balance sheet, if material, classified into current and non-current components. 17 CFR 210.5-02.2, 6-04.1, 6-06.1, 6A-03.2, 7-03.1, and 9-03.6. More detailed disclosure of the aggregate amounts of the various marketable securities categories (*e.g.*, government obligations, corporate equities, corporate debentures) is required on the balance sheet or notes thereto of certain registered investment companies, employee stock purchase plans, bank holding companies, and savings and loan holding companies. 17 CFR 210.6-06.1, 6A-03.2, 7-03.1, 9-03.6; Staff Accounting Bulletin No. 69. In addition, detailed marketable securities portfolio information including number of shares or units, cost, market value, and carrying value by type of issuer within each category of marketable securities may be required in a supplemental schedule. 17 CFR 210.12-02. Registered investment companies, employee stock purchase plans, and insurance companies are required to provide this information in all cases. 17 CFR 210.6-10(c), (d) and (e), 6A-05, and 7-05. Commercial and industrial companies are required to provide this information if: (1) either total current or total non-current marketable securities constitute 10 percent or more of total assets; (2) total current and non-current marketable securities in the aggregate constitute 15 percent or more of total assets; or (3) total marketable securities of a single issuer constitute two percent or more of total assets. 17 CFR 210.5-04. Bank holding companies and savings and loan holding companies are not required to provide the supplemental schedule, but are required to provide detailed investment portfolio information as part of the description of business in filings with the Commission. *See* Industry Guide 3; Staff Accounting Bulletin No. 69. Additionally, information regarding securities investments of a commercial bank appear in its Report of Condition and Income (call report) on Form FFIEC 031, and in its Annual Report of Trust Assets on Form FFIEC 001 that are filed with the Comptroller of the Currency. Information regarding securities investments of savings and loan institutions and savings banks under the jurisdiction of the Federal Home Loan Bank Board ("FHLBB") would appear in the Thrift Financial Report filed on Form 1313 with the FHLBB and in the certified financial statements they must file with the Federal Home Loan Bank in the District in which they are located. Information regarding securities investments of insurance companies may appear in the annual statements they must file with state insurance regulators.

[22] *See* Sections 5(a)(1) and 4(2) of the Investment Company Act of 1940 (15 U.S.C. §§ 80a-5(a)(1) and 80a-4(2)).

[23] 15 U.S.C. 80a-22(e).

[24] 17 CFR 274.11A.

[25] Investment Company Act Release No. 14983 (March 12, 1986) (51 FR 9773).

position that restricted securities are *per se* illiquid.[26] The commenters urged that, if Rule 144A is adopted, the Commission should reconsider this position to permit investment companies to participate more fully in the private markets, which are expected to be more liquid as a result of the Rule.

The Commission is considering revising its position so that, if Rule 144A is adopted, mutual funds and UITs would not be required to treat securities eligible for resale under rule 144A as *per se* illiquid. The determination of the liquidity of Rule 144A securties in the portfolio of an investment company issuing redeemable securities would be a question of fact for the board of directors to determine, based upon the trading market for the specific security. Comment is requested on whether the Commission should revise its position and, if so, whether any special conditions should be imposed to assure the liquidity of these securities. Commenters are requested to provide information as to any assumptions about market conditions that investment company boards of directors make in determining whether portfolio securities are liquid.

Generally, securities that cannot be publicly offered or sold because of statutory, regulatory or contractual arangements or other restrictions are deemed by the Commission's uniform net capital rule [27] to be non-marketable securities, and broker-dealers are required in their net capital computation to deduct 100 percent of the carrying value of such securities.[28] The Division of Market Regulation has taken the position in the past that a ready market could be deemed to exist with respect to securities that would otherwise be deemed to be non-marketable under the rule.[29] The division of Market Regulation is currently studying the marketability of certain short and medium term unregistered debt instruments and will expand its study to cover instruments which may be traded pursuant to Rule 144A.

[26] Investment Company Act Release No. 5847 (Oct. 21, 1969) (35 FR 19989). In the case of UITs, the Division of Investment Management has taken the position that, if the sponsor maintains a secondary market for trust units so that units are rarely redeemed, the UIT may have up to fifty percent of its assets invested in restricted securities. *See* Guide 3 to proposed Form N-7 in Investment Company Act Rel. No. 15612 (Mar. 9, 1987) (52 FR 8268).

[27] Rule 15c3-1 (17 CFR 240.15c3-1).

[28] *See* Rule 15c3-1(c)(2)(vii) (17 CFR 240.15c3-1(c)(2)(vii)).

[29] *See* Rule 15c3-1(c)(11) [17 CFR 240.15c3-1(c)(11)], and the Division of Market Regulation's letter dated December 29, 1975 to the Securities Industry Association. Rule 15c3-1(c)(11) of the uniform net capital rule sets forth the definition of what constitutes a "ready market" for securities.

B. Exclusion of Fungible Securities From Rule

As reproposed, Rule 144A would not extend to the offer or sale of securities that, when issued, were of the same class as securities listed on a national securities exchange registered under section 6 of the Exchange Act [30] or quoted in an automated inter-dealer quotation system.[31] This revision to the original proposed Rule is designed to address concerns expresed by commenters that Rule 144A could result in the development of side-by-side public and private markets for the same class of securities. As a result of the revision, privately-placed securities that, at the time of their issuance, are fungible with securities trading on a U.S. exchange or quoted in NASDAQ would not be eligible for resale under the proposed Rule. Where American Depositary Shares ("ADSs") are publicly traded in the United States, the deposited securities underlying the ADSs also would be considered publicly traded and could not be sold in reliance on the Rule.

Under the Rule, as reproposed, eligibility for resale would be determined at the time of issuance in the interest of certainty. Thus, privately placed securities of nonreporting companies that go public thereafter would still be eligible to be sold in reliance on the proposed Rule. While this could result in some side-by-side trading, it should not be substantial. Proposed Rule 144(k) can be expected to result in privately placed securities flowing from the private market to the public market three years after issuance. Accordingly, the potential for substantial side-by-side markets developing when a privately held issuer makes an initial public offering appears quite limited both in its duration and in its effect on the public markets.

In the alternative, fungibility could be measured at the time of each resale made under the Rule. To assure against loss of bargained for liquidity, purchasers could obtain registration rights that would be triggered if public trading commenced in securities of the same class. The Commission requests comment on both alternatives and on whether concerns about side-by-side markets developing in the securities of issuers newly traded in the public markets are substantial enough to necessitate changing the rule to measure fungibility on a transaction-by-transaction basis.

The reproposed Rule provides that convertible securities, exercisable within three years of issuance, would be treated as securities of both classes. In the original Rule proposal, for purposes of determining fungibility in the context of the fungible securities tier, all convertible securities were considered securities of both classes. Upon reconsideration, this does not appear necessary to serve the purposes of the Rule. The three-year period parallels Rule 144(k). Thus, if the underlying security were of a class that were traded publicly, even if the senior security were not, the senior security could not be resold under Rule 144A. This treatment is intended to prevent side-by-side markets from developing in the underlying securities through the sale of convertible securities. The Commission requests comment on whether the purpose of this provision would be adequately served by a shorter period of non-exercisability, such as one or two years and, if so, why. The Commission also requests comment on whether an alternative test relying on premiums upon conversion, such as 15 percent or 20 percent, would adequately protect against side-by-side markets developing in the underlying securities.

C. Provision of Information

As reproposed, the Rule would require that the seller provide to the buyer, upon request, basic information concerning the business of the issuer and its final statements, if the issuer was not a reporting company under the Exchange Act or exempt from Exchange Act reporting pursuant to Rule 12g3-2(b).[32] As noted above, the Commission is proposing the information requirement in response to concerns raised with respect to the effect of the proposed rule and the securities.

Where the issuer is a reporting company under the Exchange Act or is providing the information required to maintain a reporting exemption pursuant to Rule 12g3-2(b), publicly available information should sufficiently allay those concerns. Where such information is not available, the proposed information requirement would condition the availability of the rule on the seller or person acting on its behalf providing the buyer with the specified information. The rule does not specify the manner in which the seller would obtain the specified information; the information could be obtained

[30] 15 U.S.C. 78f.

[31] Consistent with the use of the term in Rule 12g3-2(b), an "automated inter-dealer quotation system" would include NASDAQ but would exclude bid and ask quotations in the current "pink sheets" of the National Quotation Bureau, Inc.

[32] *See* proposed Rule 144A(d)(4).

pursuant to contracted rights with the issuer or in any other manner.

The Commission requests comment as to whether the information condition should be deleted in its entirety, on the theory that qualified institutional buyers are sophisticated investors that are able to adequately assess their need for information and to determine when to proceed with an investment. Will the requirement unnecessarily impair the efficiency of resale transactions under the proposed rule? The Commission also requests comment as to whether the requirement should be expanded to apply to all transactions subject to Rule 144A, or to require that the holder of the security have the right to obtain such information upon request from the issuer directly. Would the issuer's liability with respect to the information be altered by a delivery to the holder requirement?

V. Securities of Foreign Non-Reporting Issuers

In the Proposing Release, the Commission expressed concerns regarding the possibility that non-reporting foreign issuers' securities, originally issued to and resold among institutions in a transaction or chain of transactions not involving any public offering, would flow into the retail market and become widely held by non-institutional investors without adequate publicly available information concerning the issuer because of the exemption from the Exchange Act's reporting requirements provided by Rule 12g3-2(b).[33] As noted above, commenters expressing a view on this issue advised the Commission that such concerns should not be resolved by repealing or otherwise amending Rule 12g3-2(b), on which more than 1400 foreign issuers currently rely. Rather than modify Rule 12g3-2(b), the Commission proposes to impose resale restrictions on securities of non-reporting foreign private issuers traded in both a U.S. and foreign securities market, which are sold in reliance upon the Rule,[34] and to revise the amendments to Rule 144 to preclude "tacking" of holding periods for securities issued by non-reporting foreign private issuers.[35] Thus, resales of such securities into the retail market under Rule 144 could be made only after the investor had held the security for at least two years. This revision, coupled with the offense resale provisions of proposed Regulation S,[36] should minimize the potential for proposed Rule 144A to increase significantly the sale of foreign securities in the United States to investors other than institutions eligible to purchase under the Rule. The proposed resale restrictions further should impede any flow of securities of non-reporting foreign private issuers into the U.S. public markets.

A. Resale Restrictions

Resale restrictions are proposed to be incorporated in Rule 144A. The revised Rule would requre that, where securities of non-reporting foreign private issuers were traded in the United States, steps would be taken to prevent their leakage into the retail market.[37] Resale restrictions would apply if, at the time of the resale, the issuer of the securities was a foreign private issuer that was not subject to Section 13 or 15(d) of the Exchange Act, and securities of the same class were traded on or through the facilities of a foreign securities exchange or designated organized foreign securities market,[38] and quoted in a U.S. inter-dealer quotation system within the previous 12 months.[39] The criteria are intended to apply resale restrictions to securities fungible with securities traded in the United States. The practical effect of this standard would be that most foreign debt securities generally would not be subject to resale restrictions. The Commission requests comment, however, whether 12 months is a reasonable period of time, and if not, whether a six or three month period during which quotations have appeared in a U.S. inter-dealer quotation system would suffice.

The proposed Rule would require that the seller of the restricted securities, or a person acting on its behalf, take reasonable steps to prevent the purchaser of such securities from reselling the securities in the United States without restriction or an available exemption. Where precautionary procedures were implemented and followed properly, a seller's transaction would be protected by the safe harbor, notwithstanding any subsequent non-exempt unregistered distribution by a purchaser. In such cases, the reselling purchaser would be in violation of Section 5 of the Securities Act,[40] but not the prior holder that sold in compliance with the safe harbor Rule.

The Rule provides that reasonable steps to guard againt an unregistered, non-exempt public offering would be conclusively established where the purchasers agreed in writing not to resell the securities in the United States absent registration or an applicable exemption, and there existed a procedure administered by the issuer or a third party that was reasonably designed to prevent the transfer of the restricted securities to other than qualified institutional buyers, unless the securities were registered under the Securities Act or an exemption was available.[41] The existence of such a procedure could be established, for example, where the securities were subject to stop transfer instructions, legends or restrictions designed to prevent the unregistered distribution of restricted securities into the U.S. public market. The issuer in establishing such a procedure could rely on the reasonable belief standard in proposed Rule 144A(d)(1) in assessing a buyer's qualification. As noted in the Proposing Release, sellers could rely on a closed trading system that limited trading to qualifying institutions and established depositary and clearance systems such that trades could be made only to other such institutions or outside the United States.[42]

---

[33] Proposing Release, 53 FR 15 44023.

[34] *See* proposed Rule 144A(d)(5).

[35] *See infra* n. 43 and accompanying text.

[36] *See* Rule 906 of proposed Regulation S. Under Rule 906, resales of securities by persons other than the issuer or a distributor could be made immediately into foreign markets provided certain conditions were met. As a result, rather than wait for the expiration of the applicable holding period under Rule 144, proposed Rule 906 would provide an incentive for holders of restricted securities to resell such securities overseas where they seek access to the foreign trading markets.

[37] *See* proposed Rule 144A(d)(5).

[38] The term "designated organized foreign securities market" would have the same meaning as in Rule 902(a) of proposed Regulation S, and would mean any market for trading of securities designated by the Division of Corporation Finance that is organized under foreign law; has an established operating history; and is subject to oversight by a governmental or self-regulatory body to which securities transactions are reported on a regular basis. *See* Securities Act Release No. 33-6838 July 11, 1989) (Reg S reproposal).

[39] The term "inter-dealer quotation system" would be defined by reference to Rule 15c2-11(e)(2) [17 CFR § 240.15c-11(e)(2)], as "any system of general circulation to brokers and dealers which regularly disseminates quotations of identified brokers or dealers * * * " Such a system would include NASDAQ as well as the National Quotation Bureau Inc. "pink sheets."

[40] 15 U.S.C. 77e.

[41] *See* proposed Rule 144A(d)(5).

[42] *See* Proposing Release, 53 FR at 44030, 44031. The American Stock Exchange, Inc. has proposed a domestic market for institutional trading of unregistered foreign securities to be known as SITUS, for "System for Institution Trading of Unregistered Securities." The National Association of Securities Dealers, Inc. has proposed a NASDAQ-type system for the trading of unregistered securities of major foreign and domestic issuers. The NASD system will be known as PORTAL, for "Private Offerings, Resales and Trading through Automated Linkages." The Commission has not yet made any determination as to the status of either SITUS or PORTAL under the Securities Act and the Exchange Act.

The seller's failure to take the particular steps specified in the Rule would not create a presumption that it has acted unreasonably to guard against an unregistered, non-exempt public offering. In the absence of taking the specified steps, the seller would remain free to establish that other reasonable steps had been taken to prevent an unregistered distribution in the United States.

The Commission requests comment on the effectiveness of the proposed resale restrictions in preventing an unregistered public offering, and specifically requests comment on the need for such resale restrictions to protect against Rule 144A's significantly increasing the amount of securities of non-reporting foreign issuers being sold to ineligible buyers.

B. Proposed Amendments to Rules 144 and 145

As originally proposed, the amendments to Rule 144 would have permitted a holder of securities acquired in a transaction or chain of transactions not involving any public offering to include in its holding period the period that prior holders unaffiliated with the issuer of such securities held the securities. The amendments would have permitted such "tacking" regardless of the status of the issuer of the restricted securities. Upon consideration of the comments received, as noted above, the Commission now proposes to modify the amendments so that each purchaser of restricted securities of non-reporting foreign private issuers would continue to be required to hold the securities for the specified holding period to reselling the securities pursuant to Rule 144.[43]

The permissibility of tacking would be determined at the time of the proposed resale. Thus, if the foreign private issuer became a reporting company after issuance of the restricted securities, subsequent sellers of such securities would be able to tack the holding periods of previous unaffiliated holders.

Under the original proposal, the Commission proposed to eliminate certain provisions allowing tacking as no longer necessary.[44] These provisions would be preserved, as revised, to conform to this change to the Commission's original proposal.[45]

In addition, the Commission has made several technical and clarifying changes to the Rules. Such changes are incorporated, as discussed below, in proposed paragraphs (d) (1) and (d)(4)(viii) of Rule 144, and paragraph (d) of Rule 145.

Proposed Rule 144(d)(1) has been revised to clarify that a person acquiring restricted securities from a non-affiliated record owner holding the securities in nominee name on behalf of an affiliate must satisfy the full two or three year holding period that, under new paragraph (d)(1), would begin upon any acquisition of restricted securities from an affiliate. Upon reconsideration, the Commission has inserted in proposed paragraph (d)(1) language from existing paragraph (d)(1) referring to commencement of the holding period upon acquisition from the issuer or an affiliate only where there full purchase price or other consideration is paid or given by the acquiror. This change is consistent with the Commission's position that consideration for the acquisition of securities may be paid through services and other non-cash media.

Technical amendments have been made to proposed Rule 144(d)(4)(viii) and paragraphs 145 (d)(2) and (d)(3) to clarify the Commission's intent that the holding period for securities acquired in merger or other Rule 145(a) transaction begins at the time of the transaction, not the subsequent date when the securities are issued.

A modification to Rule 144(k) also is proposed in response to public comment. As outlined in the Proposing Release,[46] a proposed amendment to this provision would allow a person who has been a non-affiliate for three or more months to resell restricted securities free of the volume, information, manner of sale and Form 144 filing requirements if the securities have been held for at least three years from the later of the date of their acquisition from either an issuer or its affiliate. This modification of current Rule 144(k) was intended solely to incorporate the liberalized tacking principle to be embodied in revised paragraph (d)(1), pursuant to which the three-year holding period must be calculated. One commentator nonetheless has suggested that, if adopted as drafted, amended paragraph (k) could be construed to prevent a non-affiliated trust from combining with its own holding period that of its settlor. To minimize the potential for misinterpretation, the Commission has proposed to revise paragraph (k) to clarify that a non-affiliate taking restricted securities from an affiliate of the issuer in connection with any of the no-sale transactions set forth in amended paragraphs (d)(4)(iv) through (d)(4)(vii) of Rule 144 would be permitted to sell in accordance with paragraph (k), notwithstanding his transferer's affiliate status, and to tack the latter's holding period to his own for purposes of complying with the three-year requirement.[47]

VI. Cost-Benefit Analysis

As an aid in the evaluation of the costs and benefits of these revised proposals, the Commission requests the views and other supporting information from the public. It appears to the Commission that the proposals, if adopted, would work significant cost savings for issuers without compromising investor protection.

VII. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("Analysis") in accordance with 5 U.S.C. 603 regarding proposed Rule 144A and the proposed amendments to Rules 144 and 145. The Analysis explains that the Commission proposed Rule 144A because it appeared that, in certain circumstances, specified institutional investors may not need the protection of the registration provisions of the Securities Act, and that registration in such circumstances may impose undue burdens on the parties to these transactions. The Analysis explains that the proposed amendments to Rules 144 and 145 are intended to provide more equitable means of determining the period for which restricted securities must be held before public resale is protected by the rules.

The Analysis indicates that the effect of Rule 144A would be to enhance the liquidity of the private secondary market, thus making it easier for issuers, including small issuers, to sell their securities in that market. It notes that if the qualified institutional buyer tier was adopted as originally proposed, small issuers would not be disproportionately affected by Rule 144A, as that tier would not be limited to debt securities, preferred stock and securities issued by reporting issuers. The revised definition of "qualified institutional buyer" would similarly not limit the securities that would be permitted to be sold in

[43] Proposed Rule 144(d)(1) and 144(k); proposed Rule 145(d).

[44] Proposing Release, 53 FR at 44032, 44033.

[45] *See* proposed Rules 144 (d)(2), (d)(3), and (d)(4)(iv) through (d)(4)(vii), and proposed rule 145(d)

[46] Proposing Release, 53 FR at 44032, discussing proposed Rule 144(d)(4)(viii).

[47] *See, e.g., Everest & Jennings International* (Nov. 19, 1981).

reliance on the Rule, except for securities of the same class as securities listed on a national securities exchange or quoted in an automated inter-dealer quotation system. This exception, however, would affect, without regard to size, all issuers contemplating a private or public offering. The Analysis further states that small entities that are broker-dealers generally would be affected by proposed Rule 144A in the same way as other investment firms.

The Analysis also indicates that proposed Rule 144A contains no reporting requirements. Rather, adoption of the Rule may result in decreased reporting, recordkeeping, and other compliance requirements with respect to transactions covered by the Rule. The amendments to Rules 144 and 145 would similarly have no significant effect on reporting, recordkeeping and other compliance requirements.

A copy of the Initial Regulatory Flexibility Analysis may be obtained from Brent H. Taylor, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

The Commission encourages the submission of comments with respect to any aspect of the Analysis. Such written comments will be considered in the preparation of the final Regulatory Flexibility Act Analysis if the proposed Rule is adopted. Persons wishing to submit written comments should file four copies of such comments with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC. All submission should refer to File No. S7–23–88 and will be available for public inspection.

VIII. Request for Comments

Any interested persons wishing to submit written comments on proposed Rule 144A and the proposed amendments to Rules 144 and 145, as well as on other matters that may have an impact on the proposals, are requested to do so.

IX. Statutory Basis for Proposals

Rule 144A is being proposed by the Commission and Rules 144 and 145 are proposed to be amended by the Commission pursuant to sections 2(11), 4(1), 4(3), and 19(a) of the Securities Act of 1933.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

X. Text of Proposals

In accordance with the foregoing, Title 17, Chapter II, Part 230 of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 is amended by adding the following citation: (citations before * * * indicate general rulemaking authority).

Authority: Sec. 19, 48 Stat. 85, as amended, 15 U.S.C. 77s * * * § 230.144A also issued under Sec. 2, 48 Stat. 74, as amended, 15 U.S.C. 77b; and also Sec. 10, 48 Stat. 81 as amended, 15 U.S.C. 77j.

2. By revising paragraph (a)(3) of § 230.144 to read as follows:

§ 240.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

(a) * * *

(3) The term "restricted securities" means securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering, or securities acquired from the issuer that are subject to the resale limitations of regulation D (§ 230.501 through § 230.506 of this chapter) or Rule 701(c) (§ 230.701(c) of this chapter) under the Act, or securities that are subject to the resale limitations of Regulation D and acquired in a transaction or chain of transactions not involving any public offering, or securities that are acquired in a transaction or chain of transactions meeting the requirements of Rule 144A (§ 230.144A of this chapter).

* * * * *

3. By further amending § 230.144 by revising paragraph (c)(2) as follows:

(c) * * *

(2) *Other Public Information.* If the issuer is not subject to Section 13 or 15(d) of the Securities Exchange Act of 1934, there is publicly available the information concerning the issuer specified in paragraph (a)(5)(i) to (xiv), inclusive and paragraph (a)(5) (xvi) of Rule 15c2–11 (§ 240.15c2–11 of this chapter) under that Act or, if the issuer is an insurance company, the information specified in section 12(g)(2)(G)(i) of that Act.

* * * * *

4. By further amending § 230.144 by revising paragraphs (d)(1), (d)(2), (d)(3), (d)(4)(iv) through (d)(4)(vii), and the note after (d)(4)(vii) and adding a new (d)(4)(viii) as follows:

(d) * * *

(1)(i) A minimum of two years must elapse between the later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer, and any resale of such securities for the account of either the acquiror or any subsequent holder of those securites, and if the holder acquires the securities by purchase, the two-year period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities by purchase, the two-year period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer; *provided, however,* (ii) that if the securities sold were issued by a foreign private issuer that is not subject to section 13 or 15(d) of the Securities Exchange Act of 1934 at the time of the resale, the person for whose account the securities are sold shall have acquired the securities at least two years prior to the resale, and if the holder acquired the securities by purchase, the two-year period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities to the person from whom the securities were acquired.

(2) *Promissory Notes, Other Obligations or Installment Contracts.* If the person making the acquisition of the securities from the issuer or from an affiliate of the issuer, or, in the case of securities issued by a foreign private issuer not subject to Section 13 or 15(d) of the Securities Exchange Act of 1934, from the issuer, and affiliate of the issuer or any other holder, gave such seller a promissory note or other obligation to pay the purchase price or enters into an installment purchase contract with such seller, such consideration shall not be deemed full payment of the purchase price unless the promissory note, obligation or contract—

(3) *Short Sales, Puts or Other Options to Sell Securities.* In computing the two-year period with respect to the securities of foreign private issuers not subject to section 13 or 15(d) of the Securities Exchange Act of 1934, the following periods shall be excluded:

(4) * * *

(iv) *Pledged Securities.* Securities which are bona-fide pledged either by an affiliate of the issuer or, where such securities were issued by a foreign private issuer not subject to section 13 or 15(d) of the Securities Exchange Act of 1934, by any person other than the issuer, when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be

deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.

(v) *Gifts of Securities.* Securities acquired either from an affiliate of the issuer or, where such securities were issued by a foreign private issuer not subject to section 13 or 15(d) of the Securities Exchange Act, from any person other than issuer, by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.

(vi) *Trusts.* Where a trust settlor is either an affiliate of the issuer or, in the case of securities issued by a foreign private issuer not subject to section 13 or 15(d) of the Securities Exchange Act, the settlor is any person other than the issuer, securities acquired from the settlor by the trust, or acquired from the trust, or acquired from the trust by the beneficiaries thereof, shall be deemed to have been acquired when such securities were acquired by the settlor.

(vii) *Estates.* Where a deceased person was an affiliate of the issuer or, in the case of securities issued by a foreign private issuer not subject to section 13 or 15(d) of the Securities Exchange Act of 1934, the deceased was any person other than the issuer, securities held by the estate of such person or acquired from such estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

Note: While there is no holding period or amount limitation for estates and beneficiaries thereof which are not affiliates of the issuer, paragraphs (c), (f), (g), (h) and (i) of the rule apply to securities sold by such persons in reliance upon the rule.

(viii) *Rule 145(a) transactions.* The holding period for securities acquired in a transaction specified in Rule 145(a) shall be deemed to commence on the date the securities were acquired by the purchaser in such transaction. This provision shall not apply, however, to a transaction effected solely for the purposes of forming a holding company.

* * * * *

5. By further amending § 230.144 by revising paragraph (k) as follows:

* * * * *

(k) *Termination of certain restrictions on sales of restricted securities by persons other than affiliates.* The requirements of paragraphs (c), (e), (f) and (h) of this rule shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of at least three years has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer or, in the case of securities issued by a foreign private issuer not subject to Section 13 or 15(d) of the Securities Exchange Act of 1934 at the time of the sale, a period of at least three years has elapsed since the person for whose account the securities are sold shall have acquired the securities. In computing the three-year period for purposes of this provision, reference should be made to paragraph (d) of this section.

6. By revising § 230.145(d) to read as follows:

§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

* * * * *

(d) *Resale provisions for persons and parties deemed underwriters.* Notwithstanding the provisions of paragraph (c), a person or party specified therein shall not be deemed to be engaged in a distribution and therefore not to be an underwriter or registered securities acquired in a transaction specified in paragaph (a) of this section if: (1) Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f) and (g) of § 230.144; (2) such person or party is not an affiliate of the issuer, and a period of at least two years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction or, in the case of securities issued by a foreign private issuer not subject to Section 13 or 15(d) of the Securities Exchange Act of 1934 at the time of the resale, a period of at least two years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since such person shall have acquired the securities, and the issuer meets the requirements of paragraph (c) of § 230.144; or (3) such person or party is not, and has not been for at least three months, an affiliate of the issuer, and a period of at least three years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction or, in the case of securities issued by a foreign private issuer not subject to section 13 or 15(d) of the Securities Exchange Act of 1934 at the time of the resale, a period of at least three years prior to the resale, as determined in accordance with paragraph (d) of § 230.144, shall have elapsed since such person shall have acquired the securities.

7. By adding § 230.144A to read:

§ 230.144A Private resales of securities to institutions.

Preliminary Notes

1. This rule relates solely to the application of Section 5 of the Securities Act of 1933 (the "Act") and not to antifraud or other provisions of the federal securities laws.

2. Attempted compliance with this rule does not act as an exclusive election; any seller hereunder may also claim the availability of any other applicable exemption from the registration requirements of the Act.

3. Nothing in this rule obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (the "Exchange Act"), whenever such requirements are applicable.

4. Nothing in this rule obviates the need for any person to comply with any applicable state law relating to the offer or sale of securities.

5. Securities acquired in a transaction meeting the conditions of this rule are deemed to be "restricted securities" within the meaning of § 230.144(a)(3) of this chapter.

6. The fact that purchasers of securities from the issuer may purchase such securities with a view to reselling such securities pursuant to this rule will not affect the availability to the issuer of an exemption under Section 4(2) of the Act from the registration requirements of the Act.

(a) *Definition of Qualified Institutional Buyer.* For purposes of this § 230.144A, "qualified institutional buyer" shall mean:

(1) Any of the following, acting for its own account, that at the conclusion of its most recent fiscal year had assets invested in securities that were purchased for a total of more than $100,000,000: (i) any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act; (ii) any broker or dealer registered pursuant to section 15 of the Exchange Act; (iii) any insurance company as defined in section 2(13) of the Act; (iv) any investment company registered under the Investment Company Act of 1940 (the "Investment Company Act") or any business development company as defined in section 2(a)(48) of that Act; (v) any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301 (c) or (d) of the Small Business Investment Act of 1958; (vi) any plan established and maintained by a state, its political subdivisions, or any agency

or instrumentality of a state or its political subdivisions, for the benefit of its employees; (vii) any employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of that Act, which is either a bank, savings and loan association, insurance company, or investment adviser registered under the Investment Advisers Act of 1940 (the "Investment Advisers Act"); (viii) any private business development company as defined in section 202(a)(22) of the Investment Advisers Act; and (ix) any corporation, Massachusetts or similar business trust, organization described in section 501(c)(3) of the Internal Revenue Code, or partnership;

(2) Any investment adviser registered under the Investment Advisers Act, acting for its own account, that at the conclusion of its most recent fiscal year had aggregate assets invested in securities and assets under management invested in securities that it purchased for an aggregate total of more than $100,000,000;

(3) Any investment company registered under the Investment Company Act, acting for its own account, that is part of a family of investment companies which at the conclusion of the company's most recent fiscal year had aggregate assets invested in securities that were purchased for more than $100,000,000. "Family of investment companies" means:

(i) Except for insurance company separate accounts, any two or more investment companies separately registered under the Investment Company Act that share the same investment adviser (or, in the case of unit investment trusts, the same depositor); or

(ii) With respect to insurance company separate accounts, any two or more separate accounts separately registered under the Investment Company Act that share the same investment adviser and that function under operational or accounting or control systems that are substantially similar;

(4) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act, acting in its fiduciary capacity, which at the conclusion of its most recent fiscal year had accounts over which it exercised investment discretion with aggregate assets invested in securities that it purchased on behalf of such accounts for a total of more than $100,000,000;

(5) Any bank holding company, operating either (i) in a state that prohibits or restricts branch banking or (ii) in more than one state, and any wholly-owned subsidiary of that bank holding company, acting for its own account, if in the aggregate the wholly-owned subsidiaries of the holding company at the conclusion of the holding company's most recent fiscal year had assets invested in securities that the holding company and subsidiaries purchased for a total of more than $100,000,000;

(6) Any bank holding company and any wholly-owned subsidiary of the bank holding company operating either (i) in a state that prohibits or restricts branch banking or (ii) in more than one state, acting in its fiduciary capacity, if in the aggregate the wholly-owned subsidiaries of the holding company at the conclusion of the holding company's most recent fiscal year had accounts, over which they exercised investment discretion, with assets invested in securities that the holding company and subsidiaries purchased on behalf of such accounts for a total of more than $100,000,000; and

(7) Any entity all of the equity owners of which are qualified institutional buyers.

(b) *Sales by Persons other than Issuer or Dealers.* Any person, other than the issuer or a dealer, who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof within the meaning of sections 2(11) and 4(1) of the Act.

(c) *Sales by Dealers.* Any dealer who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be a participant in the distribution of such securities within the meaning of section 4(3)(C) of the Act, and such securities shall be deemed not to have been offered to the public within the meaning of section 4(3)(A) of the Act.

(d) *Conditions to be Met.* To qualify for exemption under this section, an offer or sale must meet the following conditions:

(1) The securities are offered or sold only to a qualified institutional buyer, or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer. In determining whether a particular offeree or purchaser is a qualified institutional buyer, the seller and any person acting on its behalf shall be entitled to rely upon publicly available information regarding the securities investments of the offeree or purchaser appearing in:

(i) Financial statements or other material filed with the Commission or another United States federal, state, or local governmental agency or self-regulatory organization, or with a foreign governmental agency or foreign self-regulatory organization; or

(ii) A recognized securities manual;

(2) The seller or any person acting on its behalf takes reasonable steps to ensure that the purchaser is aware that the seller may rely on an exemption from the provisions of Section 5 of the Act pursuant to this § 230.144A;

(3) The securites offered or sold:

(i) When issued were not of the same class as securities listed on a national securities exchange registered under Section 6 of the Exchange Act or quoted in a U.S. automated inter-dealer quotation system; *Provided that,* securities that, within three years from the date of issuance, are convertible into or exchangeable for securities aleady publicly traded shall be treated as securities of the class into which they are convertible or exchangeable; and

(ii) Are not securities of an open-end investment company, unit investment trust or face-amount certifiate company that is registered under Section 8 of the Investment Company Act;

(4) In the case of securities of an issuer not subject to section 13 or 15(D) of the Exchange Act and not exempt from reporting pursuant to Rule 12g3–2(b) (§ 240.12g3–2(b) of this chapter) under the Exchange Act, the seller of the securities or a person acting on its behalf must provide the following information to the buyer upon request: a brief description of the business of the issuer and its products and services offered; the issuer's most recent balance sheet and profit and loss and retained earnings statements; and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the statements should be audited statements to the extent available); and

(5) If the issuer of the securities to be offered or sold is a foreign private issuer that is not subject to section 13 or 15(d) of the Exchange Act, and the securities are of the same class as securities (i) that are traded on or through the facilities of a foreign securities exchange or designated organized foreign securities market (as such a market is defined in Rule 902(a) (§ 230.902(a) of this chapter)), and (ii) that have been quoted in a U.S. interdealer quotation system (as such a system is defined in Rule 15c2–11(e)(2) (§ 240.15c2–11(e)(2) of this chapter)) within the previous twelve

months, the seller or any person acting on its behalf shall take reasonable steps to prevent the purchaser of the securities from reselling the securities in the United States unless they are registered under the Act, or an exemption from registration is available. Such reasonable steps will be conclusively established where:

(A) The purchaser agrees in writing that the securities will not be resold in the United States unless they are registered under the Act or an exemption from registration is available; and

(B) A procedure exists, which is administered by the issuer of the securities or a third party, that is reasonably designed to prevent the transfer of the securities to other than qualified institutional buyers unless the securities are registered under the Act or an exemption from registration is available.

* * * * *

By the Commission.

Shirley E. Hollis,

Assistant Secretary.

July 11, 1989.

[FR Doc. 89-16631 Filed 7-17-89; 8:45 am]

BILLING CODE 8010-01-M

---

17 CFR Part 240

[Release No. 34-27018, International Series Release No. 106; File No. S7-18-89]

Recognition of Foreign Broker-Dealer Regulation

AGENCY: Securities and Exchange Commission.

ACTION: Request for comments.

SUMMARY: The Securities and Exchange Commission solicits comment on a conceptual approach to regulation of foreign broker-dealers that would recognize comparable foreign regulation of broker-dealers in order to achieve the goal of facilitating international securities transactions without compromising the essential protections of the U.S. broker-dealer regulatory regime. In view of the development of comprehensive supervisory schemes in other countries, the Commission is publishing a concept of an exemption from broker-dealer registration that would rely on comparable foreign regulatory regimes and cooperation with foreign securities authorities to regulate certain foreign broker-dealers conducting a limited business from outside the United States with major U.S. institutional investors.

DATE: Comments should be received on or before January 2, 1990.

ADDRESS: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 6-9, Washington, DC 20549. Comment letters should refer to File No. S7-18-89. All comment letters received will be made available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Robert L.D. Colby, Chief Counsel, (202) 272-2844; or Dan Gray, Attorney, (202) 272-2848, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 5-1, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

In June 1988, the Commission published a proposed interpretive statement and proposed rule [1] addressing the broker-dealer registration requirements for foreign broker-dealers under section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act").[2] In a companion to this release,[3] the Commission is adopting Rule 15a-6, which, among other things, exempts from U.S. broker-dealer registration foreign broker-dealers who solicit U.S. institutional investors with a U.S.-registered broker-dealer acting as intermediary. In Release 34-25801, the Commission also noted the development of comprehensive regulatory regimes for broker-dealers in other countries, and indicated that it was weighing whether an approach could be developed at some future point that recognized the regulation of securities professionals in a foreign country as a substitute in some degree for U.S. broker-dealer regulation.[4] Many commenters on Release 34-25801 strongly supported the concept of recognition of foreign regulation.[5]

The Commission believes that recognition of foreign broker-dealer regulation deserves serious consideration. Over the last decade, many institutional investors have actively participated in foreign securities markets in order to diversify their portfolios. Many foreign broker-dealers possess special expertise in foreign markets that would be of use to U.S. institutional investors, yet they may not anticipate obtaining sufficient U.S. business to justify registering in the United States. Recognizing foreign regulation as a substitute, in certain circumstances, for U.S. registration would allow certain of these foreign broker-dealers to deal with U.S. institutional investors without incurring the expense of U.S. registration. This would substantially increase the access of U.S. investors to the valuable services that foreign broker-dealers provide relative to foreign markets. By increasing this access, an approach involving reliance on comparable foreign regulation and cooperation with foreign securities authorities could facilitate international securities transactions, while maintaining effective broker-dealer oversight and preserving the essential protections of U.S. broker-dealer regulation.

Such an approach would, however, raise many difficult issues that must be resolved in order to maintain adequate protection for U.S. investors and markets. In addition, the concept of recognizing foreign regulation could take many forms. To obtain more focused comment on the contours and merits of this concept, the Commission is soliciting public comment on a conceptual approach that would exempt from U.S. broker-dealer registration certain comparably-regulated foreign broker-dealers who conduct a limited business from outside the United States with major U.S. institutional investors. The Commission's preliminary views on the issues raised by such an exemption are discussed below.

II. Background

A. U.S. Broker-Dealer Regulation

Efficient allocation of capital requires that mechanisms exist for bringing buyers and sellers of securities together to ensure liquidity for investors in the capital markets. In most cases, these investors are unlikely to be in a position to locate counterparties and effect transactions efficiently without the assistance of market intermediaries. In their role as market intermediaries, broker-dealers provide services throughout the execution of a securities

---

[1] Securities Exchange Act Release No. 25801 (June 14, 1988), 53 FR 23645 ("Release 34-25801").

[2] 15 U.S.C. 78o(a).

[3] Securities Exchange Act Release No. 27017 (July 11, 1989) ("Rule 15a-6 Adopting Release").

[4] *See* Release 34-25801, 53 FR at 23652.

[5] A detailed summary of comments on Release 34-25801 ("Comment Summary") has been prepared and placed in the Commission's public file, together with all comment letters received. *See* File No. S7-11-88. The Commission received seventeen letters commenting on the concept of recognition of foreign regulation, all of which supported the concept. These commentators included U.S. institutional investors, groups representing the U.S. securities industry, foreign securities authorities, and foreign broker-dealers. *See* Part II.D. of the Comment Summary.

transaction, including providing research and advice in the decision-making stage, implementing a decision to buy or sell by finding the most advantageous terms and executing the transaction, arranging for delivery of securities by the seller and payment by the buyer, and maintaining custody of customer funds and securities. In addition, broker-dealer market making and other principal activities are major sources of liquidity in the securities markets. In using a broker-dealer to perform these functions, investors and issuers depend upon the intermediary's integrity, competence, and financial soundness.

Congress has recognized the dangers both to broker-dealers' customers and to the market system as a whole when broker-dealers do not meet minimum standards of integrity, competence, and financial soundness. Congress has enacted a statutory scheme for regulating broker-dealers that requires registration with the Commission and membership in a self-regulatory organization ("SRO"), and that authorizes the Commission and the SROs to establish a comprehensive broker-dealer regulatory regime. U.S.-registered broker-dealers are required, among other things, to meet minimum standards of integrity and competency, to handle customer funds and securities safely, and to maintain sufficient net capital to protect customers and markets from defaults. Comprehensive examination procedures by both the Commission and the SROs have been implemented to monitor broker-dealer compliance and sanction broker-dealers who fail to comply with these requirements.

In view of the longstanding congressional emphasis on the importance of broker-dealer regulation in protecting investors and maintaining the integrity of the securities markets, the Commission believes that any approach recognizing foreign broker-dealer regulation should seek to facilitate international securities transactions without compromising the essential protections of the U.S. regulatory regime.

B. Internationalization and Broker-Dealer Regulation

Securities regulation in the United States, like securities regulation in most other countries, is applied primarily on a territorial basis. When all parties to a securities transaction are located within the same jurisdiction, as in the past was predominantly the case, it is possible to operate an effective regulatory regime within national boundaries. Increasingly, however, issuers and investors are seeking the lowest cost of capital and the greatest return on investment without regard to national boundaries, and securities intermediaries have sought to provide the services necessary to effect securities transactions in which the seller, purchaser, and intermediary may be located in two or more jurisdictions.

In its recent Policy Statement on Regulation of International Securities Markets,[6] the Commission outlined its views on the appropriate regulatory responses to increasing internationalization of the securities markets. The Commission noted that the challenge facing securities regulators is to ensure that global securities markets are efficient and honest. While recognizing that major differences remain among national regulatory structures, the Commission indicated that in its view the appropriate means to reduce these differences without compromising the integrity of national regulatory structures is through increased cooperation between national securities regulators as they seek common solutions to international problems.

The Commission believes that a cooperative approach to the regulation of foreign broker-dealers conducting a limited business from outside the United States with major U.S. institutional investors deserves serious consideration. By relying in certain limited circumstances on comparable foreign regulation as a substitute for U.S. regulation and on cooperation with foreign securities authorities to monitor the cross border activities of these foreign broker-dealers, a cooperative approach potentially could provide U.S. institutional investors with increased access at lower cost to the services of such broker-dealers without undue loss of protection for U.S. investors and markets.

As noted in Release 34–25801, the exclusion of foreign firms from U.S. regulatory requirements possibly could result in risks for U.S. investors and markets if the foreign regulatory system did not afford fundamental protections, or if the cross border activities of exempted broker-dealers were not adequately monitored by either U.S. or foreign regulatory authorities. The Commission believes, however, that a properly tailored approach recognizing foreign broker-dealer regulation can accomplish its goal of maintaining effective regulation of such cross border activities.

III. Conceptual Approach Recognizing Foreign Regulation

To provide a basis for further discussion of a cooperative regulatory approach in the context of U.S. regulation of foreign broker-dealers, the Commission is publishing for comment the concept of a conditional exemption from full U.S. broker-dealer regulation for foreign broker-dealers operating abroad.[7] The purpose of this concept

[6] Securities and Exchange Commission, *Policy Statement on Regulation of International Securities Markets* (November 1988), International Series Release No. 1, 43 SEC Doc. 128 (March 28, 1989) ("Policy Statement"). In addition to the Policy Statement and Release 34–25801, the Commission has on several other occasions indicated its interest in developing approaches that would facilitate international securities transactions. *See, e.g.*, Securities Act Release No. 6806 (October 25, 1988), 53 FR 44016 (proposing Rule 144A); Securities Act Release No. 6779 (June 10, 1988), 53 FR 22661 (proposing Regulation S); Securities Exchange Act Release No. 21958 (April 18, 1985), 50 FR 16302 (request for comment on issues concerning internationalization of the world securities markets); Securities Act Release No. 6568 (February 28, 1985), 50 FR 9281 (request for comment on two conceptual approaches for facilitating multinational securities offerings). *See also Internationalization of the Securities Markets*, Report of the Staff of the U.S. Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Energy and Commerce (July 27, 1987).

Several jurisdictions have adopted or proposed approaches that make special provision for foreign market intermediaries in their regulatory schemes. As noted in Release 34–25801, the U.S. Commodity Futures Trading Commission ("CFTC") has provided an exemption from its rules for futures commission merchants who are located outside the United States, who only transact business in futures traded on a foreign board of trade, and who demonstrates that they are subject to a regulatory scheme comparable to that of the CFTC. *See Interpretive Statement with Respect to the Commission's Exemptive Authority Under § 30.10 of Its Rules*, 17 CFR Part 30, Appendix A. The United Kingdom does not require authorization of a foreign broker-dealer without a permanent office in the United Kingdom if the foreign broker-dealer limits its activities to dealing with sophisticated investors and established customers. *See Financial Services Act 1986*, ch. 60, sch. 1, § 27; *The Financial Services (Unsolicited Calls) Regulation 1987*, § 4. The Ontario Securities Commission requires only limited registration of "international securities dealers." *See Revised Regulations of Ontario*, Regulation 910, § 180. Finally, the European Economic Community has proposed an intra-community approach that would permit firms authorized in one member state to conduct business in other member states without separate authorization in those states. *See* Commission of the European Communities, *Proposal for a Council Directive on investment services in the securities field*, COM (88) 778 (December 16, 1988), O.J. No. C43 (February 22, 1989).

[7] A Commission exemption recognizing foreign regulation would draw on the exemptive authority in section 15(a)(2) of the Exchange Act. 15 U.S.C. 78o(a)(2). Section 15(a)(2) provides that "[t]he Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order."

release is to give notice of the Commission's preliminary views on how an approach recognizing foreign regulation could be developed and to elicit comment on this approach.

The conceptual approach reflects the Commission's awareness of securities regulatory developments in countries with major trading markets throughout the world, as well as the potential benefits of providing substantial U.S. institutional investors broader access to regulated foreign broker-dealers. In this connection, while the Commission believes that Rule 15a–6 provides an effective means for foreign broker-dealers with U.S. affiliates to provide information and trading assistance to U.S. institutional investors, the Commission is concerned that U.S. registration standards may unduly restrict the access of U.S. institutional investors to unaffiliated broker-dealers. Accordingly, the conceptual approach would provide conditional exemptions for unaffiliated foreign broker-dealers providing cross border services to major U.S. institutional investors.

The conceptual approach would be based on the following elements:

1. A limitation on the scope of the exemption to foreign broker-dealers operating outside the United States whose business is predominantly foreign, who do not have U.S. broker-dealer affiliates, and who limit their activities requiring U.S. broker-dealer registration to providing cross border services to major U.S. institutional investors.

2. The existence of investigative and financial memoranda of understanding ("MOU"), or comparable treaties, between the Commission and the foreign securities authority ("FSA"), that support the reliance by the Commission on the FSA that this conceptual approach would entail.

3. The existence of a foreign regulatory regime that is comparable to that of the United States.

4. Compliance by exempted broker-dealers with specific U.S. regulatory requirements deemed necessary by the Commission for the protection of U.S. investors and markets.

An exemption under the conceptual approach would not depend on a foreign country providing reciprocal treatment to U.S. broker-dealers. The Commission currently extends national treatment to foreign broker-dealers by permitting them to operate in the United States subject to the same terms and conditions applicable to domestic broker-dealers. Although the Commission strongly believes that foreign countries should grant U.S. broker-dealers national treatment, it does not make U.S. national treatment contingent on reciprocal foreign national treatment of U.S. firms. Similarly, although the Commission encourages foreign countries to consider the concept of recognition of U.S. broker-dealer regulation, it would not condition the U.S. exemption on reciprocal recognition by foreign countries of U.S. regulation.

The four elements that would be conditions to an exemption under the conceptual approach are discussed more fully below.

A. Restrictions on U.S.-Related Activities

Broker-dealer regulation is an essential, congressionally-mandated component of the U.S. regulatory structure for protecting investors and maintaining the integrity of the securities markets. To preserve the effectiveness of the U.S. broker-dealer regulatory regime, the Commission does not believe that an exemption recognizing foreign regulation should be made available to foreign broker-dealers if they either (1) operate from within the territory of the United States, whether through corporate affiliates, branches, or otherwise, or (2) conduct a significant portion of their business with U.S. investors. These foreign broker-dealers should be subject to the same rules and regulations applicable to domestic broker-dealers engaged in similar activities. Consequently, the conceptual approach discussed in this release contains several significant restrictions on the U.S.-related activities of exempted broker-dealers.

First, the conceptual approach would make an exemption recognizing foreign regulation available only to foreign broker-dealers operating outside the territory of the United States. The primary rationale for an exemption recognizing foreign regulation is that an FSA can effectively regulate certain cross border activities of broker-dealers operating from its territory. An FSA is unlikely to be able to oversee as effectively as U.S. regulatory authorities those elements of the securities activities of a broker-dealer conducted inside the United States.[8] In this case, U.S. regulators will have much greater access to personnel and records that are located in the United States than will the FSA. Moreover, the Commission has a heightened interest, and governmental comity concerns are less, in activities that are occurring within the territorial boundaries of the United States.

In addition, the Commission does not believe that it would be appropriate to exempt foreign broker-dealers who have an affiliate conducting business as a broker-dealer in the United States. First, Rule 15a–6 provides relief to foreign broker-dealers with U.S. affiliates by permitting foreign associated persons to contact U.S. institutional investors without registration of the foreign broker-dealer.[9] Second, exempting foreign broker-dealers with U.S. broker-dealer affiliates could create a significant potential for inappropriate circumvention of U.S. regulatory requirements. For example, transactions generated by the U.S. affiliate's activities inside the United States, and therefore appropriately subject to U.S. regulation, might be "booked" through the exempted foreign broker-dealer, thereby avoiding U.S. requirements regarding net capital, protection of customer funds and securities, and recordkeeping. The ability of the Commission and SROs to detect such abuse would be limited. In view of the significant connection to the U.S. market of foreign broker-dealers with U.S. affiliates, the Commission does not believe that requiring transactions to be booked through U.S. affiliates, as in Rule 15a–6,[10] constitutes an unreasonable burden on the operations of foreign broker-dealers.

The Commission's conceptual approach also would make an exemption available only to broker-dealers whose business is predominantly foreign. Under this condition, a broker-dealer would not qualify for an exemption under the conceptual approach if its U.S.-related securities activities accounted for more than ten percent of its revenues generated from securities activities.[11] The Commission is concerned that disparities between U.S. and "comparable" foreign broker-dealer regulation could encourage U.S. broker-dealers to relocate offshore while continuing to deal with U.S. institutions. Conceivably, even if a broker-dealer were located outside the United States and its only U.S. customers were institutional investors, the broker-dealer's U.S.-related activities could

[8] As discussed *infra*, note 39, the Commission is seeking comment on the extent to which an exemption recognizing foreign regulation should be available to a foreign broker-dealer operating branches in more than one foreign country.

[9] *See* 17 CFR 240.15a–6(a)(3).

[10] *See* 17 CFR 240.15a–6(a)(3)(iii).

[11] In addition to the percentage restriction, the Commission solicits comment on whether the conceptual approach should include a restriction on the dollar amount of revenues that a foreign broker-dealer could generate from its U.S-related securities activities without being required to register in the United States.

account for a significant portion of its overall business. The Commission does not believe that the conceptual approach should permit this circumvention of the U.S. regulatory scheme.

Finally, the Commission's conceptual approach would exempt foreign broker-dealers only to the extent that they are dealing with major U.S. institutional investors, such as U.S. institutions with more than $100,000,000 in assets or assets under management.[12] Institutional investors have been the most active U.S. participants in foreign securities markets and therefore are most likely to seek the expertise of foreign broker-dealers in foreign markets. Moreover, because major institutions generally are more sophisticated investors than other investors, they are more likely to be capable of dealing with foreign broker-dealers who may have practices and customs different from those of U.S. broker-dealers. These investors also are generally less subject than individual investors to common sales practice abuses, such as churning and unsuitable recommendations. This additional safeguard against foreign broker-dealer misconduct may be important in view of the novelty of an exemptive approach that relies on foreign regulation as a substitute for U.S. regulation. As the Commission and FSAs gain more experience in implementing an approach recognizing foreign regulation, the Commission could consider expanding the types of U.S. investors who could be solicited by exempted broker-dealers.

Some commenters on Release 34-25801 suggested that the Commission adopt an approach providing an exemption for foreign broker-dealers who only deal with major institutional investors, regardless of the nature of the foreign regulation of the broker-dealer.[13] Under present circumstances, the Commission is not inclined to pursue this alternative. Recent experience indicates that major institutional investors can benefit from the safeguards provided by the U.S. regulatory system.[14] Further, institutional investors who specifically seek the opportunity to trade in a foreign market subject to different regulatory standards are free to do so.[15]

The Commission's conceptual approach to an exemption recognizing foreign regulation is intended to increase substantially the access of U.S. institutional investors to foreign markets. At the same time, it will increase the interdependence of U.S. and foreign markets. The increased linkage of world financial markets can benefit investors and the capital-raising process; it also increases the likelihood that a problem in one national market will affect investors based in other markets. In view of the Commission's congressionally-mandated responsibility to protect investors and maintain the integrity of the U.S. securities markets, and the importance of broker-dealer regulation in this process, the Commission is seeking to maintain the safeguards resulting from broker-dealer regulation through cooperation among securities regulators in recognizing international regulatory standards and reducing regulatory differences.

B. Memoranda of Understanding

The conceptual approach would require MOUs between the Commission and the FSA that provide for cooperation and coordination in regulatory, as well as enforcement, matters. To the extent that foreign broker-dealers have dealings with U.S. investors, the conduct and financial condition of these broker-dealers remains of concern to the Commission. Because under the conceptual approach the FSA will be the primary regulator of exempted broker-dealers, the Commission would have to rely on the FSA for information and other assistance necessary for the Commission to fulfill its regulatory responsibilities. Absent agreement by the FSA to provide such assistance to the Commission, broker-dealers from that FSA's jurisdiction would not qualify for an exemption under the conceptual approach.

The essential characteristics of a comprehensive MOU providing for cooperation in enforcement matters are reflected in the Commission's existing MOUs with Canadian and Brazilian securities authorities.[16] These MOUs provide for the fullest mutual assistance possible for investigations and litigation or prosecution of cases where information needed by one authority is located in the territory of another. This assistance includes providing access to information in official agency files, taking the testimony of persons, and obtaining documents from persons.

In addition to cooperation in enforcement matters, an acceptable MOU for purposes of the conceptual approach would provide for cooperation in regulatory matters.[17] Under such a MOU, the FSA would agree to provide (1) periodic reports on the financial condition of exempted broker-dealers and prompt notice of financial difficulties; (2) notice of any disciplinary or other proceedings that bear on an exempted broker-dealer's securities business; and (3) access on an as-

---

[12] The term "major institutional investor" could be defined in several ways. Rule 15a-6 generally defines the term as institutions that have assets, or assets under management, in excess of $100,000,000. *See* 17 CFR 240.15a-6(b)(4). The Commission solicits comment on appropriate standards for determining the types of U.S. investors that exempted foreign broker-dealers could contact under the conceptual approach.

[13] *See, e.g.*, comments of the Securities Industry Association, Institute of International Bankers, and Brown Brothers Harriman & Co., on proposed Rule 15a-6, summarized in Comment Summary, *supra note 5.*

[14] For example, the practices of unregulated broker-dealers in the primarily institutional government securities market prompted Congress in 1986 to require registration of government securities broker-dealers. *Government Securities Act of 1986*, Pub. L. No. 99-571, 100 Stat. 3208 (1986)("Government Securities Act"). The failures of several government securities broker-dealers during the preceding ten years had resulted in losses of over $900 million for their customers. The failed firms had masked their financial problems by issuing false and misleading financial statements, engaging in complex transactions with affiliated entities, and improperly handling customer funds and securities. The interdependence of modern financial markets and the impact of broker-dealer failures on them were recognized as important factors requiring adequate regulation of broker-dealers in the government securities market:

> The destabilizing effects upon the financial markets of the failures of two relatively small government securities firms must not be underestimated. For example, ESM's failure resulted in losses of over $300 million to local governments and certain savings and loan associations, which precipitated a depositor's run on thrift institutions in Ohio that resulted in the temporary closing of 71 Ohio thrift institutions. The run on Ohio thrifts precipitated a sharp rise in the price of gold in European markets and a corresponding drop in the value of the dollar. The gold and currency markets responded in a similar fashion after the failure of Bevill, Bresler.

S. Rep. No. 426, 99th Cong., 2d Sess. 7-8 (1986).

[15] For one analysis of the implications of competing regulatory structures in the international legal environment, see SEC News Release, Remarks of Joseph A. Grundfest, Commissioner, U.S. Securities and Exchange Commission, to the Chartered Association of Certified Accountants, London, England, *Regulating the International Capital Markets: A New World and a New Perspective* (November 11, 1987).

[16] Memorandum of Understanding between the U.S. Securities and Exchange Commission and the Ontario Securities Commission, the Commission des valeurs mobilieres du Quebec, and the British Columbia Securities Commission (January 7, 1988), International Series Release No. 6, 43 SEC Doc. 186 (March 28, 1989); Memorandum of Understanding between the U.S. Securities and Exchange Commission and the Brazil Comissao de Valores Mobiliarios (July 1, 1988), International Series Release No. 7, 43 SEC Doc. 206 (March 28, 1989).

[17] An example of a limited MOU providing for assistance in regulatory matters is the Commission's MOU with regulatory authorities in the United Kingdom in which the Commission and U.S. SROs agree to assist the U.K. regulators in monitoring the financial condition of U.S. broker-dealers with branches in the United Kingdom. *See* Memorandum of Understanding between the U.S. Securities and Exchange Commission, the Securities and Investments Board, the self-regulatory organizations in the United States and the United Kingdom, and the Bank of England (August 1988).

needed basis to records and reports of an exempted broker-dealer that relate to transactions with U.S. customers. Since in many foreign jurisdictions securities regulatory responsibility is shared among a governmental agency and self-regulatory organizations, the scope of a satisfactory MOU would have to cover both types of regulatory authorities.

C. Comparable Foreign Regulation

Because an exemption recognizing foreign regulation would substantially rely on the foreign regulatory regime as a substitute for U.S. regulation, the conceptual approach envisions that the foreign regulatory regime would be comparable to the U.S. regulatory system. The Commission anticipates that assessing the comparability of a foreign regulatory regime would require extensive consultations with foreign regulators on a country-by- country basis, including comprehensive consideration of the laws and regulations of the foreign jurisdiction.

In assessing comparability, the Commission would not require that a foreign regulatory regime be identical to the U.S. regime. The Commission recognizes that different cultures and market characteristics can result in alternative regulatory requirements appropriate for the particular jurisdiction.[18] The Commission therefore would assess the foreign regulatory regime as a whole and determine whether it adequately addressed the concerns reflected in the U.S. regulatory regime. Such an assessment inevitably would be a complex endeavor, and the Commission solicits comment on any procedures, guidelines, or other suggestions commenters may have that would facilitate the assessment.

The Commission preliminarily believes that an assessment of whether a foreign regulatory regime is comparable to that in the United States involves a consideration of the following elements: (1) Broker-dealer registration qualifications and conduct standards; (2) broker-dealer financial responsibility requirements, and procedures for protection of customer funds securities; (3) limitations on extension of credit in securities transactions; (4) a sound clearance, settlement, and payment system; and (5) a comprehensive monitoring and enforcement program.

1. Registration Qualifications and Conduct Standards

Registration qualifications that require broker-dealers and their associated persons to possess minimum standards of integrity and competence are important components of the U.S. regulatory regime. U.S.-registered broker-dealers are required to disclose the identity of their owners, control persons, and associated persons, and these individuals are required to meet minimum standards of integrity. Firms or persons who have committed securities violations or other violations reflecting unfavorably on their integrity may be prohibited by the Commission from registration as securities professionals or as owners of broker-dealers.[19] In addition, U.S. SROs require all personnel who provide securities services to pass qualification examinations administered by the SROs to demonstrate their competence to engage in the securities business.[20] Finally, broker-dealers are required as a condition of registration to demonstrate that they have sufficient financing and facilities to conduct their securities business properly.[21]

In addition to meeting these qualifications for registration, U.S. broker-dealers and their associated persons are held to high standards of commercial honor and integrity because of the reliance placed on them by their customers. The general antifraud provisions of the Exchange Act,[22] Commission rules thereunder,[23] and SRO rules [24] impose both general and specific obligations on broker-dealers to deal fairly with their customers. The central U.S. elements of fair dealing involve sales practice and disclosure standards, such as having a reasonable basis for recommendations, timely and adequate confirmation of transactions, disclosure of conflicts of interest, and fair compensation both in agency and principal transactions. In addition, broker-dealers must have adequate procedures for supervising the activities of their personnel to ensure that these standards of fair dealing are upheld. Similar standards of fair dealing and supervision would appear to be necessary in order for a foreign broker-dealer regulatory structure to be substantially comparable to that of the United States.

2. Financial Responsibility and Customer Protection

Two critical aspects of U.S. broker-dealer regulation are the requirements that a broker-dealer maintain adequate capital for the safe conduct of its business, and that it properly handle and safeguard customer funds and securities. These requirements serve the important function of protecting not only a broker-dealer's customers, but the integrity of U.S. securities markets. Rule 15c3–1[25] under the Exchange Act imposes a risk-based standard that requires broker-dealers to maintain liquid assets in excess of their liabilities, and Rule 15c3–3[26] under the Exchange Act provides for the segregation and safe handling of customer funds and securities. These rules are intended to ensure that broker-dealers have sufficient capital to conduct a sound securities business, to weather difficult business conditions, and to protect customer funds and securities from general creditors of the broker-dealer in the event of a sudden liquidation. In addition, the Securities Investor Protection Corporation administers a fund to compensate customers for losses, up to specified amounts, arising from the financial difficulties of broker-dealers.[27] Under the Commission's conceptual approach, the Commission would assess whether a foreign regulatory regime included provisions designed to achieve the goals of these financial responsibility and customer protection rules. An important aspect of this assessment may be the status of customer funds and securities under the bankruptcy laws of the foreign country.

Inevitably, any foreign regulatory requirement will differ in some significant respects from U.S. requirements. Accordingly, where a foreign jurisdiction's capital requirements are not sufficiently comparable to certain U.S. requirements, it may be appropriate for the Commission to impose supplemental capital requirements as a condition for an exemption. In particular, the availability of an exemption could be limited to broker-dealers who have a substantial amount of net worth. For such a conditional exemption to be granted, the FSA would have to agree to monitor compliance with the

[18] *See* Policy Statement, 43 SEC Doc. at 129.

[19] Section 15(b)(4) of the Exchange Act, 15 U.S.C. 78o(b)(4), specifies events that may be grounds for disqualification from registration as a broker-dealer, and section 3(a)(39) of the Exchange Act, 15 U.S.C. 78c(a)(39), specifies events that may be grounds for disqualification from membership in a self-regulatory organization.

[20] *See e.g.*, NASD Schedules to the By-Laws, Schedule C, *NASD Manual* (CCH) ¶ 1785. The Commission has authority to set similar requirements pursuant to section 15(b)(7) of the Exchange Act, 15 U.S.C. 78o(b)(7).

[21] *See* 17 CFR 240.15b1–2(c).

[22] Sections 10(b) and 15(c) of the Exchange Act, 15 U.S.C. 78j(b) and 78o(c).

[23] *See, e.g.*, 17 CFR 240.10b 5; 17 CFR 240.15cl–2.

[24] *See, e.g.*, NASD Rules of Fair Practice, *NASD Manual* (CCH) ¶¶ 2151–2200.

[25] 7 CFR 240.15c3–1.

[26] 7 CFR 240.15c3–3.

[27] *See Securities Investor Protection Act of 1970*, 15 U.S.C. 78aaa–78111.

supplemental requirement. The Commission requests comment on whether the imposition of a supplemental minimum net worth requirement would be appropriate.

3. Extension of Credit

Regulations preventing the excessive use of credit for purchasing and carrying securities are an important aspect of the U.S. statutory scheme for enhancing the soundness of individual broker-dealers, as well as the U.S. securities markets in general. Highly leveraged securities transactions can expose broker-dealers to greater risks of customer defaults in margin accounts. In turn, customer defaults in margin accounts can substantially impair the financial soundness of broker-dealers.[28] Section 7(c) of the Exchange Act [29] requires that extensions of credit by broker-dealers must be made in conformity with rules promulgated by the Federal Reserve Board ("FRB"). Regulation T under the Exchange Act governs the amount of initial margin that a customer of a broker-dealer must deposit in effecting a purchase or short sale, as well as the period of time within which the customer must make such deposit.[30] In addition, SRO rules impose requirements for the amount of margin that must be maintained in customer accounts.[31] Similar requirements designed to ensure prompt payment for securities transactions and to prevent customer defaults in margin accounts from adversely affecting broker-dealers would be factors to be considered in assessing whether foreign regulatory regimes are comparable.

4. Clearance, Settlement, and Payment System

The financial condition of individual broker-dealers is directly affected by the soundness and efficiency of the clearance, settlement, and payment system in which the broker-dealer participates. The paperwork crisis experienced by U.S. broker- dealers in the late 1960's provides a noteworthy example of the importance of efficient clearance and settlement procedures to the operational and financial well-being of broker-dealers.[32] For this reason, the Commission has stated in the Policy Statement that the ultimate goal for the international markets should be the establishment of fully automated clearance and settlement systems that permit paperless book-entry movement of all broker-dealer and institutional equity and debt positions.[33]

In the context of an exemption recognizing foreign regulation, it would appear important that a foreign country's clearance, settlement, and payment system be sufficient to service the volume of transactions in that country's markets in a timely fashion with a minimal rate of fails, and to be able to provide secure depository facilities for the safekeeping of securities. In addition, the existence of a sound linkage between the foreign system and the U.S. system that facilitates cross border settlements without compromising the essential soundness and integrity of the respective systems would appear to be a factor for comparability discussions. A sound linkage would contain safeguards to reduce the risk of default and contain potential losses.

5. Monitoring and Enforcement

A further element of a comparable regulatory regime would be the monitoring and enforcement of broker-dealer compliance with the substantive requirements of the regulatory system. In the United States, the Commission and the SROs have implemented a comprehensive program that includes recordkeeping, reporting, surveillance, inspections; and disciplinary actions. Rule 17a–3 [34] and Rule 17a–4 [35] under the Exchange Act require broker-dealers to generate and maintain records relating to their transactions, customers, and financial condition. Rule 17a–5 [36] requires broker-dealers to report periodically on their financial condition, with annual reports to be independently audited,[37] and Rule 17a–11 [38] requires special notification whenever a broker-dealer's net capital approaches its minimum requirement. Finally, the Commission and the SROs cooperate in monitoring the marketplaces, periodically inspecting individual broker-dealers, and taking disciplinary action against broker-dealers who fail to comply with the securities laws and SRO rules. Similar requirements would be of importance in assessing the level of oversight and monitoring of broker-dealers in foreign markets.

6. Solicitation of Comments on Comparability

The Commission requests comment on the attributes identified above as potentially significant in assessing comparability of U.S. and foreign broker-dealer regulatory structures. Are these appropriate attributes on which to focus, or should the Commission be concerned with some subset of the attributes? Are there other significant aspects of the U.S. regulatory structure not identified? If commentators believe that appropriate attributes have been discussed, how close a comparability should be required under the conceptual approach? In addition, it is possible that the Commission could determine that a foreign regulatory regime was substantially comparable to the U.S. regime except for certain areas. The Commission requests comment on whether, as discussed regarding minimum capital requirements, supplemental U.S. requirements should be used to address specific areas of noncomparability.

D. U.S. Regulatory Requirements

The final element of the Commission's conceptual approach to an exemption recognizing foreign regulation relates to the role of the Commission in regulating the cross border activities of exempted broker-dealers. It would appear to be consistent with a cooperative approach to establish special U.S. regulatory requirements to help monitor the effectiveness of the cooperative approach. Accordingly, after comparability of regulatory structures had been determined and an acceptable

---

[28] *See The October 1987 Market Break*, Report by the Division of Market Regulation, U.S. Securities and Exchange Commission (February 1988), ch. 5, for discussion of the impact of customer defaults on broker-dealers during the October 1987 market break.

[29] 15 U.S.C. 78g(c).

[30] *See* 12 CFR 220.4 and 220.18.

[31] *See, e.g.*, NYSE Rule 431, *NYSE Guide* (CCH) ¶2431; NASD Rules of Fair Practice, Appendix A, *NASD Manual* (CCH) ¶2180A.

[32] The paperwork crisis was precipitated first by an increase in transaction volume that was far beyond the capability of broker-dealers to process, and then by a downturn in the securities markets that resulted in the liquidation of over 100 broker-dealers and the merging of many others. These problems were caused by a number of factors, including weaknesses in the capital structure of broker-dealers, poor recordkeeping, and inefficient clearance and settlement systems. *See Securities Industry Study*, H.R. Rep. No. 1519, 92d Cong., 2d Sess. 3–13 (1972); *Study of Unsafe and Unsound Practices of Brokers and Dealers*, Report and Recommendations of the Securities and Exchange Commission, H. Doc. No. 231, 92d Cong., 1st Sess. 13–30 (1971).

[33] Policy Statement, 43 SEC Doc. at 132. *See also* SEC News Release, Remarks of David S. Ruder, Chairman, U.S. Securities and Exchange Commission, on the Group of Thirty Report on International Clearance and Settlement (May 15, 1989) (discussion of changes in clearance and settlement systems that are needed to support worldwide securities trading).

[34] 17 CFR 240.17a–3.

[35] 17 CFR 240.17a–4.

[36] 17 CFR 240.17a–5.

[37] The audit must be made in accordance with generally accepted auditing standards, and include a review of the accounting system, internal accounting control, and procedures for safeguarding securities. 17 CFR 240.17a–5(g).

[38] 17 CFR 240.17a–11.

MOU was in place, as discussed above, the Commission would issue a general exemptive order for the foreign jurisdiction. An individual broker-dealer located in that jurisdiction [39] then would rely on the exemption after satisfying any individual broker-dealer requirements that the Commission adopted. In the event an exempted broker-dealer or its FSA failed to remain in compliance with any of the conditions of the conceptual approach, the Commission would have the discretion to withdraw the exemption from the broker-dealer or from all broker-dealers regulated by the FSA.

The Commission preliminarily believes that an individual firm should be required to (1) notify the Commission of its intention to avail itself of the exemption; (2) provide evidence of its sponsorship by the FSA, including a written indication that the firm is in good standing to conduct a securities business in the foreign jurisdiction and that the firm's U.S.-related activities will be monitored by the FSA; (3) consent to service of process for proceedings in the United States; (4) agree to provide periodic certifications to the Commission (a) that its U.S.-related securities activities account for less than ten percent of its revenues generated by securities activities, and (b) that it is otherwise in compliance with the conditions of its exemption; and (5) agree, subject to applicable laws,[40] to provide records and information relating to its transactions with U.S. customers on request of the Commission. Moreover, exempted foreign broker-dealers could be subjected to Commission proceedings under sections 15(b)(4) and 15(b)(6),[41] and could be required to bar from U.S. activities any person who was subject to a statutory disqualification or other finding specified in Rule 15a-6(a)(3)(ii)(B).[42] These requirements may be of use even where foreign regulation is recognized because the FSA for a foreign broker-dealer may not be in a position to fully regulate the cross border activities of the broker-dealer as they relate to the United States. For cross border activities to be adequately regulated, the authorities in each jurisdiction affected should have the capability to enforce compliance with applicable securities laws.

In addition, although an exemptive approach would rely on foreign regulation as a substitute for some U.S. regulatory requirements, the general antifraud provisions of the federal securities laws would continue to apply to the foreign broker-dealers' U.S. activities.[43] Moreover, to the extent that the general exemptive order for a foreign jurisdiction was conditioned on broker-dealer compliance with supplemental U.S. requirements, foreign broker-dealers would be required to comply with those U.S. requirements, and the Commission would be able to monitor and enforce such compliance. The Commission seeks comment on the need for direct regulatory provisions in light of comparable foreign regulation, and the extent to which they would derogate from the underlying cooperative approach to regulation. The Commission also requests comment on the utility of the direct provisions discussed as part of its conceptual approach.

IV. Request for Comment

The Commission preliminarily believes that the conceptual approach discussed above could be the basis for reliance in certain limited circumstances on foreign regulation of foreign securities intermediaries in place of comprehensive, direct U.S. broker-dealer regulation. Comment is solicited on the extent to which the conceptual approach achieves the objective of facilitating international securities transactions without reducing protections for U.S. investors and markets. In particular, the Commission solicits comment on whether the conceptual approach provides a workable means to realize the benefits made possible by increased comparability and cooperation in international securities regulation.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

By the Commission.

Jonathan G. Katz,

Secretary.

Date: July 11, 1989.

[FR Doc. 89-16726 Filed 7-17-89; 8:45 am]

BILLING CODE 8010-01-M

[39] In determining the country in which a broker-dealer is located (the broker-dealer's "home country"), the Commission would consider such relevant factors as whether the broker-dealer is organized in that country, whether the broker-dealer's main office is located in the country, and the percentage of the broker-dealer's business conducted in the country. The Commission solicits comment on the appropriateness of these factors, and whether other factors also should be included.

In addition, the Commission solicits comment on the extent to which the conceptual approach should be applicable to the activities of a branch office located in a country other than an exempted broker-dealer's home country. Relevant considerations would appear to be whether the home country's regulatory authorities asserted responsibility for the branch's activities and actively examined the branch for compliance with home country regulatory requirements. If a branch were regulated in part by regulatory authorities in the country where the branch was located, the Commission could require that this country, as well as the home country, satisfy the conditions of the conceptual approach.

[40] As noted above with respect to MOUs, the existence of limitations on a broker-dealer's ability to provide requested information to the Commission could preclude a jurisdiction's broker-dealers from qualifying for an exemption under the conceptual approach.

[41] 15 U.S.C. 78o(b) (4) and (6). Section 15(b)(4) empowers the Commission to discipline a broker-dealer for conduct that reflects unfavorably on its fitness as a broker-dealer. Section 15(b)(6) empowers the Commission to discipline associated persons of broker-dealers for similar types of conduct.

[42] 17 CFR 240.15a-6(a)(3)(ii)(B).

[43] In addition, exempted broker-dealers would need to ensure that offers and sales of securities complied with the registration provisions of the Securities Act of 1933, 15 U.S.C. 77a-77aa, where applicable. *See* Securities Act Release No. 6779 (June 10, 1988), 53 FR 22661; Securities Act Release No. 4708 (July 9, 1964), 29 FR 98281. Moreover, the Commission's views on federal registration requirements for foreign broker-dealers would not alter the broker-dealer registration requirements of the various state securities statutes, which may require registration of foreign broker-dealers acting within the jurisdiction of the states.

DEPARTMENT OF HEALTH OF HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 610 and 640

[Docket No. 88N-0433]

Blood and Blood Products: Proposed Amendment to Allow for Alternative Procedures; Removal of a Labeling Requirement

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the biologics regulations governing the collection and manufacture of blood, blood components, and blood products by allowing these products to be licensed, collected, processed, tested, stored, and distributed in ways alternative to those specified in the biologics regulations, upon approval of the Director, Center for Biologics Evaluation and Research. FDA is also proposing to remove a labeling requirement applicable to injectable products prepared from human blood, plasma, or serum. The agency is taking these actions to provide flexibility needed to accommodate rapid changes in biotechnology and to assure the continued availability of blood and blood products.

DATES: Comments by September 18, 1989. FDA proposes that the effective

date of any final rule resulting from this proposal be 30 days after date of publication in the **Federal Register**. Removal of the labeling requirement would be effective 1 year after date of publication of any final rule in the **Federal Register**.

ADDRESS: Written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Joseph Wilczek, Center for Biologics Evaluation and Research (HFB–130), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892, 301–295–2188.

SUPPLEMENTARY INFORMATION:

I. Proposal for Alternative Procedures

The current biologics regulations prescribe test methods and manufacturing processes for licensed biological products related to the products' safety, purity, potency, and effectiveness. Various provisions applicable to blood, blood components, or blood products appear throughout Subchapter F of Chapter I of Title 21 of the Code of Federal Regulations. For example, the additional standards in 21 CFR Part 640 apply specifically to blood, blood components, and blood derivative products. The provisions of Part 606 detail current good manufacturing practice requirements for blood and blood components. Part 610 also contains requirements applicable to blood and blood products.

FDA is proposing to add § 640.120 *Alternative procedures* essentially to provide that blood, blood components, and blood products may be licensed, collected, processed, tested, stored, and distributed in ways alternative to those specified in these biologics regulations, only upon approval of the Director, Center for Biologics Evaluation and Research (CBER).

FDA recognizes that as technology and scientific knowledge advance, and the demands placed on the blood industry change, there will continue to be instances when a regulation will become outdated or where unanticipated circumstances may warrant a departure from an approach detailed in the regulations. FDA believes that to be responsive to improved technologies, increased scientific knowledge, and concerns about the continued availability of blood and blood products, the Director, CBER, should have the clear authority to approve alternatives to particular regulatory requirements when adequate information is available to support the alternative approaches.

FDA regulations already provide for the use of alternative procedures or criteria in some circumstances. For example, under § 640.75, FDA may approve procedures applicable to the collection, processing, and licensure of Source Plasma other than those specified in the regulations. Section 606.110 provides for variances from additional standards for plateletpheresis and leukapheresis procedures used to obtain a product for a specific recipient under specified circumstances. However, §§ 606.110 and 640.75 do not apply to the requirements for other blood products, such as most blood and blood components intended for transfusion or other blood fractionation products such as Albumin (Human). Also, under § 610.9, FDA may approve modifications to a required test method or manufacturing process for any biological product upon a showing that the modification provides assurances of the safety, purity, potency, and effectiveness of the product equal to or greater than the assurances provided by the rquired method or process. Section 610.9 is limited to mofidications in test methods and manufacturing processes and therefore does not necessarily apply to all requirements.

Under proposed § 640.120, the Director, CBER, may approve an exception or alternative to the requirements in the biologics regulations applicable to blood, blood components, or blood products. The Director would approve such exception or alternative only if, in the judgment of the Director, the safety, purity, potency, and effectiveness of the final product is assured. The Director may request additional data or information from the person who has requested permission for an excption or alternative before granting the request. Under proposed § 640.120, requests for exceptions or alternatives should ordinarily be submitted in writing; however, oral requests and approval would be permitted if necessary because of time constraints. The requestor would be required to submit written confirmation of the oral request immediately afterwards. Oral approval would also be confirmed in writing after receipt of the written request. Whether the approval is given in writing or verbally, the approval must be obtained prior to distribution of any affected blood, blood component, or blood product. Because proposed § 640.120 could be used in all circumstances for which variances under § 640.75 may be granted, FDA is also proposing to remove § 640.75.

II. Proposed Labeling Removal

Part 610 of Title 21 of the Code of Federal Regulations (21 CFR Part 610) provides general standards for the processing, testing, and labeling of biological products. Section 610.61 prescribes requirements for the labeling of biological products. Under § 610.61(s), FDA requires that the package label for injectable products prepared from human blood, plasma, or serum contain a statement that the product was prepared from blood, plasma, or serum that was found nonreactive when tested for hepatitis B surface antigen (HBsAg). Injectable products prepared from blood or blood components include fractionation products such as Albumin (Human), Plasma Protein Fraction (Human), Antihemophilic Factor (Human), and various immunoglobulin products. Section 610.61(s) does not apply to blood or blood components intended for transfusion or source plasma. The purpose of product labeling is to provide the user of the product with information necessary for its safe and effective use. FDA believes that the labeling statement required by § 610.61(s) does not provide information necessary for the product's proper use and is proposing to remove this requirement from the regulations.

Under § 610.40(a), each donation of blood, plasma, or serum to be used in preparing a biological product must be tested for the presence of HBsAg. Blood, plasma, or serum that is reactive when tested for HBsAg, or collected from a donor known to be reactive for HBsAg, ordinarily may not be used in manufacturing a biological product, except under limited circumstances provided in § 610.40(d). Accordingly, the statement required by § 610.61(s) only reaffirms that the final product adheres to Federal requirements, and the statement does not provide additional information for assuring the proper use of the product.

Moreover, comparable statements for the labeling of fractionation products are not required for other tests required by Federal regulation, such as the test for antibody to human immunodeficiency virus (HIV) or a serologic test for syphilis. As with the test for HBsAg, these are Federally required tests, and labeling statements providing confirmation that the tests have been properly performed are unnecessary.

The issues concerning the label statement required by § 610.61(s) were presented to FDA's Blood Product Advisory Committee at a public meeting on June 3 and 4, 1982. The Advisory

Committee recommended at the meeting that § 610.61(s) be removed.

Several additional tests may come into routine use for testing blood and plasma in the next several years. FDA believes that to require that the results of each of these tests be described in product labeling would unduly complicate the labeling, without providing useful information to the users of the product. Therefore, FDA believes the requirement for the labeling statement concerning hepatitis B testing should be removed because the requirement is not useful and is unnecessarily burdensome to industry and because the requirements for labeling concerning all required tests should be consistent. Upon the effective date of any final rule resulting from this proposal, the labeling statement concerning HBsAg testing would no longer be required. FDA would require that the labeling statement be removed within 1 year after date of publication of any final rule in the **Federal Register.**

III. Economic Impact

The agency has examined the economic impact of this proposed rule and has determined that it does not require either a regulatory impact analysis, as specified in Executive Order 12291, or a regulatory flexibility analysis, as defined in the Regulatory Flexibility Act (Pub. L. 96–354). Specifically, this proposal would remove an unnecessary labeling requirement. The proposed rule also provides manufacturers of blood, blood components, and blood products an opportunity to collect, process, test, and distribute their products in ways alternative to those specified in the biologics regulations, upon approval of the Director, CBER. The immediate effect of the proposal allowing exceptions or alternative procedures is neutral; i.e., it neither adds or removes requirements from the standard for blood products. A manufacturer, however, may benefit from the flexibility permitted under the proposed rule by gaining FDA approval of an exception or an alternative approach that could better conserve blood resources, improve the product through the use of new technologies, or require the use of less time or resources than may be required by a method or process described in detail in the biologics regulations. Therefore, the agency concludes that the proposed rule is not a major rule as defined in Executive Order 12291. Further, the agency certifies that the proposed rule, if implemented, will not have a significant economic impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act.

IV. Environmental Impact

The agency has determined under 21 CFR 25.24(c)(10) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

V. Comments

Interested persons may, on or before September 18, 1989, submit to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects

21 CFR Part 610

Biologics, Blood, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 640

Blood, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Public Health Service Act (sec. 351, 58 Stat. 702 as amended (42 U.S.C. 262)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10), it is proposed that Parts 610 and 640 be amended as follows:

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

1. The authority citation for 21 CFR Part 610 continues to read as follows:

Authority: Secs. 201, 501, 502, 505, 510, 701, 52 Stat. 1040–1042 as amended, 1049–1051 as amended by 76 Stat. 780, 1052–1053 as amended, 1055–1056 as amended, 76 Stat. 794 as amended, and sec. 301 of Pub. L. 87–781 (21 U.S.C. 321, 351, 352, 355, 360 and note, 371), the Public Health Service Act (secs. 351 and 361, 58 Stat. 702 and 703 as amended (42 U.S.C. 262 and 264)), and the Administrative Procedure Act (secs. 4, 10, 60 Stat. 238 and 243, as amended (5 U.S.C. 553, 702, 703, 704)); 21 CFR 5.10 and 5.11.

§ 610.61 [Amended]

2. Section 610.61 *Package label* is amended by removing paragraph (s) and by redesignating paragraph (t) as paragraph (s).

PART 640—ADDITIONAL STANDARDS FOR HUMAN BLOOD AND BLOOD PRODUCTS

3. The authority citation for 21 CFR Part 640 continues to read as follows:

Authority: Secs. 201, 501, 502, 505, 510, 701, 52 Stat. 1040–1042 as amended, 1049–1053 as amended, 1055–1056 as amended by 70 Stat. 919 and 72 Stat. 948, 76 Stat. 794–795 as amended (21 U.S.C. 321, 351, 352, 355, 360, 371) and the Public Health Service Act (sec. 351, 361, 58 Stat. 702 as amended (42 U.S.C. 262, 264)) and the Administrative Procedure Act (secs. 4, 10, 60 Stat. 238 and 243 as amended (5 U.S.C. 553, 702, 703, 704)); 21 CFR 5.10 and 5.11.

§ 640.75 [Removed]

4. Section 640.75 *Alternate procedures* is removed from Subpart G.

5. New Subpart L consisting of § 640.120 is added to Part 640 to read as follows:

Subpart L—Alternative Procedures

§ 640.120 Alternative procedures.

The Director, Center for Biologics Envaluation and Research, may approve an exception or alternative to any requirement in Subchapter F of Chapter I of Title 21 of the Code of Federal Regulations regarding blood, blood components, or blood products. Requests for such exceptions or alternatives should ordinarily be made in writing. However, in limited circumstances such requests may be made orally and permission may be given orally by the Director. Oral requests and approvals must be followed by written requests and written approvals. Approval of a request for an exception or alternative must be obtained prior to the distribution of any affected blood, blood component, or blood product.

Dated: June 11, 1989.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 89–16755 Filed 7–17–89; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 625

[FHWA Docket No. 89–16]

RIN 2125–AC34

Design Standards for Highways; Interstate System

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is requesting comments on a proposed amendment to the design standards which apply to Interstate highway construction and reconstrucation projects eligible to receive funding under the Federal-aid highway program. A revised publication of the American Association of State Highway and Tranportation Officials (AASHTO) entitled "A Policy on Design Standards—Interstate System" would be substituted for the previous version of these standards last revised June 20, 1967. If adopted by FHWA, the new AASHTO publication would constitute the FHWA's policy on geometric design for all federally-assisted construction and reconstruction projects on the Interstate highway system.

DATE: Comments must be received on or before September 18, 1989.

ADDRESS: Submit written, signed comments to FHWA Docket No. 89–16 Federal Highway Administration, Room 4232, HCC–10, 400 Seventh Street SW., Washington, DC 20590. All comments received will be available for examination at the above address between 8:30 a.m. and 3:30 p.m., e.t. Monday through Friday. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard. The current and proposed design standards are on file at the Office of the Federal Register in Washington, DC, and are available for inspection and copying from the FHWA Washington Headquarters and all FHWA Division and Regional Offices as prescribed in 49 CFR Part 7, Appendix D. Copies of the current AASHTO publications are also available for purchase from the American Association of State Highway and Transportation Officials, Suite 225, 444 North Capitol Street NW., Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Mr. Seppo I. Sillan, Geometric and Roadside Design Branch, Federal-Aid and Design Division, Office of Engineering (202) 366–1327, or Mr. Michael J. Laska, Office of the Chief Counsel (202) 366–1383, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: The standards, policies, and guides that have been approved by the FHWA for application on all Federal-aid highway projects are incorporated by reference in 23 CFR Part 625.

The American Association of State Highway and Transportation Officials (AASHTO) is an organization which represents the 52 State Highway and Transportation agencies (including the District of Columbia and Puerto Rico). Its members consist of the duly constituted heads and other chief officials of those 52 agencies. The Secretary of the United States Department of Transportation (DOT) is an ex officio member, and DOT officials participate in various AASHTO activities as non-voting representatives. Prior to 1974 the AASHTO was known as the American Association of State Highway Officials (AASHO). Among other functions, the AASHTO develops and issues standards, specifications, policies, guides, and related materials for use by the States for highway projects. Due to AASHTO's recognized expertise and representation of all State highway and transportation agencies, the FHWA has worked with the AASHTO over the years in the development of design standards pursuant to the provisions of Federal law (Title 23, U.S.C.) which directs the FHWA to consult and cooperate with the States in that regard. Many of the standards, polices, and guides approved by the FHWA and incorporated in 23 CFR Part 625 were developed and issued by the AASHTO. Revisions made to such documents by the AASHTO are independently reviewed and adopted by the FHWA before they are applied to Federal-aid projects.

Recently the AASHTO submited a copy of the document entitled "A Policy on Design Standards—Interstate System" to the Federal Highway Administration. The document is referred to in this notice as the "Standards."

The primary reasons for development of the new document are to provide guidance on design of highways on the Interstate System and to update the previous standards to incorporate the latest design criteria. A more detailed discussion of the changes in the proposed Standards is included later in this notice.

Review Procedure

The FHWA intends to conduct its review of the proposed Standards in the following manner:

1. The FHWA through this notice is proposing to approve the Standards for use on Federal-aid Interstate projects. Comments on the design criteria contained in the document are requested.

2. FHWA will analyze all comments. Based on that analysis and its own independent review, the FHWA will furnish AASHTO with those modifications that may be required to make the Standards acceptable for use on Federal-aid Interstate projects.

3. If AASHTO makes the necessary modifications or if no modifications are required, the FHWA will adopt the Standards for use on Federal-aid projects on the Interstate System and incorporate it by reference into 23 CFR Part 625.

4. If there are any unresolved differences, the FHWA will issue a final rule conditionally adopting the document for Federal-aid Interstate projects by incorporating it in 23 CFR Part 625 and officially indicating the extent of material not acceptable to FHWA and, if necessary, alternative criteria would be listed for Federal-aid Interstate projects.

Summary of Changes

The main differences between AASHTO's 1967 (old) and 1988 (new) version of "A Policy on Design Standards—Interstate System" are as follows:

1. The new Standards permit the retention of existing horizontal alignment, vertical alignment and cross-sectional elements for resurfacing, restoration and rehabilitation projects if they meet the AASHTO Interstate standards that were in effect at the time of the original construction.

2. Only if extraordinary circumstances exist, do the new Standards permit a design less than 20 years beyond the time when the plans, specifications and estimate for construction are approved.

3. The exception which permitted at-grade intersections under certain low-volume conditions has been eliminated.

4. The new Standards indicate that the desirable stopping sight distance is the upper range of values established in the current edition of AASHTO's "A Policy on Geometric Design of Highways and Streets."

5. The new Standards provide requirements for paved shoulders on the left of the traveled way. For all shoulder widths the dimensions are for the paved width versus the usable width in the old Standards.

6. Requirements for pavement cross slopes have been included in the new Standards.

7. The section on sideslopes has been

revised to indicate a maximum slope of 4:1 and a desirable slope of 6:1 or flatter.

8. Minimum width of median in urban and mountainous areas is now 10 feet rather than 4 feet.

9. Requirements for a recovery area clear of unyielding objects or provision of barriers have been included in the new Standards.

10. The new Standards do not allow the use of barrier curbs except in special cases and, then, they must be located beyond the outer edge of the shoulder.

11. Guidelines for general design and spacing of interchanges have been added in the new Standards.

12. Long bridges have been defined as bridges over 200 feet long. Offset to the parapet, the rail or the barrier for these structures has been increased from 3½ to 4 feet in order to be consistent with minimum median shoulder width.

13. Requirements for structural capacity have been included in the new Standards.

14. The new Standards give criteria for minimum cross-section width for bridges to remain in place.

15. Requirements for cross-section width, vertical clearance and safety walk for tunnels have been included in the new Standards.

16. The specific minimum right-of-way widths of the old Standards have been eliminated.

Regulatory Evaluation and Impact

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 or a significant regulation under the regulatory policies and procedures of the Department of Transportation. The FHWA has also determined that the expected impact of this proposed amendment will be minimal. This determination is based on the fact that, although the new Standards contain new material, the basic criteria remain essentially the same. In all practicality the new Standards reflect the criteria which have been used in designing Interstate highways for the last several years. Accordingly, a full regulatory evaluation has not been prepared at this time.

Based on the discussion above and under the criteria of the Regulatory Flexibility Act (Pub. L. 96–354), the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

Federalism Assessment

The FHWA has carefully considered the federalism implications of this action in the light of the principles, criteria, and requirements of the President's Executive Order on Federalism, E.O. 12612, October 26, 1987. The FHWA has determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

List of Subjects in 23 CFR Part 625

Design standards, Grant programs—transportation, Highways and roads, Incorporation by reference, Reporting requirements.

In consideration of the foregoing, the FHWA is amending Chapter 1 of Title 23, Code of Federal Regulations, Part 625 as set forth below.

Issued on: July 11, 1989.

R.D. Morgan,

Executive Director.

The FHWA proposes to amend 23 CFR Part 625 as follows:

PART 625—DESIGN STANDARDS FOR HIGHWAYS

1. The authority citation for Part 625 continues to read as follows:

Authority: 23 U.S.C. 109, 315, and 402; 49 CFR 1.48(b).

§ 625.4 [Amended]

2. In § 625.4, paragraph (a)(2) is revised to read as follows:

§ 625.4 Standards, policies, and standard specifications.

* * * * *

(1) * * *

(2) A Policy on Design Standards—Interstate System, AASHTO 1988. [3]

* * * * *

[FR Doc. 89–16717 Filed 7–17–89; 8:45 am]
BILLING CODE 4910–22–M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Parts 1602 and 1627

Proposed Modifications to Recordkeeping Provisions; Public Hearing

ACTION: Public hearing on proposed rule.

SUMMARY: A public hearing will be held by the Commission on the modifications to the EEOC recordkeeping regulations, 29 CFR Parts 1602 and 1627 as announced by the notice of proposed rulemaking in the **Federal Register** published on February 13, 1989 (54 FR 6551).

DATE: The public hearing will be held on September 18, 1989.

ADDRESS: The hearing will be held in the Commission meeting room, 1801 L Street, NW., Washington, DC 20507.

FOR FURTHER INFORMATION CONTACT: Nicholas M. Inzeo, Assistant Legal Counsel, or Gary L. Janus, at 202/663–4669, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507.

SUPPLEMENTARY INFORMATION: Notice is hereby given that a public hearing will be held on (sixty days from date of publication) commencing at 10 a.m. in the Commission meeting room at 1801 L Street, NW., Washington, DC 20507, with respect to the adoption of the proposed revisions to the EEOC recordkeeping regulations found at 29 CFR Parts 1602 and 1627. This proceeding will constitute the public hearing on the proposed modifications to the above regulations referenced by the Commission in the notice of proposed rulemaking published on February 13, 1989 (54 FR 6551).

Persons wishing to present their views orally should notify the Commission of their desire to do so in writing no later than (thirty days from date of publication) with a request to: Frances Hart, Executive Officer, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507.

The phrase "Hearing 1602/1627 Recordkeeping," should be written at the lower left-hand corner of the envelope. The request should include a written summary of the remarks to be offered.

Signed in Washington, DC.

Dated: July 3, 1989.

Clarence Thomas,

Chairman, Equal Employment Opportunity Commission.

[FR Doc. 89–16736 Filed 7–17–89; 8:45 am]
BILLING CODE 6570–06–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 920

Maryland Regulatory Program; Public Notice; Bonding

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

ACTION: Proposed rule.

SUMMARY: OSMRE is announcing the receipt of proposed amendments to the Maryland permanent regulatory program (hereinafter referred to as the Maryland program) under the Surface Mining Control and Reclamation Act (SMCRA). The amendments are intended to incorporate rule changes initiated by the State. The proposed changes would establish within the Bituminous Coal Open Pit Mining Reclamation Fund (Reclamation Fund) a bond supplement reserve; would provide for both the funding of the reserve and the disposition of said funds; would require the Secretary of Natural Resources to observe certain reporting provisions regarding the funding, obligation, and disbursement of reserve funds; would revise the performance bond filing requirements by combining the current separate bond requirements for revegetation and permit conformance and establish a single performance bond; would revise the minimum amount required for performance bonds; would provide the Maryland Department of Natural Resources (MDDNR) with discretionary authority to adjust bond amounts; would revise certain bond conditions regarding bank notification requirements; would revise certain criteria for performance bond release; and would authorize the MDDNR in the event of bond forfeiture to recover from the permittee all costs of reclamation in excess of the amount forefeited.

This notice sets forth the times and locations that the Maryland program and proposed amendments to that program are available for public inspection, the comment period during which interersted persons may submit written comments on the proposed amendments, and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received on or before 4:00 p.m. on August 17, 1989. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. on August 14, 1989, request to present oral testimony at the hearing must be received on or before 4:00 p.m. on August 2, 1989.

ADDRESSES: Written comments should be mailed or hand delivered to: Mr. James C. Blankenship, Jr., Director, Charleston Field Office, at the address listed below. Copies of the proposed amendments and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requestor may receive, free of charge, one copy of the proposed amendments by contacting OSMRE's Charleston Field Office.

Office of Surface Mining Reclamation and Enforcement, Charleston Field Office, 603 Morris Street, Charleston, West Virginia 25301, Telephone: (304) 347–7158.

Office of Surface Mining Reclamation and Enforcement, 1100 "L" Street NW., Room 5131, Washington, DC 20240, Telephone: (202) 343–5492.

Maryland Bureau of Mines, 69 Hill Street, Frostburg, Maryland 21532, Telephone: (301) 689–4136.

FOR FURTHER INFORMATION CONTACT: James C. Blankenship, Jr., Director, Charleston Field Office (304) 347–7158.

SUPPLEMENTARY INFORMATION: .

I. Background

On February 18, 1982, the Secretary of Interior approved the Maryland program. Information regarding general background on the Maryland program, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Maryland program can be found in the February 18, 1982, **Federal Register** (47 FR 7214–7217). Subsequent actions concerning the Maryland program are contained in 30 CFR 920.16.

II. Discussion of Proposed Amendment

By letter dated June 14, 1989, Maryland Bureau of Mines (MDBOM) submitted, as proposed amendments to Maryland's federally approved program, bond supplement reserve legislation (House Bill 1384) and proposed changes to the Code of Maryland Administrative Regulations (COMAR) 08.13.09.15–Performance Bonds.

1. House Bill 1384 Bond Supplement Reserve.

Natural Resources Article (NRA) Section 7–507.1 is amended to authorize the MDBOM to assess a 15 cent mine reclamation surcharge for each ton of coal removed by the open-pit or strip method. Additionally, the MDBOM is authorized to assess a 3 cent bond supplement reserve surcharge to be deposited in the Reclamation Fund for each ton of coal removed.

Section 7–514 is modified to allow funds from the bond supplement reserve to be used for reclamation purposes when the original bond is not sufficient.

Section 7–514.1 is modified to authorize one cent of the mine reclamation surcharge to be paid into the water supply replacement reserve.

Section 7–514.2 authorizes the MDDNR to establish a bond supplement reserve within the Bituminous Coal Open Pit Mining Reclamation Fund with the funding provisions previously discussed in section 7–501.1. The MDDNR will be subject to certain notification requirements; each county must be notified when remitting or suspending remittances and arrangements must be made to meet and confer with the Land Reclamation Committee at least 30 days before procuring services for which funds from the bond supplement reserve will be used.

2. COMAR 08.13.09.15 Performance Bonds.

Paragraph (A) is modified to allow an operator to file a single performance bond instead of the current requirement of two separate bonds, a general bond and a revegetation bond. The bond shall cover the entire approved area or an identified increment of land within the approved area.

Paragraph (C) is revised to require the minimum amount of a performance bond to be $600 per acre and an additional $1,500 per acre for the open-acre limit. Additionally, the minimum amount of the bond initially posted shall not be less than $10,000 for the entire area.

Paragraph (D) is revised to give the MDDNR discretionary authority to adjust the amount of performance bond liability. Additionally, the MDDNR must notify the permittee, the surety and any party with a property interest in collateral who has requested notification of any proposed bond adjustment.

Paragraph (F) is modified to require banks holding permittee's certificates of deposit to notify the MDDNR and the permittee of any pending action involving the insolvency, bankruptcy or cessation of operation of the bank. Any permittee who is without bond coverage because of the failure of a bank shall be given a reasonable period, not to exceed 90 days, to replace bond coverage.

Paragraph (H) has been revised to require an inspection by the Land Reclamation Committee of the

revegetated area prior to bond release for Reclamation Phase II work.

Paragraph (I) has been modified to require that bond release applications include proof of advertisement by the permittee of his filing of the release application. The MDDNR is granted discretionary authority to waive its inspection of the completed reclamation work if it has not received any objections or requests for an informal conference; and it has conducted an inspection of the area within a four month period prior to receiving the bond release application and the inspection did not identify any reason for denying bond release.

Paragraph (K) has been modified to allow the MDDNR to recover from the permittee all costs of reclamation in excess of the amount forfeited should the forfeited bond be insufficient to pay the full cost of reclamation.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(b), OSMRE is now seeking comments on whether the amendments proposed by Maryland satisfy the applicable program approval criteria of 30 CFR 732.15.

If the amendments are deemed adequate, they will become part of the Maryland program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking and include explanations in support of the commentor's recommendations. Comments received after the time indicated under **"DATES"** or at locations other than the OSMRE Charleston Field Office will not necessarily be considered and included in the Administrative Record for the final rulemaking.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under **"FOR FURTHER INFORMATION CONTACT"** by 4:00 p.m. on August 2, 1989. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSMRE officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment, and who wish to do so, will be heard following those scheduled. The hearing will end after all persons scheduled to comment have been heard.

Public Meeting

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

List of Subjects in 30 CFR Part 920

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

Date: July 10, 1989.

Carl C. Close,

Assistant Director, Eastern Field Operations.

[FR Doc. 89-16774 Filed 7-17-89; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900-AE09

Evaluation of Studies Relating to Health Effects of Dioxin and Radiation Exposure

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its regulation on scientific and medical study evaluations to establish criteria for determining when a significant statistical association exists between exposure to dioxin or ionizing radiation and specific diseases. This change is neceasary because of a recent court decision. This change will require reassessment of the importance of scientific and medical studies on the health effects of exposure to dioxin or ionizing radiation.

DATES: Comments must be received on or before August 17, 1989. Comments will be available for public inspection until August 28, 1989. This change is proposed to be effective the date of publication of the final rule.

ADDRESSES: Interested persons are invited to submit written comments, suggestions, or objections regarding this change to Secretary of Veterans Affairs (271A), Department of Veterans Affairs, 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, at the above address between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays), until August 28, 1989.

FOR FURTHER INFORMATION CONTACT: Robert M. White, Chief, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, (202) 233-3005.

SUPPLEMENTARY INFORMATION: On May 2, 1989, the U.S. District Court for the Northern District of California issued an order in the case of Nehmer, et al., v. United States Veterans' Administration, et al., interpreting the rulemaking requirements of the Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542. The court found Congress intended that VA predicate service connection upon a finding of significant statistical association between exposure and disease. The court also found that VA was required to apply its benefit-of-the-doubt policy to the aggregate rulemaking determination as to which diseases were associated with dioxin exposure.

To implement this court decision we propose to amend 38 CFR 1.17 concerning study evaluation criteria. Paragraphs (a) and (b) of that section have always applied to the evaluation of individual scientific or medical studies and are being retained in their entirety with the exception of technical amendments to paragraph (a) changing "Administrator" to "Secretary" in accordance with VA's elevation to Cabinet status and including clarifying language to more closely track the statutory charge to evaluate studies involving exposure to herbicides containing dioxin rather than exposure to dioxin alone. New paragraphs are being added to establish that service connection will be predicated upon determinations of significant statistical association between dioxin or radiation exposure and various diseases as shown by scientific and medical studies.

Paragraph (c) provides that the guidelines for establishing service connection based on dioxin or radiation exposure (38 CFR 3.311a and 3.311b) will be amended whenever the Secretary determines that a significant statistical association exists between such exposure and any disease. These

determinations will be based on the evaluation of scientific and medical studies and on the advice of the Veterans Advisory Committee on Environmental Hazards.

Paragraph (d)(1) sets forth the general proposition that a significant statistical association shall be deemed to exist when the relative weights of valid positive and negative studies permit the Secretary to conclude that it is at least as likely as not that the purported relationship between exposure and disease exists. This conclusion will be based on a balancing test considering the relative strengths and weaknesses of valid studies whose findings relate to the existence of the relationship under consideration. This balancing test incorporates VA's "reasonable doubt" doctrine with respect to this evaluation process. The criteria for determining whether a study is valid and whether it is positive or negative with respect to the issue under consideration are set forth in paragraphs (d)(2) through (d)(4).

There are three criteria which must be satisfied in order for a study to be considered valid for purposes of determining whether a significant statistical association exists. First, the study design and the methods of data collection, verification and analysis must be adequately described. Such descriptions are necessary for reviewers to properly assess study results.

Second, the study must be reasonably free of biases which would cause serious doubt to be cast on the study's findings and conclusions. While all biases which can affect a study's results are not listed, selection, observation and participation of subjects are included as examples of some of the biases investigators must clearly avoid.

The third criterion for a valid study is a satisfactory accounting for known confounding factors which, if not identified and corrected for, could skew the study results. For example, a study involving lung cancer and dioxin or radiation exposure would have to satisfactorily account for the effects of cigarette smoking or asbestos exposure in the study populations and correct for those factors.

In addition to satisfying the criteria for a valid study, findings of a valid *positive* study must also be statistically significant at a probability level of .05 or less and must properly account for multiple comparison and subgroup analyses. Statistical significance at a probability level of .05 or less means that it must be statistically demonstrated that the likelihood is only one in twenty, or less, that the results of the study are due to chance alone. This is to be accomplished using a standard epidemiological tool for determining with a high degree of confidence that the observed association is real and not a chance occurence. Additionaly, it is recognized that multiple comparisons within a study population or division of a study population into numerous subgroups can, upon analysis of the data, produce results which may be meaningful or may be due to chance. It is through proper analysis of the multiple comparisons and subgroup divisions by the investigators that the possibility of attributing undue importance to chance findings may be avoided.

In order to be considered a valid *negative* study, the criteria for a valid study would have to be satisfied, and, in addition, the study would have to have sufficient statistical power to detect the association of interest if it existed. This means that the study would have to include a sufficient number of subjects in both the exposed group and the comparison group to provide an opportunity for the purported association to appear if, in fact, it were there to be detected.

While satisfaction of the criteria in paragraph (d) will require a determination of "significant statistical association", paragraph (e) is being added to give the Secretary latitude to find that such an association exists on the basis of other scientific or medical evidence which may not satisfy the requirements of paragraph (d) in all respects. The Secretary must have the freedom to act positively on behalf of the veteran population in those instances where the results of one or more studies are so compelling that it is unnecessary to insist on complete satisfaction of the criteria in paragraph (d) before making a finding of significant statistical association.

This change establishes specific criteria which would require further amendment of adjudication regulations, however nothing in this regulatory proposal should be construed as in any way limiting or diminishing the Secretary's rulemaking authority under 38 U.S.C. 210(c).

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

In accordance with Executive Order 12291, Federal Regulation, the Secretary has determined that this regulatory amendment is non-major for the following reasons.

(1) It will not have an annual effect on the economy of $100 million or more.

(2) It will not cause a major increase in costs or prices.

(3) It will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance program numbers are 64.104, 64.105, 64.109, and 64.110.

List of Subjects in 38 CFR Part 1

Administrative practice and procedure, claims.

Approved: July 12, 1989.

Edward J. Derwinski,

Secretary.

38 CFR Part 1, GENERAL PROVISIONS, is proposed to be amended by revising § 1.17 to read as follows:

PART 1—GENERAL PROVISIONS

§ 1.17 Evaluation of studies relating to health effects of dioxin and radiation exposure.

(a) From time to time, the Secretary shall publish evaluations of scientific or medical studies relating to the adverse health effects of exposure to a herbicide containing 2,3,7,8 tetrachlorodibenzo-p-dioxin (dioxin) or ionizing radiation in the "Notices" section of the **Federal Register**.

(b) Factors to be considered in evaluating scientific studies include:

(1) Whether the study's findings are statistically significant and replicable;

(2) Whether the study and its findings have withstood peer review;

(3) Whether the study methodology has been sufficiently described to permit replication of the study;

(4) Whether the study's findings are applicable to the veteran population of interest;

(5) The views of the appropriate panel of the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards.

(c) When the Secretary determines, based on the evaluation of scientific or medical studies and after receiving the advice of the Veterans' Advisory Committee on Environmental Hazards,

that a significant statistical association exists between any disease and exposure to a herbicide containing dioxin or exposure to ionizing radiation, § 3.311a or § 3.311b of this title, as appropriate, shall be amended to provide guidelines for the establishment of service connection.

(d)(1) For purposes of paragraph (c) of this section a "significant statistical association" shall be deemed to exist when the relative weights of valid positive and negative studies permit the conclusion that it is at least as likely as not that the purported relationship between a particular type of exposure and a specific adverse health effect exists.

(2) For purposes of this paragraph a valid study is one which:

(i) Has adequately described the study design and methods of data collection, verification and analysis;

(ii) Is reasonably free of biases, such as selection, observation and participation biases; and

(iii) Has satisfactorily accounted for known confounding factors.

(3) For purposes of this paragraph a valid positive study is one which satisfies the criteria in paragraph (d)(2) of this section and whose findings are statistically significant at a probability level of .05 or less with proper accounting for multiple comparisons and subgroup analyses.

(4) For purposes of this paragraph a valid negative study is one which satisfies the criteria in paragraph (d)(2) of this section and has sufficient statistical power to detect an association between a particular type of exposure and a specific adverse health effect if such an association were to exist.

(e) Notwithstanding the provisions of paragraph (d) of this section, a "significant statistical association" may be deemed to exist between a particular exposure and a specific disease if, in the Secretary's judgment, scientific and medical evidence on the whole supports such a decision.

(Authority: 38 U.S.C. 210(c); Pub. L. 98-542)

[FR Doc. 89-16925 Filed 7-14-89; 1:25 pm]

BILLING CODE

DEPARTMENT OF DEFENSE

48 CFR Part 219

Department of Defense Federal Acquisition Regulation Supplement; DFARS Small Business and Small Disadvantaged Business Concerns

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule and request for comment.

SUMMARY: The Defense Acquisition Regulatory (DAR) Council is proposing a revision to the Defense Federal Acquisition Regulation Supplement Subpart 219.8 to conform to proposed FAR revisions published at 54 FR 27310, June 28, 1989.

DATE: Comments concerning the proposed rule must be received by August 17, 1989 to be considered in formulating a final rule. Please cite DAR Case 88-325 in all correspondence related to this issue.

ADDRESS: Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Charles W. Lloyd, Executive Secretary, DAR Council, ODASD (P)/DARS, c/o OASD(P&L) (M&RS), Room 3D139, The Pentagon, Washington, DC 20301-3062.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, telephone (202) 697-7266.

SUPPLEMENTARY INFORMATION:

A. Background

Section 303(b) of the "Business Opportunity Development Reform Act of 1988" requires that acquisitions offered for award pursuant to Section 8(a) of the Small Business Act be awarded on the basis of competition restricted to eligible program participants if (a) there is a reasonable expectation that at least two eligible program participants will submit offers and that award can be made at a fair market price, and (b) the anticipated award price of the contract (including options) will exceed $5,000,000 in the case of a contract opportunity assigned a standard industrial classification code for manufacturing and $3,000,000 (including options) in the case of all other contract opportunities. Section 303(d) amends the current appeal authority of the Small Business Administration to permit appeals as to whether a requirement should be offered to the Section 8(a) program and as to whether the estimated fair market price as determined by the contracting agency is correct.

B. Regulatory Flexibility Act

The requirements of the Act are being addressed by the Small Business Administration in development of its regulations implementing the "Business Opportunity Development Reform Act of 1988," Pub. L. 100-656. (FR 12054, March 23, 1989).

C. Paperwork Reduction Act

The requirements of the Paperwork Reduction Act are being addressed by the Small Business Administration in development of its regulations implementing the "Business Opportunity Development Reform Act of 1988", Public Law 100-656. (FR 12054, March 23, 1989)

List of Subjects in 48 CFR Part 219

Government procurement

Charles Lloyd

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, it is proposed that 48 CFR Part 219 be amended as follows:

1. The authority citation for 48 CFR Part 219 continues to read as follows:

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

PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

219.803 [Amended]

2. Section 219.803 is amended by redesignating paragraph (a) as paragraph (c); by changing the reference in the redesignated paragraph (c) to read "19.803(c)" in lieu of "19.803(a); by redesignating (c) (S-71) as paragraph (b); and by removing (c)(S-70) (i) and (ii);

3. Section 219.804-4 is added to read as follows:

219.804-4 Repetitive acquisition.

(a) When the SBA requests that a requirement be reserved for award of a contract (follow-on our otherwise) under the 8(a) Program, the request shall be honored, if otherwise appropriate, and the total SDB set-aside procedure shall not be used.

(b) An SBA request that a new requirement be reserved for the 8(a) Program need not be honored and a contracting officer may proceed with a total SDB set-aside if the SBA request is received after publication of a synopsis pursuant to 205.207(d)(S-72) or (S-73).

[FR Doc. 89-16779 Filed 7-17-89; 8:45 am]

BILLING CODE 3810-01-M

---

48 CFR Part 246

Department of Defense Federal Acquisition Regulation Supplement; DFARS Warranties

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule (extension of comment period).

SUMMARY: The Defense Acquisition Regulatory (DAR) Council published a proposed rule with request for public

comment on June 30, 1989, 54 FR 27655, to revise the Department of Defense Federal Acquisition Regulation Supplement (DFARS) at Part 246. The proposed rule would specifiy that a contractor's warranty shall specifically state whether or not redesign is an available remedy under the warranty. The original date for submission of comments, July 31, 1989, has been extended to August 31, 1989, to accommodate the requests of interested parties.

DATE: Written comments on the interim rule should be submitted to the address shown below not later than August 31, 1989, to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: Defense Acquistion Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, ODASD(P)/DARS, c/o OASD(P&L) (M&RS), Room 3D139, The Pentagon, Washington, DC 20301–3062. Please cite DAR Case 89–62 in all correspondence related to this subject.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, telephone (202) 697–7266.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

[FR Doc. 89–16778 Filed 7–17–89; 8:45 am]

BILLING CODE 3810–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 672 and 675

Groundfish of the Gulf of Alaska, Groundfish of the Bering Sea and Aleutian Islands Area

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

ACTION: Notice of intent.

SUMMARY: A notice of intent to prepare a supplemental environmental impact statement and notice of scoping meetings was published on February 23, 1989 (54 FR 7814). The notice concerned the potential effects of controlling access to sablefish, other groundfish, halibut, and crab fishery resources and included a proposed schedule for analyzing and implementing alternative management systems in those fisheries. The North Pacific Fishery Management Council is issuing this notice to announce that at its meetings September 25–29, 1989, and again in January and June of 1990, that schedule will be reviewed to determine if it should be revised or possibly abandoned completely.

FOR FURTHER INFORMATION CONTACT: Dick Tremaine, North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510, 907–271–2809.

Dated: July 12, 1989.

Richard H. Schaefer,

Director of Office of Fisheries, Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89–16732 Filed 7–17–89; 8:45 am]

BILLING CODE 3510–22–M

Notices

Federal Register
Vol. 54, No. 136
Tuesday, July 18, 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.

BLACKSTONE RIVER VALLEY NATIONAL HERITAGE CORRIDOR COMMISSION

Notice of Hearing

Notice is hereby given that a public hearing on the proposed plan for the Blackstone River Valley National Heritage Corridor will be held on Wednesday, July 26, 1989.

The National Heritage Corridor was established pursuant to Pub. L. 99-647. That law also established and directed a Commission to prepare a Cultural Heritage and Land Use Plan, and to submit the plan to the Secretary of the Interior for review and approval.

The Public Hearing will convene at 7:30 P.M. at the Blackstone-Millville Regional Junior-Senior High School, Blackstone MA. The Hearing is expected to end at 9:00 p.m. Interested persons may present testimony at the Hearing or provide their testimony in writing to the Commission. The Commission will accept written testimony received in the Commission offices by July 26, 1989.

The proposed plan under consideration by the Commission includes the following objectives:

1. Protect Historic Resources
2. Protect Natural Resources
3. Complete the State Park and Forest Systems in the Corridor
4. Promote Recreational Activities
5. Interpret Corridor Resources
6. Sponsor Educational and Research Activities
7. Implement Land Use Management Planning
8. Develop Public Awareness
9. Promote Compatible Economic Revitalization

It is anticipated that about twenty people will attend the Hearing in addition to Commission members, planning team, and staff.

Requests for information or written testimony should be sent to: James Pepper, Executive Director, Blackstone River Valley National Heritage Corridor, P.O. Box 34, Uxbridge, MA 01569, or brought to the Commission offices on 21 Mendon Street, Uxbridge, MA. Telephone: 508-278-9400.

James Pepper,
Executive Director, Blackstone River Valley National Heritage Corridor.

[FR Doc. 89-16730 Filed 7-17-89; 8:45 am]
BILLING CODE 4310-70-M

COMMISSION ON CIVIL RIGHTS

Illinois Advisory Committee; Agenda and Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Illinois Advisory Committee to the Commission will convene at 9:00 a.m. and adjourn at 5:15 p.m., on Friday, August 11, 1989, at the Federal Office Building, 230 Dearborn-16SE, Lakeview Conference Room 1690, Chicago, Illinois. The purpose of the meeting is to receive information on efforts made to promote housing integration in Atrium Village and the south suburbs.

Persos desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Hugh J. Schwartzberg, or Farella E. Robinson, Civil Rights Analyst, to the Centeral Regional Division at (816) 426-5253, (TDD 816/426-5009). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washngton, DC, July 11, 1989.

Melvin L. Jenkins,
Acting Staff Director.

[FR Doc. 89-16787 Filed 7-17-89; 8:45 am]
BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

[Docket No. 90129-9029]

Foreign Availability Assessment; Personal Computers

AGENCY: Office of Foreign Availability, Bureau of Export Administration, Commerce.

ACTION: Notice of finding of foreign availability.

SUMMARY: Under the authority of the Export Administration Act of 1979, as amended (EAA), the Deputy Assistant Secretary for Export Administration has determined that foreign availability exists to controlled countries of desk top personal computers incorporating industry standard bus architecture that have the following characteristics: A total Processing Data Rate (PDR) no greater than 68 million bits per second; an internal memory (RAM) no greater than 39 million bits; and a hard disk capacity no greater than 140, Megabytes. The Deputy Assistant Secretary for Export Administration has initiated action to implement the appropriate changes in the Export Administration Regulations.

FOR FURTHER INFORMATION CONTACT: Irwin M. Pikus, Office of Foreign Availability, Department of Commerce, Washington, DC., 20230, Telephone (202) 377-8074.

SUPPLEMENTARY INFORMATION:

Background

The Office of Foreign Availability (OFA) of the Bureau of Export Administration is required by sections 5(f) and (h) of the EAA to review the foreign availability of items controlled for national security purposes. Part 791 of the Export Administration Regulations establishes the procedures and criteria for initiating and reviewing claims of foreign availability. The Secretary of Commerce is authorized by statute to determine foreign availability.

In any case in which a determination is made that an item of comparable quality to a U.S. item controlled for national security purposes is available in fact to a controlled country from a foreign source in quantities sufficient to render the control ineffective in meeting its purposes, the Secretary may not require a validated license for its export.

On January 25, 1988, OFA formally undertook an assessment of the foreign availability of personal computers at the performance level of AT-Compatible Microcomputers controlled under ECCN 1565A on the Commodity Control List. The Departments of Defense and State, as well as other interested agencies of

the U.S. Government, have reviewed the report of that assessment.

Based upon the assessment and the statutory criteria, I hereby determine that foreign availability exists to controlled countries of desk top personal computers incorporating industry standard bus architecture, which have the following characteristics: A total Processing Data Rate (PDR) no greater than 68 million bits per second; an internal memory (RAM) no greater than 39 million bits; and a hard disk capacity not greater than 140 megabytes. This determination does not include computers that are ruggedized above commercial/office environment, highly portable personal computers or stand-alone graphics workstations.

Based on this determination, the Bureau of Export Administration is publishing regulations in the Rules section of this **Federal Register** to amend the national security export controls on these computers by removing the individual validated license requirement to all non-controlled destinations. The Department of Commerce also will begin the process whereby the United States Government will work with Coordinating Committee (COCOM) member governments to reach agreement on an orderly change in the multilateral controls maintained on such computers when exported to controlled countries. Upon completion of the COCOM review process, the Department of Commerce will make the appropriate changes to the regulations.

If the Office of Foreign Availability receives substantive new evidence affecting this foreign availability determination, the assessment will be reevaluated. Inquries concerning this assessment may be directed to Dr. Irvin M. Pikus at the above address.

Dated: July 13, 1989.

James M. LeMunyon,

Deputy Assistant Secretay for Export Administration.

[FR Doc. 89-16842 Filed 7-17-89; 8:45 am]

BILLING CODE 3510-DT-M

National Oceanic and Atmospheric Administration

North Pacific Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The North Pacific Fishery Management Council's Habitat Committee will hold a public meeting on July 27-28, 1989, and the Council's Plan Teams for Gulf of Alaska and Bering Sea/Aleutian Islands groundfish will hold a public meeting during the week of August 28, 1989.

On July 27 at 1 p.m., the Habitat Committee will meet at the National Marine Fisheries Service (NMFS), Federal Building conference room, 709 W. 9th Street, Juneau, AK. The Committee's agenda will include a review of legislative action necessary to provide the National Oceanic and Atmospheric Administration (NOAA) with long-term authority to respond to a disaster, a review of the Alaska Trustees Council Plan for damage assessment and restoration as a result of the Prince William Sound oil spill, and the development of a review system for monitoring activities that could impact the environment. For more information contact Steve Davis at the Council's address, below.

The Plan Teams for the Gulf of Alaska and the Bering Sea/Aleutian Islands groundfish will meet on August 28-31 and on September 1, 1989, at the NMFS, Northwest and Alaska Fisheries Center, 7600 Sand Point Way, NE., Room 2079, Seattle, WA. the public meeting will begin on August 28 at 9 am, PDT. The meeting agenda will include: (1) Preparation of draft Stock Assessment and Fishery Evaluation (SAFE) documents; (2) priority research needs for groundfish stock assessments and fishery evaluations; (3) proposals from the Plan Teams for groundfish amendments for the 1990 cycle; (4) review of proposed National Oceanic and Atmospheric Administration (NOAA) guidelines for FMPs; (5) Gulf of Alaska pollock 1989 and 1990 stock status; (6) Gulf of Alaska Pacific cod quota distribution by regulatory area, and (7) Bering Sea/Aleutian Islands bycatch management approaches for 1991 and beyond. For more information contact Bill Wilson or Hal Weeks, at the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510; telephone: (907) 271-2809.

July 12, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-16733 Filed 7-17-89; 8:45 am]

BILLING CODE 3510-22-M

COMMODITY FUTURES TRADING COMMISSION

Minneapolis Grain Exchange Proposed Option Contract

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of Availability of the Terms and Conditions of Proposed Commodity Option Contract.

SUMMARY: The Minneapolis Grain Exchange ("MGE" or "Exchange") has applied for designation as a contract market in European Exercise options on Hard Red Spring Wheat ("HRSW") futures. The Director of the Division of Economic Analysis ("Division") of the Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, had determined that publication of the proposal for comment is in the public interest, will assist the Commission in considering the views of interested persons, and is consistent with the purposes of the Commodity Exchange Act.

DATE: Comments must be received on or before August 17, 1989.

ADDRESS: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Reference should be made to MGE European Exercise HRSW futures option contract.

FOR FURTHER INFORMATION CONTACT: Fred Linse, Division of Economic Analysis, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581 (202) 254-7303.

SUPPLEMENTARY INFORMATION: The Exchange is seeking designation as a contract market in European Exercise options on the Exchange's HRSW futures contract. The proposed contract will provide for the exercise of option contracts into the underlying HRSW futures contract only on the last trading day of an expiring option contract month. Currently, the MGE also is designated as a contract market in options or HRSW futures contracts with provision for exercise into the futures

contract at any time prior to and including the expiration date of an option contract month (i.e., "American exercise" options). Both the proposed and existing option contracts are based upon the Exchange's HRSW futures contract. The Exchange intends to trade the existing option contract concurrently with the proposed option contract.

Copies of terms and conditions can be obtained through the office of the Secretariat by mail at the above address or by phone at (202) 254–6314. Other materials submitted by the MGE in support of the application for contract market designation may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 CFR Part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 CFR 145.5 and 145.9. Requests for copies of such material should be made to the FOI, Privacy and Sunshine Acts Compliance Staff of the Office of the Secretariat at the Commission's headquarters in accordance with 17 CFR 145.7 and 145.8.

Any person interested in submitting written data, views or arguments on the terms and conditions of the proposed futures option contract, or with respect to other material submitted by the MGE in support of the application, should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581 by the specified date.

Issued in Washington, DC, on July 12, 1989.

Steven Manaster,

Director, Division of Economic Analysis.

[FR Doc. 89–16747 Filed 7–17–89; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF DEFENSE

Department of the Navy

Intent To Prepare an Environmental Impact Statement for Development of Geothermal Resources Located Beneath Naval Air Station Fallon, Nevada

Pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 as implemented by the Council of Environmental Quality regulations (40 CFR Parts 1500–1508) the Department of the Navy announces its intent to prepare an Environmental Impact Statement (EIS) for development of geothermal resources located beneath Naval Air Station (NAS) Fallon, Nevada.

Field investigation research was completed by the Navy in 1987. The investigation included geophysical, geological, geochemical and petrophysical field data acquisition and analysis. Based on this analysis it was concluded that a potential exists beneath the facilities of NAS Fallon for development of 300 to 500 megawatts geothermal electrical power generation.

The EIS will address the proposed development in two stages:

(1) A power plant on the southeast corner of NAS Fallon.

(2) A power plant on the northern edge of NAS Fallon.

The proposed first stage of development would construct an 80 megawatt electrical power facility. Development of this facility would involve drilling up to thirty-six production and injection wells from multi-well pads. It is anticipated that 75 acres of land for well pads, 29 acres for roads, 24 acres for pipelines, 30 acres for the power plant, and 150 acres for transmission lines (totaling 308 acres) would be disturbed as a result of development of this facility.

A consulting firm has been retained to prepare the Draft and Final Environmental Impact Statements. Publication of the DEIS for agency and public review is planned for January 1990.

The Navy will initiate a scoping process for the purpose of determining the scope of issues to be addressed and for identifying the significant issues related to this action. Naval Air Station Fallon will hold a public scoping meeting on August 1, 1989, beginning at 7:30 pm, at the Fallon Community Center, 100 Campus Way, Fallon, Nevada. This meeting will be advertised in the Fallon area newspapers.

A formal presentation will precede request for public comment. Navy representatives will be available at this meeting to receive comments from the public regarding issues of concern to the public. It is important that federal, state, and local agencies and interested individuals take this opportunity to identify environmental concerns that should be addressed during the preparation of the EIS. In the interest of available time, each speaker will be asked to limit their oral comments to 5 minutes.

Agencies and the public are also invited and encouraged to provide written comment in addition to, or in lieu of, oral comments at the public meetings. To be most helpful, scoping comments should clearly describe specific issues or topics which the commentor believes the EIS should address. Written statements and or questions regarding the scoping process should be mailed no later than August 15, 1989 to Dr. Frank Monastero, Geothermal Program Office (Code 2606), Naval Weapons Center, China Lake, California 93555, telephone number (619) 939–3411.

Date: July 13, 1989.

Sandra M. Kay,

Department of the Navy, Alternate Federal Register, Liaison Officer.

[FR Doc. 89–16811 Filed 7–17–89; 8:45 am]

BILLING CODE 4810-AE-M

DEPARTMENT OF ENERGY

Advisory Committee on Nuclear Facility Safety; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770), notice is hereby given of the following advisory committee meeting.

Name: Advisory Committee on Nuclear Facility Safety.

Date and Time: Thursday, July 27, 1989, 8:30 a.m. to 6:00 p.m.; Friday, July 28, 1989, 8:30 a.m. to 1:00 p.m.

Place: U.S. Department of Energy, Forrestal Building, Room 1E–245, 1000 Independence Avenue SW., Washington, DC 20585.

Contact: Wallace R. Kornack, Executive Director, ACNFS, S–2, 1000 Independence Avenue SW., Washington, DC 20585, 202/586–1770.

Purpose of the Committee: The Committee was established to provide the Secretary of Energy with advice and recommendations concerning the safety of the Department's production and utilization facilities, as defined in section 11 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014).

Tentative Agenda

July 27, 1989

8:30 a.m. Subcommittee Reports
Review of Waste Isolation Pilot Plant Issues
NOON Lunch
1:00 p.m. Review of Selected Technical Issues
Committee Business
6:00 p.m. Meeting Adjourned Until Next Day

July 28, 1989

8:30 a.m. Review of Selected Technical Issues
12:30 p.m. Public Comment Session
1:00 p.m. Meeting Ends

Public Participation: This meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Wallace Kornack at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. The Chairperson of the Committee is empowered to conduct the meeting in a

fashion that will facilitate the orderly conduct of business.

Transcripts: The transcript of the meeting will be available for public review and copying at the Freedom of Information Public Reading Room, IE-190, Forrestal Building, 1000 Independence Avenue SW., Washington, DC between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Issues at Washington, DC, on July 13, 1989.

J. Robert Franklin,

Deputy Advisory Committee, Management Officer.

[FR Doc. 89-16790 Filed 7-17-89; 8:45 am]

BILLING CODE 6450-01-M

Bonneville Power Administration; Availability of the Bonneville Acquisition Guide (BAG)

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Notice of document availability.

SUMMARY: Copies of the BAG which establishes the procedures BPA uses in the solicitation, award, and administration of procurement contracts, and the Bonneville Power Assistance Instructions (BPAI) which establishes the procedures BPA uses in the solicitation, award, and administration of financial assistance instruments (principally grants and cooperative agreements) are available from BPA for $20 and $10 each, respectively.

ADDRESSES: Copies of the BAG or BPAI may be obtained by sending a check for the proper amount to the General Accounting Section—DSOG, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208.

FOR FURTHER INFORMATION CONTACT: Norman L. Linscott, Assistant to the Administrator for Contracts and Property Management, at (503) 230-4513.

SUPPLEMENTARY INFORMATION: BPA was established in 1937 as a Federal Power Marketing Agency in the Pacific Northwest. BPA operations are financed from power revenues as opposed to annual appropriations. Its procurement operations are conducted under 16 U.S.C. 832 et seq. as well as 16 U.S.C. 474(d)(20). Pursuant to these special authorities, the BAG is promulgated as a statement of procurement policy and as a body of interpretative regulations governing the conduct of BPA procurement activities. It is similar in format to the Federal Acquisition Regulations to assist offerors in locating pertinent policies. BPA's financial assistance operations are conducted under 16 U.S.C. 832 et seq., and 16 U.S.C. 839 et seq. The BPAI express BPA's financial assistance policy. The BPAI also comprise BPA's rules governing implementation of the principles provided in the following OMB circulars:

A-21 Cost principles applicable to grants, contracts, and other agreements with institutions of higher education.

A-87 Cost principles applicable to grants, contracts, and other agreements with State and local Governments.

A-102 Uniform administrative requirements for grants in aid to State and local governments, and the common rule.

A-110 Grants and agreements with institutions of higher education, hospitals, and other nonprofit organizations.

A-122 Cost principles applicable to grants, contracts, and other agreements with nonprofit organizations.

A-128 Audits of State and local governments.

All BPA solicitations include notice of applicability and availability of the BAG and BPAI, as appropriate, for the information of offerors on particular procurements or financial assistance transactions.

Issued in Portland, Oregon, on June 28, 1989

Jack Roberts,

Acting Administrotor, Bonneville Power Administration.

[FR Doc. 89-16791 Filed 7-17-89; 8:45 am]

BILLING CODE 6450-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-834-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-834-DR), dated June 30, 1989, and related determinations.

DATED: July 8, 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 June 30, 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 this declaration of June 30, 1989:

The counties of Letcher Magoffin, Pike, and Whitley 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. 89-16782 Filed 7-17-89; 8:45 am]

BILLING CODE 6718-02-M

FEDERAL TRADE COMMISSION

[Dkt. C-3255]

General Rent-A-Car Systems, Inc., et al.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibited unfair acts and practices and unfair methods of competition, this consent order requires, among other things, the Miami, Fla. national car rental company to disclose charges that are mandatory or are not reasonably avoidable to every consumer that inquires about the prices and also to disclose to consumers the car models they are to receive under the car size classification that each consumer selects.

DATE: Complaint and Order issued June 13, 1989.[1]

FOR FURTHER INFORMATION CONTACT: Michael MacPhail or Joel Winston, FTC/S-4002, Washington, DC 20580. (202) 326-3084 or 326-3153.

SUPPLEMENTARY INFORMATION: On Monday, March 20, 1989, there was published in the **Federal Register**, 54 FR 11383, a proposed consent agreement with analysis In the Matter of General Rent-A-Car Systems, Inc., et al., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of order.

No comments having been received, the Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered its

[1] Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue NW., Washington, DC 20580.

order to cease and desist in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Advertising Falsely or Misleadingly: § 13.10 Advertising fasely or misleadingly; § 13.155 Prices; § 13.155–5 Additional charges unmentioned. Subpart—Corrective Actions And/Or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533–20 Disclosures; § 13.533–50 Maintain means of communication. Subpart—Misrepresenting Oneself And Goods:—Prices: § 13.1776 Prices; § 13.1778 Additional costs mentioned.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Donald S. Clark,

Secretary.

[FR Doc. 89–16760 Filed 7–17–89; 8:45 am]

BILLING CODE 6750–01–M

[Dkt. C–3253]

KKR Associates, et al.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order requires, among other things, that the respondents divest either Beatrice or RJR assets used in the production and sale of packaged nuts, ketchup and oriental food, following KKR's acquisition of RJR Nabisco, Inc. Repondents are also required to hold RJR's assets and operations separate and apart from other entities owned by KKR, pending completion of the required divestitures.

DATE: Complaint and Order issued June 13, 1989.[1]

FOR FURTHER INFORMATION CONTACT: Renee Henning, FTC/S–3302, Washington, DC 20580. (202) 326–2621.

SUPPLEMENTARY INFORMATION: On Friday, February 17, 1989, there was published in the **Federal Register**, 54 FR 7197, a proposed consent agreement with analysis In the Matter of KKR Associates, et al., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of order.

Comments were filed and considered by the Commission. The Commission has ordered the issuance of a modified complaint in the form contemplated by the modified agreement, made its jurisdictional findings, and entered an order to divest in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Acquiring Corporate Stock Or Assets: § 13.5 Acquiring corporate stock or assets; § 13.5–20 Federal Trade Commission Act. Subpart—Corrective Actions And/Or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533–45 Maintain records; § 13.533–45(k) Records, in general; § 13.533–50 Maintain means of communication.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 45, 18)

Donald S. Clark,

Secretary.

[FR Doc. 89–16761 Filed 7–17–89; 8:45 am]

BILLING CODE 6750–01–M

---

[1] Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H–130, 6th Street & Pennsylvania Avenue NW., Washington, DC 20580.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Statement of Organization, Functions, and Delegations of Authority; Office of the Regional Director

This Notice amends Part A, Chapter AD of the Statement of Organization, Functions and Delegations of Authority of the Office of the Secretary, Section AD.20—Office of the Regional Director, for the Department of Health and Human Services. Chapter AD was last amended at 47 FR 3611 on 1/26/82. This paragraph is being amended to reflect to consolidation of the Region VII, VIII and X Divisions of Cost Allocation (DCAs) with the DCA offices in adjacent Regions, and the transfer of affected staff and workload.

SUPPLEMENTARY INFORMATION: In January 1989, the Assistant Secretary for Management and Budget signed an order merging these three DCA offices with the DCA offices in adjacent Regions, and transferring their staff and workload to the adjacent Regions. The organizational structure of the Regional DCAs has been a concern for some time. The current structure fragments this function into ten small offices, each dedicated to a small part of the overall national workload. This creates workload/staff imbalances (in overall numbers as well as in the quality and areas of staff expertise), and makes it difficult to use staff most efficiently and productively. These problems have become especially acute in recent years as total DCA staff has been reduced while the cost proposals they are responsible for evaluating and negotiating have become increasingly complex. Accordingly, the Region VII (Kansas City) DCA is being merged into the Region VI (Dallas) DCA; and the Region VIII (Denver) and X (Seattle) DCAs are being merged into the Region IX (San Francisco) DCA. This consolidation is designed to strengthen DCA operations by assuring that there is a sufficient breadth and depth of experties in each DCA office to properly handle the wide range of cost allocation plans and indirect cost proposals they are required to review and negotiate.

While the consolidation will become effective upon publication in the **Federal Register** there will be a period of time before the affected staff actually relocate and the DCA offices in Regions VII, VIII and X physically close. During this transition period, DCA operations in Regions VII, VIII and X will continue to be part of the Regional Administrative Support Centers in those Regions, but will be under the technical oversight of the DCA Director for Region VI or IX. Also, Interim Operating Instructions have been issued to the affected Regions which provide general ground rules for managing DCA activities during the transition. Grantees and contractors located in Regions VII, VIII and X should continue to submit their cost allocation plans and indirect cost proposals to the DCA offices in Kansas City, Denver and Seattle, respectively, until notified to do otherwise.

Accordingly, Chapter AD(I–X) of the Department's Organization Manual is amended as follows:

Section AD.20 D. Regional Administrative Support Center (AD(I–X)L), paragraph 3 is amended by deleting paragraph 3 in its entirety and replacing it with the following:

3. In accordance with policies and procedures established by the Office of Grant and Contract Financial Management, Office of Finance, ASMB, conducts cost allocation activities in Regions I, II, III, IV, V, VI, and IX. Reviews, negotiates and approves indirect cost rates; State and local government cost allocation plans; research patient care rates and amounts; fringe benefit rates and other special rates applicable to Federal grant and contract programs. Provides financial management technical assistance and training on cost allocation to grantees and contractors, HHS grant and contract officials, and grant and contract officials of other Federal agencies. Resolves audit findings on cost allocation plans, indirect cost rates, etc.

Carries out these functions on behalf of all Federal agencies and programs when HHS is designated the congnizant agency by OMB. The Region VI (Dallas) office will generally perform these activities for grantees and contractors located in the following States: Arkansas, Iowa, Kansas, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, and Texas. The Region IX Office (San Francisco) will generally perform these activities for grantees and contractors located in the following States, Territories and Nations: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming as well as American Samoa, Australia, Japan, the Trust Territories of the Pacific Islands and Eastern Caroline, Guam and Wake Islands.

Date: July 9, 1989.

Kevin E. Moley,

Assistant Secretary for Management and Budget.

[FR Doc. 89-16785 Filed 7-17-89; 8:45 am]

BILLING CODE 4110-60-M

Office of the Assistant Secretary for Personnel Administration

Privacy Act of 1974; Clarification of Record System Notice

AGENCY: Office of the Assistant Secretary for Personnel Administration, Office of the Secretary, HHS.

ACTION: Notice of a change to the routine uses, storage of records, and location of offices.

SUMMARY: In accordance with the Privacy Act, HHS is giving notice that it is clarifying an existing routine use to make it more restrictive, is adding the possibility that records may be stored on computer readable media (discrete to the EAP office), is clarifying and expanding the record safeguards to make it compatible with HHS policy, is editing the entire notice particularly to reflect the program's name change, and is updating the list of system managers. The system of records is 09-90-0010-Employee Assistance Program (formerly Employee Counseling Services), HHS/OS/ASPER. Records in this system contain information on employees and their family members who have been counseled by the Employee Assistance Program for all types of personal problems.

EFFECTIVE DATE: This amendment is effective on July 18, 1989.

FOR FURTHER INFORMATION CONTACT: Manager, Human Resources Development Group, Room 1416 Switzer, 330 C Street, SW., Washington, DC 20201. Telephone number FTS 475-0322.

SUPPLEMENTARY INFORMATION: The existing system notice has a routine use allowing some releases for the purpose of defending the Department in the event of litigation. The new routine use restricts this release further by mandating that a qualified service organization agreement by signed with the Department of Justice for any records falling under 42 CFR Part 2. It also now requires that the Director of the EAP approve any such disclosure to determine if it is compatible with the purpose for which the record was collected. The Department has also revised its Personnel Instruction on the EAP. This system notice reflects the program's name change and storage/safeguard procedures that are in this Instruction. This notice indicates that records may be stored on computer readable media. These computers will not be part of any larger system. Their use will be limited to the EAP and will be password protected. Finally, the list of system managers has been updated.

The notice is published below in its entirety, as amended. Previously, the system was published on January 4, 1984.

Thomas S. McFee,

Assistant Secretary for Personnel Administration.

09-90-0010

System Name

Employee Assistance Program Records HHS/OS/ASPER/OPS.

Security Classification

None.

System Location

Designated offices providing counseling and/or referral for counseling for employees and their family members (see Appendix 1).

Categories of Individuals Covered by the System

This system covers Department employees, employees of other organizations serviced by the HHS EAP, or family members of any of these employees who have been counseled and/or referred for counseling for personal problems by the EAP.

Categories of Records in the System

The system contains records of each employee and family member who has utilized the EAP for a personal problem. Examples of information which may be found in each record are employee or family member name, date of birth, grade, job title, home address, telephone numbers, and supervisor's name and telephone number. In addition to the demographic data, certain clinical information is normally maintained in each record including a psychosocial history, assessment of personal problem, information regarding referrals to treatment facilities in the community, and intervention outcomes. Finally, if an employee is referred to the EAP by a supervisor, the record may contain information regarding the referral such as leave record, reasons for referral, and outcomes of supervisory interventions.

Authority for Maintenance of the System

5 U.S.C. 7361, 7362, 7901, 7904, 44 U.S.C. 3101.

Purpose(s)

These records are used to document the nature and extent of the employee's or family member's personal problem and the background information necessary for formulating an intervention plan in an effort to resolve the personal problem and return the employee to full productivity. The record is also used to document, when appropriate, where the employee or family member has been referred for treatment or rehabilitation and the progress in such treatment.

Anonymous information from these records is also needed for the purpose of preparing statistical reports and analytical studies in support of the EAP's management.

Routine Uses of Records Maintained in the System, Including Categories of Users and the Purposes of Such Uses

(1) The Department contemplates that it will contract with a private firm, individual, or other group such as a Federal Employee Assistance Program consortium for the purpose of providing the EAP functions. Relevant records will be disclosed to such a contractor. The contractor shall be required to maintain Privacy Act safeguards with respect to such records. The contractor will surrender to the EAP all of these records as well as any new records at the time of contract termination.

(2) The Department may disclose information from this system of records for litigation purposes when

(a) HHS, or any of its components, or

(b) Any HHS employee in his or her official capacity, or

(c) Any HHS employee in his or her individual capacity where the Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee, or

(d) The United States or any agency thereof where HHS determines that the litigation is likely to affect HHS or any of its components.

is a party to litigation, and HHS determines that such use of records is

relevant and necessary to the litigation and would help in the effective representation of the government party. The disclosure may be made to the Department of Justice. Where the records are *not* covered by the Confidentiality of Alcohol and Drug Abuse Patient Records regulations (42 CFR Part 2), disclosures may also be made to a court or other tribunal, or to another party before such tribunal. Any disclosure of such patient records must be pursuant to a qualified service organization agreement that meets the requirements of 42 CFR Part 2 *and* must also comply with all other aspects of these regulations. The Director of the Employee Assistance Program (in ASPER) must personally approve any disclosure made under this routine use based on his or her determination that it is compatible with the purpose for which the records were collected.

Policies and Practices for Storing, Retrieving, Accessing, Retaining and Disposing of Records in the System

Storage

Employee records are maintained in folders, on index cards and on computer readable media. Computer systems are discrete, for EAP use only, and/or are password protected.

Retrievability

Records are retrieved by a case code number, unique to the employee or family member utilizing the program. These numbers are cross indexed by name.

Safeguards

(1) *Authorized Users:* Access to these records is limited to EAP Administrators who work directly with employees and family members in each program location (see Appendix 1) and their immediate staffs (including staff counselors, staff secretaries, contract or consortia counselors and secretaries). All EAP Administrators, whether or not they directly provide clinical services, may access the records for the purposes of program evaluation, destroying records at the end of their period of maintenance, and transferring records from one contractor to another.

(2) *Physical Safeguards:* All records are stored in a metal filing cabinet equipped with at least a combination lock, and preferably a locking bar. This file cabinet is in a secured area, accessible only to the EAP staff, and is locked when not in use. Computer readable information is maintained in discrete systems and/or is password protected. Computers are also stored in secured areas, accessible to only the EAP staff. These records are always maintained separate from any other system of records.

(3) *Procedural Safeguards:* All persons having access to the records shall have previous training in the proper handling of records covered by the Privacy Act and 42 CFR Part 2 (Confidentiality of Alcohol and Drug Abuse Patient Records). These restrict disclosures to unique situations, such as medical emergencies, except when the employee or family member has consented in writing. Furthermore, employees and family members who utilize the EAP will be informed in writing of the confidentiality provisions; and secondary disclosure of information is prohibited without employee consent.

Retention and Disposal

Records are retained until three years after the employee or family member has ceased contact with the EAP or until any litigation is resolved. However, if an employee has been terminated from HHS employment, records are retained for at least three years after the official date of termination and until any litigation is resolved. Files are then destroyed.

System Manager(s) and Address

The records of individuals participating in the EAP are managed by the EAP Administrators in the various regional and headquarters offices (Appendix 1).

Notification procedures

Inquiries to determine whether the system contains a record about the requester should be addressed to the system manager where the counseling was provided (see Appendix 1). The individual should provide his or her name, grade, organization where employed, date of birth, and location and approximate date of counseling. Upon receiving a request, the EAP Administrator shall weigh the need for disclosure against the potential injury to the patient, to the physician-patient relationship, and to the treatment services. The EAP Administrator will then determine the extent to which any disclosure of all or any part of the record is necessary. 42 CFR Part 2 does not compel disclosure.

Record Access Procedures

Same as notification procedures. Requesters should also reasonably specify the record contents being sought.

CONTESTING RECORD PROCEDURES:

Contact the EAP Administrator at the address found in Appendix 1, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction.

RECORD SOURCE CATEGORIES:

Information in this system of records is: (1) Supplied directly by the individual, or (2) supplied by a member of the employee's family, or (3) derived from information supplied by the individual, or (4) supplied by sources to whom the employee and/or family member has been referred for assistance, or (5) supplied by Department officials, or (6) supplied by EAP counselors.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

APPENDIX 1

Regional Offices:

Region I
Employee Assistance Program Administrator
HHS Regional Personnel Office
JFK Federal Building, Room 1503
Boston, Massachusetts 02203

Region II
Employee Assistance Program Administrator
HHS Regional Personnel Office
Room 39–120
26 Federal Plaza
New York, New York 10278

Region III
Employee Assistance Program Administrator
HHS Regional Personnel Office
Room 9400
P.O. Box 13716
Philadelphia, Pennsylvania 19101

Region IV
Employee Assistance Program Administrator
HHS Regional Personnel Office
101 Marietta Tower, Room 1604
Atlanta, Georgia 30323

Region V
Employee Assistance Program Administrator
HHS Regional Personnel Office
31st Floor
300 South Wacker Drive
Chicago, Illinois 60606

Region VI
Employee Assistance Program Administrator
HHS Regional Personnel Office
Room 930
1200 Main Tower
Dallas, Texas 75202

Region VII
Employee Assistance Program Administrator
HHS Regional Personnel Office
Box 15458
601 East Twelfth Street
Kansas City, Missouri 64106

Region VIII
Employee Assistance Program Administrator
HHS Regional Personnel Office
Room 1062
19th & Stout Streets
Denver, Colorado 80294

Region IX

Employee Assistance Program Administrator
HHS Regional Personnel Office
Room 118
50 United Nations Plaza
San Francisco, California 94102

Region X
Employee Assistance Program Administrator
HHS Regional Personnel Office
Mail Stop RX-05
2201 Sixth Avenue
Seattle, Washington 98121

Other Offices:

Centers for Disease Control
Employee Assistance Program Administrator
Employee Service Branch, Personnel Management Office
Centers for Disease Control
1600 Clifton Road, N.E.
Atlanta, Georgia 30333

Health Care Financing Administration
Employee Assistance Program Administrator
GG-5-A East Low Rise
6325 Security Boulevard
Baltimore, Maryland 21207

National Institutes of Health
Employee Assistance Program Administrator
Building 31, Room E2B57
9000 Rockville Pike
Bethesda, Maryland 20205

Public Health Services
Employee Assistance Program Administrator
Room 1335 Parklawn Building
56 Fishers Lane
Rockville, Maryland 20857

Social Security Administration
Employee Assistance Program Administrator
3120 Annex
6401 Security Boulevard
Baltimore, Maryland 21235

Southwest Complex
Employee Assistance Program Administrator
Room 1036 Switzer Building
330 C Street, SW.
Washington, D.C. 20201

[FR Doc. 89-16709 Filed 7-17-89; 8:45 am]
BILLING CODE 4150-04-M

Food and Drug Administration

Consumer Participation; Notice of Open Meeting

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the following district consumer exchange meeting: Nashville District Office, chaired by Hayward E. Mayfield, District Director. The topic to be discussed is "Consumer Update of FDA Issues Today."

DATES: Thursday, August 3, 1989, 10 a.m. to 12 m.

ADDRESSES: University of Tennessee Agricultural Extension Services, West Tennessee Center for Research, Extension, and Public Service, 605 Airways Blvd., Jackson, TN 38301.

FOR FURTHER INFORMATION CONTACT: Sandra S. Baxter, Consumer Affairs Officer Food and Drug Administration, 297 Plus Park Blvd., Nashville, TN 37217, 615-736-2088.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to encourage dialogue between consumers and FDA officials, to identify and set priorities for current and future health concerns, to enhance relationships between local consumers and FDA's district offices, and to contribute to the agency's policymaking decisions on vital issues.

Date: July 12, 1989.

Alan L. Hoeting,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-16756 Filed 7-17-89; 8:45 am]
BILLING CODE 4160-01-M

Social Security Administration

Statement of Organization, Functions and Delegations of Authority

Part S of the Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services covers the Social Security Administration (SSA). Notice is given that Chapter S1 is amended to add a division-level subcomponent and functions within the Office of Budget (OB) in the Office of the Deputy Commissioner, Management. The new material and changes are as follows:

Section S1.10 *The Office of Budget*—(Organization):

Delete:

D. The Division of Administrative Budget (S1BB).

Add:

D. The Division of Administrative Budget Review and Analysis (S1BC).

F. The Division of Administrative Budget Coordination and Analysis (S1BE).

Section S1B.20 *The Office of Budget*—(Functions):

Delete:

D. The Division of Administrative Budget (S1BB) in its entirety.

Add:

D. The Division of Administrative Budget Review and Analysis (S1BC).

1. Interprets and applies SSA policies and guidelines on budget formulation and execution in the review and analysis of SSA component budget requests.

2. Formulates the operational workload portion of SSA's administrative budget based on SSA plans, policies and operational data.

3. Monitors and analyzes component spending as part of SSA level budget execution policies.

F. The Division of Administrative Budget Coordination and Analysis (S1BE).

1. Interprets administrative budgetary policies and limitations, and develops and issues guidelines and instructions to SSA components for budget formulation and execution.

2. Executes the total administrative and program budgets for SSA through issuance of workyear and dollar controls, budgetary allotments/allowances for administrative and program expenditures and employment ceilings to SSA components, coordinating with OE's Division of Administrative Budget Review and Analysis and the Division of Program Budget as appropriate.

3. Coordinates and analyzes SSA administrative budget totals including the Information Technology Systems Budget.

4. Provides direct budget support for the Office of the Deputy Commissioner for Management.

Dated: July 6, 1989.

John R. Dyer,

Deputy Commissioner Management.

[FR Doc. 89-16783 Filed 7-17-89; 8:45 am]
BILLING CODE 4190-11-M

Public Health Service

National Vaccine Advisory Committee; Public Meeting AGENCY: Office of the Assistant Secretary for Health

SUMMARY: The Department of Health and Human Services (DHHS) and the Office of the Assistant Secretary for Health are announcing the forthcoming meeting of the National Vaccine Advisory Committee.

DATE: Date, Time and Place: September 7, 1989 at 9:00 a.m.; September 8, 1989, at 8:30 a.m.; Hubert Humphrey Building, Room 703A, 200 Independence Avenue SW., Washington, DC 20201. The entire meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Written requests to participate should be sent to Yuth Nimit, Ph.D., Executive Secretary, National Vaccine Advisory Committee, National Vaccine Program, 5600 Fishers Lane, Park Building, Room 1-24, Rockville, Maryland 20857, (301) 443-0715.

Agenda

Open Public Hearing

Interested persons may formally present data, information, or views orally or in writing on issues pending before the Advisory Committee or on any of the duties and responsibilities of the Advisory Committee as described below. Those desiring to make such presentations should notify the contact person before August 7, 1989 and submit a brief statement of the information they wish to present to the Advisory Committee. Those requests should include the names and addresses of proposed participants and an indication of the approximate time required to make their comments. A maximum of 15 minutes will be allowed for a given presentation. Any person attending the meeting who does not request an opportunity to speak in advance of the meeting will be allowed to make an oral presentation at the conclusion of the meeting, if time permits, at the chairperson's discretion.

Open Advisory Committee Discussion

Discussion at this meeting will be directed to an update of the National Vaccine Program; the July 26 meeting of the Advisory Commission on Childhood Vaccines; the development status of vaccine information materials; an update on infant immunization; a report from the Resources and Financing Subcommittee; a report from the Vaccine Supply Subcommittee; a report from the Vaccine Utilization Subcommittee; development of a National Vaccine Plan. Meetings of the Advisory Committee shall be conducted, insofar as is practical, in accordance with the agenda published in the Federal Register notices. Changes in the agenda will be announced at the beginning of the meeting.

Persons interested in specific agenda items may ascertain from the contact person the approximate time of discussion. A list of Advisory Committee members and the charter of the Advisory Committee will be available at the meeting. Those unable to attend the meeting may request this information from the contact person. Summary minutes of the meeting will be made available after the approval of the Advisory Committee at the subsequent Committee meeting on December 14.

Dated: July 11, 1989.

Yuth Nimit,

Executive Secretary, NVAC.

[FR Doc. 89-16784 Filed 7-17-89; 8:45 am]

BILLING CODE 4160-17-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

[Docket No. D-89-900; FR2639]

Delegation of Authority

AGENCY: Department of Housing and Urban Development (HUD) Office of the Secretary.

ACTION: Notice of delegation of authority.

SUMMARY: This Notice announces delegation of authority to the Assistant Secretary for Housing-Federal Housing Commissioner and General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner for certain responsibilities under Section 255 of the National Housing Act.

EFFECTIVE DATE: July 7, 1989.

FOR FURTHER INFORMATION CONTACT: Stephen A. Martin, (202) 755-3046. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Housing-Federal Housing Commissioner and the General Deputy Assistant Secretary for Housing each is delegated the power and authority of the Secretary with respect to the following functions and responsibilities under section 255 of the National Housing Act, 12 U.S.C. 1715z-20. This Delegation carries with it the authority to redelegate to employees of the Department unless provided otherwise.

1. Commit to insure and insure home equity conversion mortgages in accordance with section 255(c).

2. Approve mortgages to originate and hold home equity conversion mortgages as provided in Section 255(d)(1).

3. Cause mortgagees to make available to mortgagors, at the time of application, a list of third party information sources, as required by Section 255(e)(1).

4. Provide or cause to be provided, counseling to mortgagors as specified in section 255(f), including the approval pursuant to section 255(e)(1) of information sources as being responsible and able to provide counseling information to mortgagors.

5. Cause disclosure information to be made availble to mortgagors by mortgagees, both prior to the individual loan closing as required by Section 255(e)(2), and annually thereafter in the form of summary statements as required by section 255(e)(3).

6. Pursuant to section 255(i)(1), provide funds to mortgagors when the mortgagee or other party responsible for making the equity conversion payments fails to make them; obtain, by legal, equitable, or administrative means, repayment from any source of funds disbursed; and take such actions described in section 255(i)(2) as may be necessary to enable funds to be provided to mortgagors and mortgagees.

7. Service and foreclose (or accept deeds in lieu of foreclosure) on mortgages assigned to the Secretary, sell, or otherwise convey interest in acquired property, and in all respects carry out the responsibilities of the Secretary under section (7)(i) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(i).

8. Enter into such contracts and agreements as may be necessary or desirable to carry out the responsibilities delegated above, with the exception of procurement contracts.

9. Issue rules and regulations necessary to implement the authority conferred hereby, and required by Section 417(b) of Pub. L. 100-242. This rulemaking authority may not be redelegated.

This Delegation is effective upon execution and until such time as it may be expressly superseded or terminated.

Authority: Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3534(d).

Washington, DC, July 7, 1989.

Jack Kemp,

Secretary of Housing and Urban Development.

[FR Doc. 89-16748 Filed 7-17-89; 8:45 am]

BILLING CODE 4210-32-M

Office of Assistant Secretary for Housing-Federal Housing Commissioner

[Docket No. D-89-901; FR-2641]

Redelegation of Authority

AGENCY: Department of Housing and Urban Development, Office of Assistant Secretary for Housing-Federal Housing Commisioner.

ACTION: Notice of redelegation of authority.

SUMMARY: This Notice announces a redelegation of certain responsibilities under Section 255 of the National Housing Act to officials of the Office of the Assistant Secretary for Housing-Federal Housing Commissioner.

EFFECTIVE DATE: July 7, 1989.

FOR FURTHER INFORMATION CONTACT: Stephen A. Martin (202) 755-3046. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. The Deputy Assistant Secretary for Single Family Housing is delegated the power and authority of the Assistant Secretary for Housing-Federal Housing Commissioner with respect to the following functions and responsibilities under Section 255 of the National Housing Act, 12 U.S.C. 1715z–20.

1. Commit to insure and insure home equity conversion mortgages in accordance with section 255(c).

2. Approve mortgagees to orginate and hold home equity conversion mortgages as provided in section 255(d)(1).

3. Cause mortgagees to make available to mortgagors, at the time of application, a list of third party information sources, as required by section 255(e)1).

4. Provide or cause to be provided, counseling to mortgagors as specified in section 255(f), including the approval pursuant to section 255(e)(1) of information sources as being responsible and able to provide counseling information to mortgagors.

5. Cause disclosure information to be made available to mortgagors by mortgagees, both prior to the individual loan closing as required by section 225(e)(2), and annually thereafter in the form of summary statements as required by section 225(e)(3).

6. Pursuant to section 255(i)(1), provide funds to mortgagors when the mortgagee or other party responsible for making the equity conversion payments fails to make them; obtain, by legal, equitable, or administrative means, repayment from any source of funds disbursed; and take such actions described in section 255(i)(2) as may be necessary to enable funds to be provided to mortgagors and mortgagees.

7. Service and foreclose (or accept deeds in lieu of foreclosure) on mortgages assigned to the Secretary, sell, or otherwise convey interest in acquired property, and in all respects carry out the responsibilities of the Secretary under section 7(i) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(i).

8. Enter into such contracts and agreements as may be necessary or desirable to carry out the responsibilities delegated above, with the exception of procurement contracts.

B. The Director of the Office of Insured Single Family Housing and the Director of the Single Family Development Division is each delegated the following power and authority with respect to section 255.

1. Commit to insure and insure home equity conversion mortgages in accordance with section 255(c).

2. Cause mortgagees to make available to mortgagors, at the time of application, a list of third party information sources, as required by section 255(e)(1). Provide or cause to be provided, counseling to mortgagors as specified in section 255(f), including the approval pursuant to section 255(e)(1) of information sources as being responsible and able to provide counseling information to mortgagors.

3. Cause disclosure information to be made available to mortgagors by mortgagees, both prior to the individual loan closing as required by section 255(e)(2), and annually thereafter in the form of summary statements as required by section 255(e)(3).

4. Enter into such contracts and agreements as may be necessary or desirable to carry out the responsibilities delegated above.

C. The Director of the Office of Insured Single Family Housing and the Director of the Single Family Servicing Division is each delegated the following power and authority with respect to section 255.

1. Pursuant to section 255(i)(1), provide funds to mortgagors when the mortgagee or other party responsible for making the equity conversion payments fails to make them; obtain, by legal, equitable, or administrative means, repayment from any source of funds disbursed; and take such actions described in section 255(i)(2) as may be necessary to enable funds to be provided to mortgagors and mortgagees.

2. Service and foreclose (or accept deeds in lieu of foreclosure) on mortgages assigned to the Secretary, sell, or otherwise convey interest in acquired property, and in all respects carry out the responsibilities of the Secretary under section 7(i) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(i).

3. Provide or cause to be provided, counseling to mortgagors as specified in section 255(f), including the approval pursuant to section 255(e)(1) of information sources as being responsible and able to provide counseling information to mortgagors.

4. Enter into such contracts and agreements as may be necessary or desirable to carry out the responsibilities delegated above, with the exception of procurement contracts.

D. The Director of the Office of Lender Activities and Land Sales and the Director of the Lender Approval and Recertification Division each is delegated the power and authority to approve mortgagees to originate and hold home equity conversion mortgages as provided in section 255(d)(1).

Officials to whom authority under section 255 has been redelegated may redelegate in turn to subordinate employees of the Department.

The Redelegation is effective upon execution and until such time as it may be expressly terminated or superseded.

Authority: Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Washington, DC, July 7, 1989.

James E. Schoenberger,

General Deputy Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 89–16749 Filed 7–17–89; 8:45 am]

BILLING CODE 4210–27–M

[Docket No. D89–902; FR–2642]

Redelegation of Authority

AGENCY: Department of Housing and Urban Development (HUD) Office of Assistant Secretary for Housing-Federal Housing Commissioner.

ACTION: Notice of redelegation of authority.

SUMMARY: This Notice announces a redelegation of authority to certain officials of HUD Regional and Field Offices. The Authority relates to section 255 of the National Housing Act.

EFFECTIVE DATE: July 7, 1989.

FOR FURTHER INFORMATION CONTACT: Stephen A. Martin, (202) 755–3046. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: Each Regional Administrator-Regional Housing Commissioner, Deputy Regional Administrator, Director of the Office of Housing in a Regional Office, Manager of a HUD Field Office and Deputy Manager of a HUD Field Office, is redelegated the power and authority of the Assistant Secretary for Housing-Federal Housing Commissioner with respect to the following functions and responsibilities under section 255 of the National Housing Act, 12 U.S.C. 1715z–20.

1. Commit to insure and insure home equity conversion mortgages in accordance with section 255(c).

2. Cause mortgagees to make available to mortgagors, at the time of application, a list of third party information sources, as required by section 255(e)(1).

3. Provide or cause to be provided, counseling to mortgagors as specified in section 255(f), including the approval pursuant to section 255(e)(1) of information sources as being responsible and able to provide counseling information to mortgagors.

4. Cause disclosure information to be made available to mortgagors by

mortgagees, both prior to the individual loan closing as required by section 255(e)(2), and annually thereafter in the form of summary statements as required by section 255(e)(3).

5. Pursuant to section 255(i)(l), provide funds to mortgagors when the mortgagee or other party responsible for making the equity conversion payments fails to make them; obtain, by legal, equitable, or administrative means, repayment from any source of funds disbursed; and take such actions described in section 255(i)(2) as may be necessary to enable funds to be provided to mortgagors and mortgagees.

6. Service and foreclose (or accept deeds in lieu of foreclosure) on mortgages assigned to the Secretary, sell, or otherwise convey interest in acquired property, and in all respects carry out the responsibilities of the Secretary under section 7(i) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(i).

7. Enter into such contracts and agreements, including loan agreements with mortgagors, as may be necessary or desirable to carry out the responsibilities delegated above, with the exception of procurement contracts.

Regional and Field Office officials to whom authority under Section 255 has been redelegated may redelegate in turn to subordinate employees of the Department.

This Redelegation is effective upon execution and until such time as it may be expressly terminated or superseded.

Authority: Section 7(d) of the Department of Housing and Urban Development Act. 42 U.S.C. 3535(d).

Washington, DC, 1989.

James E. Schoenberger.

General Deputy Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 89-16750 Filed 7-17-89; 8:45 am]

BILLING CODE 4210-27-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY-040-09-4300-90]

Rock Springs District Grazing Board; Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting of the Rock Springs District Grazing Advisory Board.

SUMMARY: This notice sets forth the schedule and proposed agenda of a meeting of the Rock Springs District Grazing Advisory Board. Notice of this meeting is required under Pub. L. 92-463.

DATE: September 7, 1989, 9:30 a.m. until 4 p.m.

ADDRESS: Bureau of Land Management District Office, Highway 191 North, Rock Springs, Wyoming 82902-1869.

FOR FURTHER INFORMATION CONTACT: Donald H. Sweep, District Manager, Rock Springs District, Bureau of Land Management, P.O. Box 1869, Rock Springs, Wyoming 82902-1869, (307) 382-5350.

SUPPLEMENTARY INFORMATION: The proposed agenda for the meeting will include:

1. Introduction and opening remarks
2. Approval of the transcript of the September 8, 1988 Board meeting
3. Election of a Chairman and Vice-Chairman
4. Improvements proposed for completion in FY90 with range betterment (8100) funds
5. Update on wild horse gathering
6. Thompson sheep to cattle conversions and related AMPs
7. North LaBarge CRMP
8. Public comment period
9. Arrangements for next meeting.

This meeting is open to the public. Interested persons may make oral statements to the Board between 3:00-3:30 p.m., or file written statements for the Board's consideration. Anyone wishing to make an oral statement should notify the District Manager, Bureau of Land Management, Highway 191 North, P.O. Box 1869, Rock Springs, Wyoming 82902-1869, by September 6, 1989. Depending on the number of persons wishing to make oral statements, a per person time limit may be established by the District Manager.

A transcript of the meeting will be maintained in the District Office and will be available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

Donald H. Sweep,

District Manager.

[FR Doc. 89-16762 Filed 7-17-89; 8:45 am]

BILLING CODE 4310-22-M

[AZ-050-4333-12]

Arizona: Resource Management Planning; Yuma District Resource Management Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent to prepare Category I amendment to the Yuma District Resource Management Plan, Yuma District, Arizona.

FOR FURTHER INFORMATION CONTACT: Mary Barger, Acting Area Manager, Yuma Resource Area, 3150 Winsor Avenue, Yuma, Arizona 85365, 602-726-6300.

SUPPLEMENTARY INFORMATION: In accordance with 43 CFR 1610.2(c) and 1610.3-1(d), notice is hereby given of intent to prepare a planning amendment document. This notice also constitutes the scoping notice required by regulation for the *National Environmental Policy Act* (40 CFR 1501.7).

1. Description of the proposed planning policy: The proposed action is to amend the *Yuma District Resource Management Plan* (RMP), completed in May 1986. The Category I planning amendment will be based upon existing statutory requirements and policies and will carry out the requirements of the *Federal Land Policy and Management Act* of 1976 (FLPMA). The RMP Amendment and accompanying Environmental Assessment (EA) will provide the basis for changing the RMP's Land Ownership Adjustment section (Issue #6). Changes in the Land Ownership Adjustment section will allow the disposal through sale or exchange of approximately 4,317.5 acres of public land not previously identified for disposal. Changes in the Recreation section will be specific to off-road vehicle (ORV) use, and will allow for—(a) classification of approximately 340 acres as open to intensive ORV use and approximately 560 acres as limited to designated roads and trails on public lands that had previously been classified as limited to existing roads and trails; and (b) designation of one additional competitive-use ORV area. The Amendment and EA are scheduled for completion by September 30, 1989.

2. Identification of the geographic area involved: The proposed amendment affects three discrete areas within the Yuma District—

(a) Lands proposed to be available for disposal through sale or exchange are public lands in the vicinity of Quartzsite, Arizona, in sections 15, 17, 20, 21, 22, 23, 26, 27, 28, and 29 of T. 4 N., R. 19 W., G&SRM;

(b) Lands affected by changes in the District's ORV designations are all north of Senator Wash Reservoir in Imperial County, California, in T. 14 S., R. 24 E., SBM, secs. 29, 30, 31, and 32, and T. 15 S., R. 24 E., SBM, sec. 6;

(c) The proposed competitive-use ORV area is approximately 10 miles east of Yuma, Arizona, in T. 8 S., R. 21 W., G&SRM, secs. 27, 28, 33, 34 and 35. A map delineating the proposed disposal area is available for public

review at BLM's Yuma Resource Area Office, 3150 Winsor Avenue, Yuma, Arizona. Final acreages and boundaries for all of these areas will be determined at a later date.

3. General types of issues anticipated: The proposed amendment addresses changes to the Land Tenure Adjustment and Recreation sections of the RMP.

4. Disciplines to be represented and used to prepare the amendment: air quality, soils, vegetation, wildlife, mineral and energy resources, visual resources, floodplains, rangeland resources, recreation resources, cultural resources, and economic conditions.

5. The kind and extent of public participation: A 30-day public comment period will be announced in the Federal Register and other appropriate media. There will also be a specific comment period for the Governors of Arizona and California to inform and seek comment from State and local agencies.

6. Times, dates, and locations scheduled for any public meetings, hearings, conferences, or gatherings as known: At this time, no public meetings are planned. All public input is scheduled to be handled through written comments.

7. The location and availability of documents relevant to the planning process: Documents will be available for public review at the Yuma Resource Area, 3150 Winsor Avenue, Yuma, Arizona 85365.

Herman L. Kast,

District Manager.

Date: July 7, 1989.

[FR Doc. 89-16788 Filed 7-17-89; 8:45 am]

BILLING CODE 4333-12-M

[ES-940-09-4520-13; (ES-041293, Group 156)]

Filing of Plat of Dependent Resurvey and Subdivision of Sections; Minnesota

July 12, 1989.

1. The plat, in three sheets, of the dependent resurvey of portions of the south and north boundaries, the west boundary, a portion of the subdivisional lines and the survey of the subdivision of sections 4, 5, 7, 8, 9, 16, 17, 18, 21, 28, 29, 30, 31, 32, and 33 of Township 142 North, Range 39 West, Fifth Principal Meridian, Minnesota, will be officially filed in the Eastern States Office, Alexandria, Virginia at 7:30 a.m., on August 28, 1989.

2. The dependent resurvey was made at the request of the Bureau of Indian Affairs.

3. All inquiries or protests concerning the technical aspects of the dependent resurvey must be sent to the Deputy State Director for Cadastral Survey, Eastern States Office, Bureau of Land Mangement, 350 South Pickett Street, Alexandria, Virginia 22304, prior to 7:30 a.m., August 28, 1989.

4. Copies of the plat will be made available upon request and prepayment of the reproduction fee of $4.00 per copy.

Joseph W. Beaudin,

Acting Deputy State Director for Cadastral Survey.

[FR Doc. 89-16789 Filed 7-17-89; 8:45 am]

BILLING CODE 4310-GJ-M

Minerals Management Service

Meeting of Working Panel Established by the Royalty Management Advisory Committee

July 12, 1989.

AGENCY: Minerals Management Service (MMS), Interior..

ACTION: Notice of meeting.

SUMMARY: The Minerals Management Service (MMS) hereby gives notice that the Royalty Management Advisory Committee (RMAC) Strategic Planning Work Panel will meet in Lakewood, Colorado, at the location and on the dates identified below. This panel was established by RMAC to provide recommendations for further program improvements and other changes to Royalty Management Program (RMP) mission and performance.

LOCATION AND DATES: The RMAC Strategic Planning Work Panel will meet at the Sheraton Hotel and Conference Center, 360 Union Blvd., Lakewood, Colorado, on July 26–28, 1989. The Panel will meet again on August 14–18, 1989, and August 28–31, 1989. The Panel will meet from 9:00 a.m. to 5:00 p.m. each day. If the meeting is completed in less than the days scheduled, the Panel will adjourn. For information on the location of the last two meetings and to conform each session in the event a date is changed, contact Ms. Deborah Gibbs at the telephone number shown below.

The public is invited to attend these meetings and make oral comments. A time will be set aside by the panel chairperson during which the public will be invited to make oral comments.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Gibbs, Mineral Management Service, Royalty Management Program, Denver Federal Center, Building 85, Box 25165, Mail Stop 660, Denver, Colorado 80225, Telephone Number (303) 231-3410, FTS 326-3410.

SUPPLEMENTARY INFORMATION: In November 1986, MMS initiated a comprehensive planning process aimed at fostering steady improvements to its royalty program through internal assessment and external input. This process included an evaluation of the overall RMP mission and performance to determine if the program was generally "on track" or if fundamental changes were needed. The assessment was comprised of the following three components:

- Program Performance Standards:
- Selected Options for Change in the Royalty Management Mission:
- RMP Business System Improvement Plan:

An aggressive effort has been made to develop a consensus among RMP's constituents for the appropriate royalty management mission and performance levels to fulfill the needs and expectations of royalty recipients to the maximum practicable entent. In late 1988 and early 1989, the three strategic planning and improvements products listed above were sent to over 170 of RMP's constituents, including Indian tribes and associations, States, industry, RMAC members, Congress, and various review/oversight groups. Constituents were requested to comment on a spectrum of the most likely and historically persistent suggestions for change to the program mission and to provide recommendations on RMP's systems improvement plans and program performance standards.

As a result a Strategic Plan for Operations and Systems is being developed for RMP with emphasis on supporting mission requirement well into the 1990's.

A status report on the findings and input received from RMP constituents was presented to RMAC on June 22, 1989. The RMAC agreed to establish a working panel to review the findings and provide recommendations for further program improvements and other changes in mission and performance.

Recently, numerous issues related to Indian royalty management have been explored through testimony and exhaustively reviewed by the Senate Select Committee on Indian Affairs. The MMS is in the process of evaluating the concerns expressed by the Senate Select Committee relative to royalty management.

The Strategic Planning Work Panel is charged with reviewing the draft Strategic Plan for Operations and Systems and making recommendations as to conclusions drawn in the plan. The Panel will also provide to the Committee proposals on the extent to which the RMP mission and performance should be changed. In addition, the Panel will review and make recommendations on

any royalty management improvements being contemplated in response to concerns recently expressed by the Senate Select Committee. The RMAC will review the Panels' recommendations at a meeting tentatively scheduled for later this summer.

Dated: July 12, 1989.

Donald T. Sant,

Acting Associate Director for Royalty Management.

[FR Doc. 89-16745 Filed 7-17-89; 8:45 am]

BILLING CODE 4310-MR-M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on July 3, 1989, a proposed Consent Decree in *United States* v. *Boyd, et al.* was lodged with the United States District Court for the District of Maryland. The proposed Consent Decree provides for the payment by defendant Carnegie Institution of Washington, Inc. of $100,000 of the costs incurred by the Environmental Protection Agency in investigation, response, and enforcement activities related to the Security Boulevard Site in Baltimore County, Maryland.

The Department of Justice will receive for a period of thirty (30) days from the date of publication comments relating to the proposed Consent Decree. Comments should be addressed to the Acting Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Boyd, et al.* D.J. Ref 90-11-3-264.

The proposed Consent Decree may be examined at the Office of the United States Attorney, 101 Lombard Street, Baltimore, Maryland 21201, and at the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Room 1515, Ninth Street and Pennsylvania Avenue NW., Washington, DC 20530. A copy of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice. In requesting a copy, please enclose $1.20 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Donald A. Carr,

Acting Assistant Attorney General.

[FR Doc. 89-16764 Filed 7-17-89; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to the Clean Air Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on July 7, 1989 a proposed Consent Decree in *United States* v. *Campbell Soup Company*, Civil Action No. CIV-S 87-1272 EJG/EM, was lodged with the United States District Court for the Eastern District of California. The Complaint sought penalties and injunctive relief against Campbell Soup Company ("Campbell") under section 113 of the Clean Air Act, 42 U.S.C. 7413, for Campbell's violations of the volatile organic compound ("VOC") limitations contained in the federally enforceable California State Implementation Plan.

The proposed Consent Decree imposes a permanent injunction against future violations of the Clean Air Act and imposes a civil penalty of $125,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044. Comments should refer to *United States* v. *Campbell Soup Company*, D.J. Ref. 90-5-2-1-1115.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Eastern District of California, 3305 Federal Building, 650 Capitol Mall, Sacramento, California 95814, and at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1732(R), Ninth Street and Pennsylvania Avenue NW., Washington, DC 20004. A copy 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.

Donald A. Carr,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-16765 Filed 7-17-89; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on July 5, 1989 a proposed Consent Decree in *United States* v. *Martin Marietta Corporation and Commonwealth Aluminum Corporation*, District of Oregon Civil Action No. _____ was lodged with the United States District Court for the District of Oregon. This is a civil action against two corporate defendants under sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9606 and 9607, for recovery of costs and injunctive relief in connection with the clean up of the Martin Marietta Reduction Facility, a site that was contaminated with the waste products arising from the reduction of aluminum ore, near The Dalles, Wasco County, Oregon.

The proposed consent decree resolves all of the claims alleged in the complaint and provides for the defendants to implement the remedy selected by EPA in its Record of Decision. The Environmental Protection Agency estimates the remedy will cost approximately $6.7 million.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044. Comments should refer to *United States* v. *Martin Marietta Corporation and Commonwealth Aluminum Corporation*, D.J. Ref. 90-11-2-410.

The proposed Consent Decree may be examined at the Office of the United States Attorney, District of Oregon, 312 U.S. Courthouse, 620 SW. Main Street, Portland, Oregon 97205, and at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1732(R), Ninth Street and Pennsylvania Avenue NW., Washington, DC 20004. A copy 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 of the decree, please enclose a check for copying costs in the amount of

$4.80 payable to Treasurer of the United States.

Donald A. Carr,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-16766 Filed 7-17-89; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

Pursuant to the National Cooperative Research Act of 1984—PDES 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"), PDES Inc. ("PDES") on June 27, 1989 has filed an additional written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing changes to its membership. The additional written notification was filed for the purpose of extending the protections of Section 4 of the Act, which limit the recovery of antitrust plaintiffs to actual damages under specified circumstances.

On September 20, 1988, PDES filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on October 14, 1988 (53 FR 40282). On February 16, 1989, PDES filed an additional written notification. The Department published a notice in response to the additional notification on March 21, 1989 (54 Fed. Reg. 11580).

PDES, with the addition of General Motors Corporation, Honeywell, Inc., Newport News Shipbuilding & Drydock Company, and Westinghouse Electric Corporation, consists of the following firms: The Boeing Company; Computervision Corporation; Digital Equipment Corporation; FMC Corporation; General Dynamics Corporation; General Electric Company; General Motors Corporation; Grumman Corporation; Honeywell, Inc.; International Business Machine Corporation; Lockheed Corporation; LTV Aerospace and Defense Company; Martin Marietta Corporation; McDonnell Douglas Corporation; Newport News Shipbuilding & Drydock Company; Northrop Corporation; Rockwell International Corporation, and Westinghouse Electric Corporation.

The nature and objectives of PDES are not affected by the additional Notification.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 89-16763 Filed 7-17-89; 8:45 am]

BILLING CODE 4410-01-M

Drug Enforcement Administration

[Docket No. 88-73]

Liberty Discount Drugs, Inc. Revocation of Registration

On July 22, 1988, the Deputy Assistant Administrator, Office of Diversion Control of the Drug Enforcement Administration (DEA), issued an Order to Show Cause to Liberty Discount Drug, Inc. (Respondent), proposing to revoke DEA Certificate of Registration, BL0809523, and to deny any pending applications for renewal of that registration. The Order alleged that the pharmacy's continued registration was inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). Specifically, the Order to Show Cause stated that from November 1986 to May 1987, Respondent had dispensed excessive quantities of Schedule V codeine-based cough preparations and that such dispensing violated 21 CFR 1306.32(b).

Respondent, through counsel, filed a request for a hearing which was held on January 10, 1989, in Ann Arbor, Michigan, before Administrative Law Judge Mary Ellen Bittner. Judge Bittner issued her recommended ruling on April 11, 1989. Thereafter, the entire file was transmitted to the office of the Adminstrator for a final decision. Having reviewed the evidence and Judge Bittner's recommendation, the Administrator makes the following findings.

Respondent is a retail pharmacy located in Detroit, Michigan. George Esho, R.Ph., worked in the pharmacy as a pharmacist since November 1, 1986 and became the sole owner of the pharmacy on March 26, 1987. The Detroit office of the DEA received a suspicious purchase report that Respondent was purchasing between 72 and 144 four-ounce bottles of Schedule V codeine-based cough syrup once or twice a month. According to the Michigan Board of Pharmacy, the average pharmacy in Michigan dispenses an average of 14 four-ounce bottles per month.

On June 2, 1987, DEA Investigators conducted an audit of Respondent pursuant to an administrative inspection warrant. The audit comprised a period from November 1986 to May 1987. Respondent's total monthly sales of four-ounce bottles of Schedule V cough preparations during the audit period were as follows: November 1986—187 bottles, December 1986—266 bottles, January 1987—287 bottles, February 1987—336 bottles, March 1987—432 bottles, April 1987—446 bottles, May 1987—434 bottles. Respondent charged customers approximately $6.50 to $7.00 per bottle.

Three log books, containing the names and addresses of those individuals who received the cough syrup and the dates on which it was dispensed, were seized by the DEA during the regulatory inspection. Nineteen individuals were selected for profiling.

Three individuals with the last name of Mrozowski bought a combined total of 95 four-ounce bottles from Respondent during the seven-month audit period. On seven occasions, all three Mrozowskis, two of whom listed the same address, purchased cough syrup on the same day. On seven other occasions, two of the Mrozowskis purchased cough syrup on the same day. One purchased cough syrup on consecutive days of May 6 and 7 and May 26 and 27, 1987. Mr. Esho initialed the pharmacy's Schedule V log book as the dispenser of these purchases.

Al Dozak purchased 47 bottles of cough syrup from Respondent during the audit period using two different addresses. Mr. Dozak purchased cough syrup every three to four days from December 1986 to March 1987, and increased the frequency of his purchases in April and May 1987. He also made purchases on consecutive days of December 29 and 30, 1986 and April 15 and 16, 1987. Mr. Esho initialed the log book as the dispenser for the April purchases.

E.P. Reyes purchased a total of 37 bottles of cough syrup during the audit period. From January 1, 1987 to February 28, 1987, Mr. Reyes purchased 10 bottles of cough syrup. Eight of the ten were dispensed by Mr. Esho. From March 1, 1987 to May 31, 1987, Mr. Reyes bought 25 bottles of cough syrup, making a purchase approximately every three days.

Keith Sizemore and C. Sizemore, listing the same address, purchased a total of 71 bottles during the audit period. On eight occasions, they purchased cough syrup on the same day, and on 14 different occasions, they alternated their dates of purchases, i.e., one individual would buy on one day, and the other would buy on the following day.

Chico, Sally and James Silva, all using the same address, purchasd a total of 37 bottles during the last three months of the audit period. The family made these purchases on a regular basis, and on two separate occasions, Chico and Sally Silva made purchases on the same day. Dan and Ron Buda, both using the same address, purchased a combined total of 105 bottles during the audit

period, buying the medication every three to four days. On 15 occasions, they purchased cough syrup on the same day, and on 25 occasions, they alternated their dates of purchase.

The Administrator may revoke a DEA Certificate of Registration and deny an application for such registration if he determines that the continued registration of the registrant would be inconsistent with the public interest. 21 U.S.C. 823 (f) and 824(a)(4). Under 21 U.S.C. 823(f)(5), it is clear that not only can the Administrator consider violations of the law but also any "conduct which may threaten the public health and safety." There is no question that the pharmacy violated 21 CFR 1306.32(b) when it dispensed more than four ounces of codeine-based cough syrup in less than 48 hours to the same individual.

Respondent contends, however, that he did not violate any other law because 21 CFR 1306.32(b) exempts the dispensing of Schedule V cough syrup from the requirements of a prescription and, since only prescriptions must be issued for a valid medical purpose, a pharmacist may dispense as much cough syrup as he likes as long as he does not violate 21 CFR 1306.32(b).

Respondent's argument is without merit and the Administrator rejects this tortured interpretation of DEA's regulations. Title 21, United States Code, section 829(c) provides that "[n]o controlled substance in Schedule V which is a drug may be distributed or dispensed other than for a medical purpose." Since the entire transaction with respect to a non-prescription Schedule V drug involves only the dispensing pharmacist and the ultimate user, or patient, the pharmacist must bear sole responsibility to assure that the drug is being dispensed for a legitimate medical purpose. The Administrator does not posit that the pharmacist must examine a patient or even question him closely regarding his medical condition. However, the pharmacist may not close his eyes to obvious abuse, ignoring the fact that his clientele are purchasing far more medication that would be necessary for legitimate medical purposes. When controlled substances, even those in Schedule V, are dispensed pursuant to a prescription, the law and regulations place corresponding responsibility on both the prescribing practitioner and the dispensing pharmacist. 21 CFR 1306.04(a). When prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid positive knowledge of the real purpose of the prescriptions, thereafter filling them with impunity. See *United States* v. *Kersham*, 555 F.2d 198 (8th Cir. 1977); *United States* v. *Hayes*, 595 F.2d 258 (5th Cir. 1979). Where, as in this case, there is no prescriber, but only a dispenser, the law still requires the exercise of common sense and professional judgment. The Administrator will not permit a pharmacist to abdicate his professional and legal responsibilities merely because a drug is dispensed without a prescription. To do so would make a mockery of the controls inherent in the controlled substance regulatory scheme.

The Administrator finds that from the pattern of dispensing in this case, Respondent knew or should have known that the cough syrup he dispensed was being obtained for other than legitimate medical purposes. It is apparent, even to those with no pharmacology training, that alternating purchases by family members is a ruse to obtain more cough syrup than is allowed under 21 CFR 1306.32(b). Likewise, same day purchases by multiple family members and frequent, regular purchases over a long period, are clear signs of dispensing for other than legitimate medical purposes.

The Administrator finds that the pattern of dispensing in this case is conduct which threatens the public health and safety. The average amounts of cough syrup dispensed by Respondent show that Respondent exercised little or not restraint or independent judgment in dispensing these drugs. Mr. Esho testified that it was "not his job" to guard against the type of purchases described above, and that the law gave his customers the "right" to make these purchases. It thus appears that Mr. Esho is unwilling to make diligent efforst to insure that controlled substances are dispensed from his pharmacy only for legitimate medical purposes. Respondent's continued registration would be contrary to the public interest and his Certificate of Registration must be revoked.

Accordingly, having concluded that there are lawful bases for the revocation of the Respondents's registration and for the denial of any pending applications for renewal thereof, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration, BL0809523, previously issued to Liberty Discount Drug, Inc,. be, and it hereby is, revoked. The Administrator further orders that any pending applications for renewal of that registration be, and they hereby are, denied.

The order is effective August 17, 1989.

John C. Lawn,

Administrator.

Dated: June 29, 1989.

[FR Doc. 89-16706 Filed 7-17-89; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 88-71]

David W. Warren, D.O., Kansas City, Missouri; Hearing

Notice is hereby given that on July 13, 1988, the Drug Enforcement Administration, Department of Justice, issued to David W. Warren, D.O., an Order to Show Cause as to why the Drug Enforcement Administration should not deny your application for registration.

Thirty days have elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Wednesday, July 12, 1989, commencing at 9:30 a.m., at the Jackson County Courthouse, 415 East 12 Street, Division 7 Courtroom, Kansas City, Missouri.

Dated: July 6, 1989.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 89-16705 Filed 7-17-89; 8:45 am]

BILLING CODE 4410-09-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Humanities Panel; Meeting

AGENCY: National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, as amended), notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Stephen J. McCleary, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone 202/786-0322.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation

and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. Because the proposed meetings will consider information that is likely to disclose: (1) Trade secrets and commercial or financial information obtained from a person and privileged or confidential; (2) information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or (3) information the disclosure of which would significantly frustrate implementation of proposed agency action, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated January 15, 1978, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), (6) and (9)(B) of section 55b of Title 5, United States Code.

1. *Date:* August 1, 1989.
Time: 8:30 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review Fellowships for University Teachers applications in Religious Studies, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January 1990.

2. *Date:* August 2, 1989.
Time: 8:30 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review Fellowships for University Teachers applications in Philosopy, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

3. *Date:* August 2, 1989.
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2.
Program: This meeting will review Fellowships for University Teachers applications in British Literature I, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

4. *Date:* August 3, 1989.
Time: 8:30 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review Fellowships for University Teachers applications in Comparative Literature: Germanic, Slavic, Oriental languages and Literatures; and Literary Theory and Criticism, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1989.

5. *Date:* August 3–4, 1989.
Time: 8:30 a.m. to 5:00 p.m.
Room: 415.
Program: This meeting will review applications for the Humanities Projects in Museums and Historical Organizations program, submitted to the Division of General Programs, projects beginning after October 1, 1989.

6. *Date:* August 4, 1989.
Time: 8:30 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review Fellowships for University Teachers applications in Political Science, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January 1990.

7. *Date:* August 4, 1989.
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2.
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in Political Science, Law, and Economics, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January 1990.

8. *Date:* August 7, 1989.
Time: 8:30 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review Fellowships for University Teachers and Fellowships for College Teachers and Independent Scholars applications in Music and Dance History and Criticism, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January 1990.

9. *Date:* August 7, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in Philosophy, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January 1990.

10. *Date:* August 8, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 315
Program: This meeting will review Fellowships for University Teachers applications in European History, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January 1990.

11. *Date:* August 8, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 415
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in Foreign Languages I: French and Spanish, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January 1990.

12. *Date:* August 8, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in European History, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January 1990.

13. *Date:* August 25, 1989
Time: 9:00 a.m. to 5:30 p.m.
Room: 430
Program: This meeting will review applications to Humanities Projects in Libraries and Archives program, submitted to the Division of General Programs, for projects beginning after January 1990.

14. *Date:* August 14, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 415
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in American History II, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

15. *Date:* August 14, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in American History I, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

16. *Date:* August 14, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 315
Program: This meeting will review Fellowships for University Teachers and Fellowships for College Teachers and Independent Scholars applications in Latin American and Non-Western History, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

17. *Date:* August 15, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in Religious Studies, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

18. *Date:* August 15, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 315
Program: This meeting will review Fellowships for University Teachers applications in Art History and Criticism, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

19. *Date:* August 15, 1989.
time: 8:30 a.m. to 5:30 p.m.
Room: 415

Program: This meeting will review Fellowships for University Teachers appliations in American History I, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

20. *Date:* August 16, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in Sociology, Anthropology, Psychology, and Education, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

21. *Date:* August 16, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 315
Program: This meeting will review Fellowships for University Teachers applications in Romance and Classical Languages and Literatures, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

22. *Date:* August 16, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 415
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in American Studies, Theater, and Communications, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

23. *Date:* August 17, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in American Literature, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

24. *Date:* August 17, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 315
Program: This meeting will review Fellowships for University Teachers applications in American Literature and Studies; and film, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

25. *Date:* August 18, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 315
Program: This meeting will review Fellowships for University Teachers applications in American History II, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

26. *Date:* August 18, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 415
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in British Literature, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

27. *Date:* August 18, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in Linguistics and Foreign Languages II: Classical, Italian, German, Slavic, and Oriental Languages, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

28. *Date:* August 21, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for College Teachers and Independent Scholars applications in Art History, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

29. *Date:* August 21, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 315
Program: This meeting will review Fellowships for University Teachers applications in Sociology, Anthropology, Archaeology, and Psychology, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

30. *Date:* August 21, 1989
Time: 8:30 a.m. to 5:30 p.m.
Room: 316–2
Program: This meeting will review Fellowships for University Teachers applications in British Literature II; Theatre History; and Linguistics, submitted to the Division of Fellowships and Seminars Programs, for projects beginning after January, 1990.

Stephen J. McCleary,
Advisory Committee, Management Officer.

[FR Doc. 89–16716 Filed 7–17–89; 8:45 am]
BILLING CODE 7536-01-M

NATIONAL SCIENCE FOUNDATION

Compliance With Environmental Law in Antarctica

AGENCY: National Science Foundation.
ACTION: Notice of report availability.

SUMMARY: Notice is hereby given that a draft report, "A National Science Foundation Strategy for Compliance with Environmental Law in Antarctica", is available to the public for review and comment.

DATE: Comments on the draft report should be received by the Office of General Counsel, National Science Foundation, no later than Friday, August 25, 1989.

ADDRESS: Copies of the draft report may be obtained at the following address: Robert M. Andersen, Deputy General Counsel, Office of General Counsel, Rm. 501, National Science Foundation, 1800 G Street NW., Washington, DC 20585, ATTN: Report Request. Requests for copies (limit of 1) may also be sent to the above address, or requested by telephone at (202) 357–9435.

SUPPLEMENTARY INFORMATION:

The Office of General Counsel, National Science Foundation (NSF), recently completed a draft report entitled "A National Science Foundation Strategy for Compliance with Environmental Law in Antarctica". The report (1) determines which environmental laws apply to Antarctic activities, (2) applies applicable laws to United States Antarctic Program operations to determine if NSF is in compliance, and (3) develops recommendations designed to bring NSF into full compliance with applicable laws and sound principles of pollution control, wildlife conservation, and waste management.

This review was done at the request of the Director of NSF, and pursuant to the Division of Polar Program's Environmental Protection Agenda, which recognized the need to conduct a comprehensive analysis of environmental laws and their applicability to the United States Antarctic Program, as managed and operated by NSF.

The public is invited to review the draft report, and submit written comments to the Office of General Counsel. All comments must be received no later than Friday, August 25, 1989. Timely comments will be considered prior to the issuance of a final report.

(National Science Foundation Act of 1950, 42 U.S.C. 1861, 1870)

Robert M. Andersen,
Deputy General Counsel.

[FR Doc. 89–16734 Filed 7–17–89; 8:45 am]
BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 030-05980 et al.; ASLBP No. 89-590-01-OM]

Safety Light Corp., et al.; (Byproduct Material License No. 37-00030-02 et al.); Order

July 12, 1989.

Before Administrative Judges: Helen H. Hoyt, Chair, Oscar H. Paris, Frederick J. Shon.

1. A prehearing conference is scheduled for 2:00 p.m. EDT August 3, 1989 at the offices of the Board, 4350 East-West Highway, Bethesda, Maryland 20814, in the hearing room on the 5th floor.

2. Parties should be prepared to frame the issues and discuss schedules for future hearings.

3. Written appearance of counsel representing participating parties will be filed prior to August 3, 1989.

For The Atomic Safety and Licensing Board.

Helen F. Hoyt,

Chair, Administrative Judge.

[FR Doc. 89-16793 Filed 7-17-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-456 and 50-457]

Commonwealth Edison Co.; Issuance of Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. NPF-72 and NPF-77 issued to Commonwealth Edison Company (the licensee), for operation of Braidwood Station, Units 1 and 2, located in Will County, Illinois.

Identification of Proposed Action

The amendment would consist of changes to the Technical Specifications (TS) and would authorize an increase of the storage capacity of the spent fuel pool from 1060 fuel assemblies to 2870 fuel assemblies.

The amendment to the TS is responsive to the licensee's application dated January 3, 1989 as supplemented January 24, and February 10, 1989. The NRC staff has prepared an Environmental Assessment of the Proposed Action, "Environmental Assessment by the Office of Nuclear Reactor Regulation Relating to the Expansion of the Spent Fuel Pool, Facility Operating License Nos. NPF-72 and NPF-77, Commonwealth Edison Company, Braidwood Station, Units 1 and 2, Docket Nos. 50-456 and 50-457, dated July 13, 1989.

Summary of Environmental Assessment

The "Final Generic Environmental Impact Statement (FGEIS) on Handling and Storage of Spent Light Water Power Reactor Fuel" (NUREG-0575), Volumes 1-3, (1979), concluded that the environmental impact of interim storage of spent fuel was negligible and the cost of the various alternatives reflects the advantage of continued generation of nuclear power with the accompanying spent fuel storage. Because of the differences in design, the FGEIS recommended evaluating spent fuel pool expansions on a case-by-case basis.

For Braidwood Station, Units 1 and 2, the expansion of the storage capacity of the spent fuel pool will not create any significant additional radiological effects or non-radiological environmental impacts beyond those assessed in the Commission's Final Environmental Statement related to operation of Braidwood Station, Units 1 and 2, NUREG-1026, June 1984.

The occupational radiation dose for the proposed operation of the expended spent fuel pool is estimated to be less than one percent of the total annual occupational radiation exposure for this facility.

Finding of No Significant Impact

The staff has reviewed the proposed spent fuel pool expansion to the facility relative to the requirements set forth in 10 CFR Part 51. Based on this assessment, the staff concludes that there are no significant radiological or non-radiological impacts associated with the proposed action and that the issuance of the proposed amendment to the license will have no significant impact on the quality of the human environment. Therefore, pursuant to 10 CFR 51.31, no environmental impact statement needs to be prepared for this action.

For further details with respect to this action, see (10 the application for amendment to the Technical Specifications dated January 3, 1989 as supplemented January 24, and February 10, 1989; (2) the FGEIS on Handling and Storage of Spent Light Water Power Reactor Fuel (NUREG-0575), (3) the Final Envorinmental Statement for Braidwood Station, Units 1 and 2, dated June 1984, and (4) the Environmental Assessment dated July 13, 1989. These documents are available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555 and at the Wilmington Township Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481.

Dated at Rockville, Maryland, this 13th day of July 1989.

For The Nuclear Regulatory Commission.

Paul C. Shemanski,

Acting Director, Project Directorate III-2, Division of Reactor Projects—III, IV, V and Special Projects.

[FR Doc. 89-16780 Filed 7-17-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-259, 50-260 and 50-296]

Tennessee Valley Authority; (Browns Ferry Nuclear Plant, Units 1, 2 and 3); Exemption

I

The Tennessee Valley Authority (TVA or the licensee) is the holder of Operating License Nos. DPR-32, DPR-52 and DPR-69 which authorize operating of Units 1, 2 and 3, respectively. These licenses provide, among other things, that Browns Ferry is subject to all rules, regulations, and Orders of the Commission now or hereafter in effect.

Browns Ferry (BFN), Units 1, 2 and 3 are boiling water reactors (BWR) at the licensee's site located near Decatur, Alabama.

II

10 CFR Part 50.71(e) requires, in part, that licensees shall update periodically the final safety analysis report (FSAR) originally submitted as part of the application for the operating license, to assure that the information in the FSAR contains the latest material developed. Revisions to the original FSAR shall be filed no less frequently than annually and shall reflect all changes up to a maximum of six months prior to the date of filing. This regulation requires the annual updated FSAR (UFSAR) for Browns Ferry to be submitted on July 22, 1989.

III

By letter dated May 23, 1989, the licensee requested a temporary exemption from certain requirements of 10 CFR Part 50.71(e). Specifically, the licensee requested a temporary exemption from the requirements to submit an annual update of the Browns Ferry UFSAR on July 22, 1989. A revised UFSAR would be submitted on July 22, 1990.

Deficiencies regarding the accuracy of the Browns Ferry UFSAR were identified by the licensee through the Employee Concerns Program. The last updated UFSAR was provided to the staff by letter dated July 19, 1988.

Corrective actions have been implemented which include establishing improved controls for maintaining an accurate UFSAR and performance of a program to review relevant documentation to update and verify the UFSAR. The licensee has recently implemented a new UFSAR update program that provides a corporate standard and site procedures necessary to coordinate the updating of the UFSAR with the responsible organizations. A verification program has also been initiated. This UFSAR verification program will utilize the output of the Design Baseline and Verification Program (DBVP) to ensure that the UFSAR is consistent with the latest as-configured drawings and design changes, as well as the existing Technical Specifications, fuel load analysis, and current administrative and operational programs.

TVA has updated the Browns Ferry UFSAR annually for the past six years. With the many design modifications currently underway to support Unit 2 restart, an update in July 1989 would not reflect the Unit 2 configuration relative to the time of its projected start-up (currently projected for late 1989). Units 1 and 3 are currently defueled and will not be restarted until after the next annual updated UFSAR of July 1, 1990. In order to ensure that users of the UFSAR have available the latest information which could affect the UFSAR (e.g., 10 CFR 50.59 determinations, Engineering Change Notices and Design Change Notices), the licensee has put in place programs and procedures to maintain a 10 CFR 50.59 library and a file on UFSAR changes. These compensatory measures should assist UFSAR users by providing the latest information concerning any part of the UFSAR. As part of the licensee's DBVP program, operation personnel are being provided with up-to-date configuration drawings which are utilized in the control room as source material. Therefore, the requested temporary exemption will not affect plant operation and safety.

The staff has concluded that the requested temporary exemption is administrative in nature and would not affect plant equipment, operations or procedures.

The Commission has determined that special circumstances, as provided in 10 CFR 50.12(a)(2)(v), are present justifying the exemption, namely; that the exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation.

This exemption would provide Browns Ferry with only temporary relief from compliance with the annual UFSAR update. The licensee is making good faith efforts to comply with the intent of the regulation which is to ensure a complete, updated and a single integral document (UFSAR) on file for each power reactor license. TVA's verification/update program is indicative of their recognition of problems with the updated UFSAR process and their good faith efforts to correct these problems.

IV

Accordingly, the Commission has determined, pursuant to 10 CFR Part 50.12, that (1) this temporary exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security, and (2) in this case, special circumstances are present as described in section II.

In light of this determination and as reflected in the Environmental Assessment and Notice of Finding of No Significant Environmental Impact prepared pursuant to 10 CFR 51.21 and 51.32 (July 6, 1989) (54 FR 28523), it is determined that the intended action will have no significant impact on the environment.

A copy of the licensee's request for exemption dated May 23, 1989 related to this action is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, and at the Local Public Document Room located at Athens Public Library, South Street, Athens, Alabama 35611.

This Exemption is effective upon issuance.

Dated at Rockville, Maryland this 7th day of July 1989.

For The Nuclear Regulatory Commission.

B.D. Liaw,

Director, TVA Projects Division, Office of Nuclear Reactor Regulation.

[FR Doc. 89-16781 Filed 7-17-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-443-OL; 50-444-OL (Offsite Emergency Planning Issues)]

Atomic Safety and Licensing Appeal Board; Public Service Co. of New Hampshire, et al.; (Seabrook Station, Units 1 and 2); Oral Argument

Notice is hereby given that, in accordance with the Appeal Board's order of July 11, 1989, oral argument on the appeals of the Attorney General of Massachusetts, the Seacoast Anti-Pollution League, the New England Coalition on Nuclear Pollution, and the Town of Hampton from the Licensing Board's December 30, 1988, initial decision on the New Hampshire Radiological Emergency Response Plan, LBP-88-32, 28 NRC 667 (1988), will be heard at *10:00 a.m. on Thursday, July 27, 1989, in the NRC Public Hearing Room, Fifth Floor, East-West Towers Building, 4350 East-West Highway, Bethesda, Maryland.*

For the Appeal Board.

Barbara A. Tompkins,

Secretary to the Appeal Board.

Dated: July 11, 1989.

[FR Doc. 89-16708 Filed 7-17-89; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF PERSONNEL MANAGEMENT

Proposed Extension of OPM Form 1164 Submitted to OMB for Clearance

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S.C. chapter 35), this notice announces a proposed extension of the use of a form which collects information from the public. OPM Form 1164, Qualifications Inquiry for Testing Personnel, is completed by former employers of candidates being considered for positions as OPM test examiners. OPM uses the information to evaluate the trustworthiness and integrity of candidates being considered for these positions, thus supplementing a National Agency Check and Inquiry (NACI) and satisfying the special needs of this program. This form takes approximately 15 minutes to complete and is submitted by 3,600 persons per year for an annual public burden of 900 hours. For copies of this proposal, call Grace Butler on (202) 632-0259.

DATE: Comments on this proposal should be received within 10 working days from the date of this publication.

ADDRESSES: Send or deliver comments to—

C. Ronald Trueworthy, Agency Clearance Officer, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6410, Washington, DC 20415.

and

Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW, Room 3235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: James E. Coyle, (202) 653–5914, U.S. Office of Personnel Management.

Constance B. Newman,

Director.

[FR Doc. 89–16751 Filed 7–17–89; 8:45 am]

BILLING CODE 6325–01–M

Request for Approval of Form RI 25–7 Certification of Marital Status Submitted to OMB for Clearance

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces a request to extend an information collection from the public. Section 8341, title 5, U.S. Code permits payments of an annuity to the spouse or former spouse of a deceased employee or retiree provided the survivor is otherwise eligible and does not remarry before reaching age 55. Widows, widowers, and former spouses complete and submit Form 25–7, Certification of Marital Status, to verify that they have not remarried and thereby remain eligible to receive survivor annuity benefits. OPM conducts the survey only as needed. Approximately 50,000 survivors under age 55 are sent a certification of Marital Status form. OPM estimates that each form requires approximately 6 minutes to complete, for total burden of 5,000 hours. For copies of this proposal, call Larry Dambrose, Agency Clearance Officer, on (202) 632–0199.

DATES: Comments on this proposal should be received within 10 working days from the date of this publication.

ADDRESSES: Send or deliver comments to—

C. Ronald Trueworthy, Agency Clearance Officer, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6410, Washington, DC 20415.

and

Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 3235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mary Beth Smith, (202) 632–5472. U.S. Office of Personnel Management.

Constance B. Newman,

Director.

[FR Doc. 89–16752 Filed 7–17–89; 8:45 am]

BILLING CODE 6325–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–27015; File No. SR–PSE–89–18]

Self-Regulatory Organizations; Immediate Effectiveness of Proposed Rule Change by the Pacific Stock Exchange, Inc. Relating to the Waiver of Transaction and Order Book Charges for Trades

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on July 3, 1989, the Pacific Stock Exchange, Inc. ("PSE" or the "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Item 1. Text of the Proposed Rule Change

Pursuant to the Schedule of Rates and Charges published by the PSE the Exchange will waive the transaction fees for any customer firm, and all Order Book charges, for trades executed in Micron Technology, Inc., a dually listed option. These charges will be waived from July 3, 1989 through January 19, 1990.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rules Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B) and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement on the Purpose of, and Statutory Basis for the Proposed Rule Change

The waiver of Order Book and transaction charges in Micron Technology, Inc., is a competitive response to Securities and Exchange Act Release No. 34–22026,[1] which permits the multiple trading of OTC options. Although the Exchange believes that its Market Makers provide excellent markets in this option, the Exchange deems a waiver of certain fees necessary to remain competitive with other option exchanges. This waiver of Order Book and transaction fees will encourage trading decisions on the basis of the strength of the marketplace.

The proposed rule change is consistent with section 6(b)(5) of the Securities Exchange Act of 1934, in that it will increase competition and the quality of markets.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes a burden on competition.

(C) Self-Regulatory Organization's Statement of Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3) of the Securities Exchange Act of 1934 and subparagraph (e) of Securities Exchange Act Rule 19b–4. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the

[1] 50 FR 20310 (May 15, 1985).

Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 8, 1989.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

Dated: July 10, 1989.

[FR Doc. 89-16727 Filed 7-17-89; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-27014; File No PHLX 89-37]

Self-Regulatory Organizations; Proposed Rule Change By the Philadelphia Stock Exchange, Inc. Relating to Half Point Strike Prices

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on June 26, 1989, the Philadelphia Stock Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substances of Proposed Rule Change

The Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange"), pursuant to Rule 19b-4, hereby proposes to adopt a pilot program pursuant to Exchange Rule 1012(a)(ii) to provide for the addition of half point (.005) strike price intervals for the Deutsche Mark, (CFM/XDM), Japanese Yen (CJY/XJY) and Swiss Franc (CSF/XSF) currency options. The pilot program would be applicable to as many as the first three (3) expiration cycles and as many as the nearest four half point strike price intervals to the currency spot market *i.e.*, two (2) above and two (2) below spot.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statements of the Purpose of, and Statutory Basis for the Proposed Rule Change

The purpose of the pilot program is to provide additional options series at half point exercise prices, two (2) above and two (2) below spot in the three nearest term expiration cycles. By providing these additional options series in both American and European style foreign currency options the PHLX hopes to provide foreign currency options market participants with competitive alternative products to the other foreign currency markets particularly the over-the-counter options market and the forward market.

The proposed rule change is based on section 6(b)(5) of the Securities Exchange Act of 1934 in that it is designed to further promote the mechanism of a free and open market and to protect investors and the public interest.

B. Self-Regulatory Organizations Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days or such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or,

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organizations. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days after the date of this publication].

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

Dated: July 10, 1989.

[FR Doc. 89-16728 Filed 7-17-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17059; 812-7178]

IDS Financial Corporation, et al., Application To Amend a Prior Order

July 10, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("1940 Act").

Applicants: IDS Financial Corporation ("IDS") IDS Financial Services Inc. ("IDSFS"), IDS Bond Fund, Inc., IDS Cash Management Fund, Inc., IDS Discovery Fund, Inc., IDS Equity Plus Fund, Inc., IDS Extra Income Fund, Inc., IDS Federal Income Fund, Inc., IDS Global Bond Fund, Inc., IDS Growth Fund, Inc., IDS International Fund, Inc., IDS Managed Retirement Fund, Inc., IDS Mutual, Inc., IDS New Dimensions Fund, Inc., IDS Precious Metals Fund, Inc., IDS Progressive Fund, Inc., IDS Selective Fund, Inc., IDS Stock Fund, Inc., IDS Strategy Fund, Inc., IDS Utilities Income Fund, Inc. (individually a "Fund" and collectively the "Funds") and any other fund that may in the future be advised

or distributed by IDS or IDSFS (collectively the "Applicants").

Relevant 1940 Act Sections: Amended exemptive order requested under Section 6(c) exempting Applicants from the provisions of section 2(a)(32), 2(a)(35), 22(c), 22(d) and Rule 22c–1.

Summary of Application: Applicants seek an order, pursuant to section 6(c) of the 1940 Act, amending a prior order (Investment Company Act Release No. 13974, May 31, 1984, the "Prior Order"). The amended order would exempt Applicants from sections 2(a)(32), 2(a)(35), 22(c) and 22(d) of the 1940 Act and Rule 22c–1 thereunder to the extent necessary (i) to permit the Funds to assess and, in certain circumstances, to waive a deferred sales load and (ii) to permit Strategy Fund to waive a contingent deferred sales load ("CDSL") under certain circumstances in addition to those allowed by the Prior Order.

Filing Dates: The application was filed on November 18, 1988 and amended on May 8, 1989, May 23, 1989, and July 5, 1989.

Hearing or Notification of Hearing: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing request should be received by the SEC by 5:30 p.m. on August 3, 1989, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature or the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

FOR FURTHER INFORMATION CONTACT: Barbara Chretien-Dar, Staff Attorney, at (202) 272–3022, or Stephanie M. Monaco, Branch Chief, at (202) 272–3030.

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231–3282 (in Maryland (301) 258–4300).

Applicants' Representations

1. The Funds are open-end management investment companies registered under the 1940 Act. IDS Financial Corporation acts as investment adviser to the Funds and IDS Financial Services Inc. acts as distributor.

2. The Prior Order permits Strategy Fund to assess a contingent deferred sales load ("CDSL") on redemptions of its shares. The CDSL is waived with respect to redemptions (a) following the death of a shareholder, and (2) from an Individual Retirement Account or other tax-qualified retirement plan. The Prior Order also permits certain exchanges of shares among the Funds on a basis other than their net asset value per share at the time of exchange.

3. Applicants now seek an amendment to the Prior Order to permit the Strategy Fund to waive the CDSL, in addition to those waivers already permitted under the Prior Order, for any redemption made by: (a) A director, officer or employee of the Fund, IDS or its subsidiaries or IDS financial planners, (b) participants in an employee payroll deduction program, (c) participants in a qualified employee benefit plan or (d) a trust company, bank trust department or similar institution holding shares in a fiduciary, agency, advisory, custodial or similar capacity, subject to minimum requirements.

4. Applicants also seek an amendment to the Prior Order to permit the Funds that charge a front-end sales load (the "FESC Funds") and Cash Management Fund to assess and, in certain circumstances, to waive a deferred sales load. Shares of the FESC Funds are sold with a five percent front-end sales load. Presently the FESC Funds waive the front-end sales load for certain groups, including participants in employee benefits plans qualified under Section 401 of the Internal Revenue Code ("qualified plans") which also meet certain minimum requirements. However Applicants propose to charge these sharesholders and qualified plan participants who are shareholders in the Cash Management Fund a deferred sales load on certain redemptions from the Funds. Applicants contend that if Cash Management Fund had no deferred sales load, investors in the FESC Funds could avoid the deferred sales load by exchanging into Cash Management Fund prior to redeeming their shares. In no event will the deferred sales load exceed four percent of the purchase payments made by the shareholder. The proposed deferred load will decrease to two percent for plans with $1 million or more in assets or 200 or more participants and will be eliminated for plans with $3 million or more in assets or 500 or more participants.

5. Applicants believe that waiver of the front-end sales load will increase sales in the qualified plan market. Applicants do not wish to impose a deferred sales load on all purchases by qualified plan participants, but instead wish to recover distribution costs only when shareholders who have not paid a sales load redeem prior to retirement, in circumstances unrelated to death, disability, loans or hardship withdrawals.

6. Therefore, the proposed deferred sales load will not be assessed (a) on the death or disability of an investor, (b) in connection with lump-sum or other distributions following retirement or attaining age 59½, (c) with respect to loans or hardship withdrawals, or (d) in connection with the combination of any Fund with another investment company by a merger or acquisition of assets.

7. No Fund will be charged with any revenue lost as a result of the proposed waivers.

8. Applicants submit that the deferred sales load, its waiver, and the additional waivers of the CDSL are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provision of the 1940 Act. Applicants believe that the proposal will not harm the Funds or shareholders or unfairly discriminate among shareholders or purchasers.

9. Applicants will implement the deferred sales load and its waiver, and the waiver of the CDSC in a manner consistent with the requirements of Rule 22d–1 applicable to sales loads.

Condition: Applicants state that their proposal will be implemented in accordance with the following condition:

The terms of the deferred sales load and its implementation will comply with Rule 6c–10 as currently proposed and as adopted or modified in the future.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89–16729 Filed 7–17–89; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–27020; File No. SR–GSCC–89–8]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by Government Securities Clearing Corp.; Relating to the Fee Structure for Government Securities Clearing Corporation ("GSCC")

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on June 26, 1989 GSCC filed with the Securities and Exchange Commission the proposed rule change

as described in Items I, II, and III below, which Items have been prepared by GSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change.

The proposed rule change would modify GSCC's fee schedule as summarized in II.A. below.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, GSCC include statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. GSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organizations's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change.

(a) The purpose of the proposed rule change is to establish a fee and charge schedule for use of GSCC's netting service. A fee of $1.00 per side that goes into the net is established as the basic netting fee. This fee will be used to cover GSCC's expenses associated with the provision of neeting services. As an incentive for Netting Members to commence netting as early as possible, a discount of 50 cents per side will be offered during the interim period from the start-up of the Netting System until the point in time when GSCC determines that all Treasury Note issues on GSCC's file are eligible for netting.

With regard to the clearance and financing charges that will be incurred by GSCC, which charges will be passed through to its Netting Members, in order to provide an incentive for Inter-Dealer Broker Netting Members to submit, for comparison and netting, data on all of thier trades with other Netting Members, and in recognition of the fact that such Members, by virtue of the nature of their business, will pay a high proportion of the netting fees charged to Netting Members, no clearance or financing charges will be passed through to Inter-Dealer Broker Netting Members. GSCC's clearance and financing charges will be distributed among its other Netting Members, pro rata based on the dollar value of a Member's settlements in a particular product. GSCC believes that this allocation of clearance and financing costs is appropriate, as this method fairly reflects the level of a Member's netted trading activity and provides the most benefits to those Members with the highest netting factor and, thus, its use of the Netting System. Notwithstanding the above, as provided for in GSCC's proposed rules, if, after providing a Netting Member appropriate notice and opportunity to be heard, the Board determines that such Netting Member has, on a recurring basis and without good cause, caused GSCC to incur financing costs, such Member will be obligated to pay for the entire amount of any financing costs incurred by GSCC as the result of deliveries by such Member to GSCC.

Finally, the cost of substitutions and withdrawals of a Netting Member's Clearing Fund or other collateral in custody, which are expected to be minimal, will be passed through directly to such Netting Member.

The GSCC Board of Directors approved the above changes to the GSCC fee schedule with the understanding that the various fees and charges related to netting would be comprehensively reviewed by the Board within 3 months after the commencement of the Netting System.

(b) For the reasons provided in paragraph (a) above of this section, the proposed rule change provides for an equitable allocation of fees and charges and is, therefore, consistent with the requirements of the Securities Exchange Act of 1934, as amended (the "Act") and the rules and regulations thereunder applicable to a self-regulatory organization.

B. Self-Regulatory Organization's Statement on Burden on Competition

GSCC does not believe that the proposed rule will have an impact on, or impose a burden on, competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Comments on the proposed rule change have not been solicited or received. Members will be notified of the rule filing, and comments will be solicited, by an Important Notice. GSCC will notify the Securities and Exchange Commission of any written comments received by GSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective, pursuant to Section 19(b)(3)(A) of the Securities Exchange Act of 1934 and subparagraph (e) of Securities Exchange Act Rule 19b-4. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 8, 1989.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

Dated: July 11, 1989.

[FR Doc. 89-16775 Filed 7-17-89; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-27021; File No. SR-NSCC-89-8]

Proposed Rule Change by National Securities Clearing Corp.; Processing of Basket Trades

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on June 7, 1989 NSCC filed with the

Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would modify NSCC's Rules and Procedures as summarized in II.A. below.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. *Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change.*

(a) The purpose of the proposed rule filing is to amend NSCC's rules to provide for the processing of Basket Trades. Basket Trades are being defined by NSCC as trades in a group of securities that an exchange or market place Self-Regulatory Organization has designated as eligible for execution in a single trade.

The proposed rule will permit NSCC to accept from an exchange or market place Self-Regulatory Organization locked in Basket Trade data. On T+1, NSCC will report the compared Basket Trades to Members on a Basket Trade Settlement Detail Report. Basket Trades will be netted by NSCC so that a Member will be either a net buyer or net seller for each Basket. The exchange or market place Self-Regulatory Organizations will provide NSCC with the component details for each Basket. After netting the trades, NSCC will separate the netted result into the individual stock components. These will also be reported on the Basket Trade Settlement Detail Report. The rule provides NSCC with the ability to accept adjustment data relating to the Basket Trade prices or component parts from the exchange or market place Self-Regulatory Organization. All adjustment data will be reported to Members on the next issued Basket Trade Settlement Detail Report. If an adjustment made by the Corporation on T+4 or thereafter causes a change in the quantity of securities to be received or delivered or value received or paid, such revised quantity or value will settle two business days later.

Trading of Baskets, with settlement of component parts, will cause the Corporation to make a cash adjustment in order to provide Members with the appropriate value of the Basket Trades. In order to do so, the Corporation will assign a settlement price (the then current NSCC system price) to each component security after netting of the Basket Trades. The number of shares in each component will be multiplied by the settlement price to arrive at the settlement value for each component security. The aggregate settlement value (of all component securities) will be used to create the money adjustment, which is the difference between the net contract money value (of the net Basket Trades) and the aggregate settlement value. This money adjustment will be separately reflected on the Members' settlement statements.

The component securities will either be CNS eligible or processed as Balance Order Securities. They will be reflected on the appropriate CNS or non-CNS Compared Trade Summary and, except as noted below, netted with all other transactions in the same security and entered into the CNS or Balance Order Accounting Operation for settlement on T+5. If an adjustment is made on T+4 or later to a Balance Order security, it will result in the production of a trade-for-trade ticket between the original contracting parties to the Basket Trade.

Permitting NSCC to process Basket Trades will not affect NSCC's operation since trading in the underlying components is currently processed by NSCC. Processing of Basket Trades will result in one trade being received by NSCC, which in turn is broken down into components, rather than the components being separately received.

NSCC intends to implement Basket processing concurrent with the NYSE's implementation of Basket Trading. Certain operational features which are still being developed, may not be available initially. NSCC may not net Basket Trades prior to separating them into the component securities. Thus, Members may see on the Basket Trade Settlement Detail Report both obligations to receive and deliver the same security if they executed Basket purchases and sales on the same day. Once the securities are entered into the appropriate accounting operation the positions will be netted, however, causing the Member to be obligated to receive or deliver one net position in each security. In addition, the Trade Summaries may not have separate indicators to differentiate securities to be received or delivered resulting from Basket Trading. Also, the cash adjustment may not be separately set forth on the settlement statement but may be incorporated with the clearance cash adjustment for Balance Orders. Lastly, NSCC may only issue print reports. As soon as capability permits, NSCC will provide the features discussed above as well as issue reports in machine readable output format.

These enhancements will be phased in as developed.

No determination has been made respecting involvement of specialists in Basket Trades. Accordingly, no determination has been made as to how trades will be reported to specialists who become involved in Basket trading. This filing, therefore, does not indicate the appropriate reporting form.

(b) Since the proposed rule change will facilitate the prompt and accurate clearance and settlement of securities transactions it is consistent with the requirements of the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder applicable to self-regulatory organizations.

B. Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not perceive that the proposed rule change will have an impact or impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments have been solicited or received. NSCC will notify the Commission of any written comments received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and published its reason for so finding or (ii) as to which the Self-Regulatory Organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be approved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change that are filed with Commission, and all written communications relating to the proposed rule change between the Commisison and any person, other than those that may be withheld from the public in accordance with provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number SR-NSCC-89-8 and should be submitted by August 8, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Johathan G. Katz,

Secretary.

Dated: July 11, 1989.

[FR Doc. 89-16776 Filed 7-17-89; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-27019; File No. SR-NYSE-89-15]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by New York Stock Exchange, Inc. Relating to Content Outline for the Compliance Official Qualification Examination

Pursuant to Section 19(b) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on June 26, 1989, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange has filed the Content Outline for its Compliance Official Qualification (Series 14) Examination.

II. Self-Regulatory Organization's Statements Regarding the Purpose of, and Statutory Basis for, the Proposed Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The Compliance Official Qualification Examination was created as one of a number of NYSE regulatory initiatives designed to codify, clarify, and give specificity to compliance obligations of Exchange members and member organizations.[1] The Series 14 Examination is a qualification examination intended to insure that the individuals designated as having overall day-to-day compliance responsibilities for their respective firms or who directly supervise ten or more persons engaged in compliance activity have the knowledge, skills and abilities necessary to carry out their job responsibilities. The Series 14 Examination Content Outline filed as this proposed rule change details the subject coverage of the examination.

The Content Outline was developed by the Exchange in conjunction with various committees comprised of compliance professionals from a group of representative member organizations.

[1] The NYSE proposal to require persons responsible for direct day-to-day compliance activity within NYSE member firms and persons with direct supervision of ten or more persons engaged in compliance activity to take and pass a Compliance Official Qualification Examination was approved by the Commission in conjunction with a group of proposed changes to NYSE rules intended to supplement the internal compliance procedures of NYSE members and member organizations by imposing additional trade review, inquiry, and reporting requirements. *See* File No. SR-NYSE-87-10, approved by the Commission in Securities Exchange Act Release No. 25763, May 27, 1988, 53 FR 20925; NYSE Rule 342.13(b).

The statutory basis for the Series 14 Examination is section 6(c)(3)(B) of the Act. Under that Section, it is the Exchange's responsibility to prescribe standards of training, experience and competence for persons associated with Exchange members. Pursuant to this statutory obligation, the Exchange has developed examinations that are administered to establish that persons associated with Exchange members have attained specified levels of competence and knowledge.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the Content Outline for the Compliance Official Qualification (Series 14) Examination imposes any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Comments were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC, 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any persons, other that those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552 will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC, 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-89-15 and should be submitted by August 8, 1989.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission has closely reviewed the proposed Content Outline for the NYSE's Compliance Official Qualification (Series 14) Examination and has concluded that it accurately describes the contents and subject matter of the proposed examination. The

Commission believes that the proposed Content Outline is consistent with the requirements of the Act and the rules and regulations thereunder pertaining to national securities exchanges. In particular, the Commission believes that the proposed rule change is consistent with Section 6(c)(3)(B) [2] which provides that a national securities exchange may prescribe standards for training, experience, and competence for its members or persons associated with its members.

In addition, the Commission believes that proposed rule change is consistent with the requirements of sections 6(b)(1) and 19(g)(1) of the Act.[3] Section 6(b)(1) requires a national securities exchange to be so organized and have the capacity to enforce compliance by its members and persons associated with its members with theAct, the rules and regulations thereunder, and the rules of the exchange. Section 19(g)(1) requires national securities exchanges to comply with the Act, the rules and regulations thereunder, and absent reasonable justification or excuse enforce compliance with such provisions by its members and persons associated with its members.

As noted above, the requirement that individuals having overall day-to-day compliance resposibilities for their firms, or who directly supervise persons engaged in compliance activity, pass a Compliance Official Qualification Examination was approved by the Commission as part of a package of rule changes proposed by the Exchange that were intended to supplement compliance procedures of NYSE members and member organizations.[4] In its order approving this requirement, the Commission stated that the compliance official examination will ensure that those persons responsible for day-to-day compliance activity will have the requisite specialized knowledge of broker-dealer compliance responsibilities under the federal securities laws and NYSE rules.[5] The proposed Content Outline for the Series 14 Examination is intended to provide a comprehensive guide to the topics which will be included on the examination. It will familiarize examination candidates with the range of subjects covered by the examination as well as provide some indication as to the depth of knowledge required. The Content outline also includes sample questions so that candidates will be familiar with the principal formats of the multiple choice questions used on the examination.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in order that the Exchange may provide compliance officials who will be required to take the examination with advance notice of the subject matter that will be covered by the examination. Because the Exchange projects that the examination will be given for the first time in the fall of 1989, the Commission believes it is appropriate to approve the Content Outline at this time in order to afford examination candidates adequate time to prepare for the examination. Moreover, the Content Outline reflects the input of dozens of compliance officials and securities experts, and thus already has received extensive industry input.

It is Therefore Ordered, pursuant to Section 19(b)(2) [6] of the Act, that the proposed rule change be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Jonathan G. Katz,

Secretary.

Dated: July 11, 1989.

[FR Doc. 89-16777 Filed 7-17-89; 8:45 am]

BILLING CODE 8010-01-M

[2] 15 U.S.C. 78f(c)(3)(B) (1982).

[3] 15 U.S.C. 78f(b)(1) and 78s(g)(1) (1982).

[4] *See* note 1, *supra.*

[5] *Id.*

[6] 15 U.S.C. 78s(b)(2) (1982).

[7] 17 U.S.C. 200.30-3(a)(12) (1988).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #2361]

Kentucky (and a Contiguous County in the State of Tennessee); Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on June 30, 1989, I find that Bell, Clay, Floyd, Knott, Knox, and Leslie Counties, in the State of Kentucky, constitute a disaster loan area due to damages from severe storms and flooding beginning on June 15, 1989. Eligible persons, firms, and organizations may file applications for physical damage until the close of business on August 29, 1989, and for economic injury until the close of business on March 30, 1990, at the address listed below: Disaster Area 2 Office, Small Business Administration, 120 Ralph McGill Blvd., 14th Fl., Atlanta, GA 30308, or other locally announced locations. In addition, applications for economic injury from small businesses located in the contiguous counties of Breathitt, Harlan, Jackson, Johnson, Laurel, Letcher, Magoffin, Martin, Owsley, Perry, Pike, and Whitley, in the State of Kentucky, and Claiborne County in the State of Tennessee may be filed until the specified date at the above location.

The interest rates are:

Homowners with Credit Available Elsewhere:	8.000%
Homeowners without Credit Available Elsewhere:	4.000%
Businesses with Credit Available Elsewhere:	8.000%
Businesses and Non-Profit Organizations Without Credit Available Elsewhere:	4.000%
Businesses and Non-Profit Organizations (EIDL) Without Credit Available Elsewhere:	4.000%
Others (Including Non-Profit Organizations) with Credit Available Elsewhere:	9.125%

The number assigned to this disaster for physical damage is 236106 for the State of Kentucky. For economic injury the numbers are 678100 for the State of Kentucky and 678200 for the State of Tennessee.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Date: July 7, 1989.

Bernard Kulik,

Deputy Associate Administrator for Disaster Assistance.

[FR Doc. 89-16753 Filed 7-17-89; 8:45 am]

BILLING CODE 8025-01-M

[License No. 02/02-0515]

CMNY Capital II, L.P. Issuance of a Small Business Investment Company License

On February 8, 1989, a notice was published in the Federal Register (54 FR 6228) stating that an application has been filed by CMNY Capital II, L.P. 77 Water Street, New York, New York 10005 with the Small Business Administration (SBA) pursuant to Section 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1988)) for a license as a small business investment company.

Interested parties were given until close of business March 9, 1989, to submit their comments to SBA. No comments were received.

Notice is hereby given that, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 02/02-0515 on June 30, 1989, to CMNY Capital II, L.P. to

operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

Dated: July 11, 1989.

[FR Doc. 89-16754 Filed 7-17-89; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF STATE

Office of the Secretary

[Public Notice No. 1117]

Eagle Pass, Tex.; Application for Bridge Permit

Notice is hereby given that the Department of State has received an application for a permit authorizing construction of a bridge across the Rio Grande River from the City of Eagle Pass, Texas to Piedras Negras, Coahuila, Mexico.

The Department's jurisdiction with respect to this application is based upon Executive Order 11423, dated August 16, 1968, and the International Bridge Act of 1972 (Pub. L. 92-434, 86 Stat. 731, 33 U.S.C. 535 approved September 26, 1972).

As required by E.O. 11423, the Department of State is circulating this application to concerned agencies for comment.

Interested persons may submit their views regarding the application in writing by (*insert date 30 days from publication in* Federal Register) to Mr. Kenneth R. Propp, Office of the Legal Adviser, Economic, Business and Communications Affairs, Room 6420, U.S. Department of State, 2201 C Street, NW., Washington, DC 20520.

The application and related documents made part of the record to be considered by the Department of State in connection with this application are available for inspection and copying in the Office of the Assistant Legal Adviser for Economic, Business and Communications Affairs during normal business hours.

Any questions relating to this notice may be addressed to Mr. Propp at the above address (202) (647-7770).

Date: June 30, 1989.

Ted A. Borek,

Assistant Legal Adviser Economic, Business and Communications Affairs.

[FR Doc. 89-16767 Filed 7-17-89; 8:45 am]

BILLING CODE 4710-01-M

[Public Notice CM-8/1294]

Study Group 8 of the U.S. Organization for the International Radio Consultative Committee (CCIR); Meeting

The Department of State announces that Study Group 8 of the U.S. Organization for the International Radio Consultative Committee (CCIR) will meet on August 10, 1989, in Room 6332-36, Department of Transportation, Nassif Building, 7th and D Streets SW., Washington, DC. The meeting will be held from 9:30 a.m. to 12:30 p.m.

Study Group 8 studies matters relating to systems of radiocommunications and radiodetermination for the mobile services. The purpose of this meeting is to prepare positions and contributions to be recommended for the United States to take at the Final Study Group 8 Meeting scheduled for October 1989.

Members of the general public may attend and participate in the meeting, subject to available seating and the instructions of the Chairman. Requests for further information should be directed to the Chairman: Mr. Herbert T. Blaker, Rockwell International Corporation, 1745 Jefferson Davis Highway, Arlington, Virginia, 22202; telephone (703) 553-6687.

Date: July 6, 1989.

Richard E. Shrum, Chairman,

U.S. CCIR National Committee.

[FR Doc. 89-16768 Filed 7-17-89; 8:45 am]

BILLING CODE 4710-07-M

[Public Notice CM-8/1293]

The U.S. Organization for the International Telegraph & Telephone Consultative Committee CCITT Study Group B; Meeting

The Department of State announces that Study Group B of the U.S. Organization for the International Telegraph and Telephone Consultative Committee (CCITT) will meet on August 3, 1989 at 9:30 a.m. in Room 1912, Department of State, 2201 C Street NW., Washington, DC.

The agenda of the meeting will be as follows:

1. Approval of May 26 Meeting Minutes.
2. Report of CCITT Study Group XVIII Meeting, June 19-30, 1989
3. Consideration of Contributions in Preparation for the CCITT Study Group XI Working Party Meetings, and Consideration of any Appropriate White Contributions for CCITT Study Group XI/Working Party 4 and 7 (December 4-15) and Study Group XVIII (January 8-19, 1990.
4. Other business.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the Chairman. Admittance of public members will be limited to the seating available. In that regard, entrance to the Department of State building is controlled and entry will be facilitated if arrangements are made in advance of the meeting. Prior to the meeting, persons who plan to attend should so advise the office of Mr. Earl S. Barbely, State Department, Washington, DC; telephone (202) 647-5220. All attendees must use the C Street entrance to the building.

Date: July 5, 1989.

Earl S. Barbely,

Director, Office of Telecommunications and Information Standards; Chairman, U.S. CCITT National Committee.

[FR Doc. 89-16769 Filed 7-17-89; 8:45 am]

BILLING CODE 4710-07-M

[Public Notice CM-8/1292]

The U.S. Organization for the International Telegraph & Telephone Consultative Committee (CCITT) Study Group D; Meeting

The Department of State Group D of the U.S. Organization for the International Telegraph and Telephone Consultative Committee (CCITT) will meet on August 28, 1989 at 9:30 a.m. in Room 1406, Department of State, 2201 C Street, NW., Washington, DC.

The purpose of the meeting will be to: Review and approve contributions to the September meeting of CCITT Study Group XVII; review contributions circulated from CCITT; report on the results of the July meeting of Study Group VII, and discuss any other business relevant to the scope of Study Group D activities.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the Chairman. Admittance of public members will be limited to the seating available. In that regard, entrance to the Department of State building is controlled and entry will be facilitated if arrangements are made in advance of the meeting. Prior to the meeting, persons who plan to attend should so advise the office of Mr. Earl Barbely, State Department, Washington, DC, telephone (202) 647-5220. All attendees must use the C Street entrance to the building.

Date: July 6, 1989

Earl S. Barbely,

Director, Office of Telecommunications and Information Standards; Chairman, U.S. CCITT National Committee.

[FR Doc. 89-16770 Filed 7-17-89; 8:45 am]

BILLING CODE 4710-07-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: July 12, 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, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: New
Form Number: 8808
Type of Review: New Collection
Title: Supplemental Medicare Premium
Description: This form is used by Medicare eligible individuals whose adjusted income tax liabilities are $150 or more to figure the supplemental Medicare premium.
Respondents: Individuals or households
Estimated Number of Respondents/ Recordkeepers: 12,169,196
Estimated Burden Hours Per Response:
Recordkeeping, 13 minutes
Learning about the law or the form, 8 minutes
Preparing the form, 38 minutes
Copying, assembling, and sending the form to IRS, 35 minutes
Frequency of Response: Annually
Estimated Total Recordkeeping/ Reporting Burden: 19,105,638 hours
OMB Number: New
Form Number: 8814
Type of Review: New Collection
Title: Parent's Election to Report Child's Interest and Dividends
Description: Form 8814 is used by parents who elect to report the interest and dividend income of their child under age 14 on their own tax return. If this election is made, the child is not required to file a return.
Respondents: Individuals or households
Estimated Number of Respondents/ Recordkeepers: 1,100,000
Estimated Burden Hours Per Response:
Recordkeeping, 20 minutes
Learning about the law or the form, 8 minutes
Preparing the form, 16 minutes
Copying, assembling, and sending the form to IRS, 35 minutes
Frequency of Response: Annually
Estimated Total Recordkeeping/ Reporting Burden: 1,441,000 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.

Dale A. Morgan,

Departmental Reports Management Officer.

[FR Doc. 89-16757 Filed 7-17-89; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Date: July 12, 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, P.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, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0092
Form Number: 1041 and Related Schedules D, J, and K-1
Type of Review: Revision
Title: U.S. Fiduciary Income Tax Return; Capital Gains and Losses; Trust Allocation of an Accumulation Distribution; Beneficiary's Share of Income, Deductions, Credits, etc.
Description: Internal Revenue Code section 6012 requires that an annual income tax return be filed for estates and trusts. Data is used to determine that the estates, trusts, and beneficiaries filed the proper returns and paid the correct tax.
Respondents: Individuals or households, Businesses or other for-profit
Estimated Number of Respondents: 2,400,000
Estimated Burden Hours Per Response/ Recordkeeping:

	Form 1041	Schedule D	Schedule J	Schedule K-1
Recordkeeping	2 hrs. 11 mins.	46 mins.	1 hr. 58 mins.	2 hrs. 11 mins.
Learning abut the law or the form	2 hrs. 45 mins.	35 mins.	25 mins.	34 mins.
Preparing the form	2 hrs. 22 mins.	55 mins.	1 hr. 2 mins.	38 mins.
Copying, assembling, and sending the form to IRS	35 mins.	35 mins.	35 mins.	20 mins.

Frequency of Response: Annually
Estimated Total Recordkeeping/ Reporting Burden: 28,430,575 hours
Clearance Office: 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.

Dale A. Morgan,

Departmental Reports, Management Officer.

[FR Doc. 89-16758 Filed 7-17-89; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Date: July 12, 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 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 2409, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Departmental Offices

OMB Number: New
Form Number: TD F 90–21.7a
Type of Review: New Collection
Title: Survey of Depreciation of Assets Used in the Manufacture of Electronic Components, Products, and Systems
Description: The purpose of this study is to collect data that will allow the estimation of the average patterns of economic depreciation for assets used in the manufacture of electronic components, products, or systems. A report describing the results will be given to Congress. The study will affect electronic manufacturers
Respondents: Businesses or other for-profit, Small businesses or organizations
Estimated Number of Respondents: 700
Estimated Burden Hours Per Response: 25 hours
Frequency of Response: Unless changes in technology require otherwise, reporting will be required only once.
Estimated Total Reporting Burden: 17,500 hours
Clearance Officer: Dale A. Morgan, (202) 566–2693, Departmental Offices, Room 2409, Main Treasury Building, 1500 Pennsylvania Avenue NW. Washington, DC 20220
OMB Reviewer: Milo Sunderhauf, (202) 395–6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,

Departmental Reports, Management Officer.

[FR Doc. 89–16759 Filed 7–17–89; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Dated: July 12, 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.

Comptroller of the Currency

OMB Number: 1557–0014.
Form Number: None.
Type of Review: Revision.
Title: Comptroller's Manual for Corporate Activities (NPRM 12 CFR 5 Operating Subsidiaries and Statutory Subsidiaries).
Description: The Comptroller's Manual for Corporate Activities explains the OCC's policies and procedures for the formation of a new national bank, entry into the national banking system by other institutions, and corporate expansion and structural changes by existing national banks.
Respondents: Businesses or other for-profit, Small businesses or organizations.
Estimated Number of Respondents: 3,050.
Estimated Burden Hours Per Response: 13 hours and 30 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 48,165 hours.
Clearance Officer: John Ference (202) 447–1177, Comptroller of the Currency, 5th Floor, L'Enfant Plaza, Washington, DC 20219.
OMB Reviewer: Gary Waxman (202) 395–7340, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,

Departmental Reports, Management Officer.

[FR Doc. 89–16718 Filed 7–17–89; 8:45 am]

BILLING CODE 4810-25-M

UNITED STATES INFORMATION AGENCY

United States Advisory Commission on Public Diplomacy

A meeting of the U.S. Advisory Commission on Public Diplomacy will be held July 19, 1989 in Room 600, 301 4th Street SW., Washington, DC from 10:30 a.m. to 11:00 a.m.

The Commission will meet with Mr. Stephen Murphy, Director, Televison and Film Service, USIA, to discuss USIA television programs

Please call Gloria Kalamets, (202) 485–2468, if you are interested in attending the meeting since space is limited and entrance to the building is controlled.

Dated: July 11, 1989.

Ledra L. Dildy,

Staff Asstistant, Federal Register Liaison.

[FR Doc. 89–16738 Filed 7–17–89; 8:45 am]

BILLING CODE 8230-01-M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 136
Tuesday, July 18, 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

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:27 a.m. on Wednesday, July 12, 1989, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider: (1) Matters relating to an assistance agreement pursuant to section 13(c) of the Federal Deposit Insurance Act; (2) requests for financial assistance pursuant to section 13(c) of the Federal Deposit Insurance Act; and (3) matters relating to the Corporation's corporate activities.

In calling the meeting, the Board determined, on motion of Director C. C. Hope, Jr. (Appointive), seconded by Director Robert L. Clarke (Comptroller of the Currency), concurred in by Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting was held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, N.W., Washington, D.C.

Dated: July 13, 1989.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 89-16871 Filed 7-14-89; 11:33 am]

BILLING CODE 6714-01-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

July 13, 1989.

TIME AND DATE: 10:00 a.m., Thursday, July 20, 1989.

PLACE: Room 600, 1730 K Street, NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. *FMC Wyoming Corporation,* Docket No. WEST 86-43-RM, etc. (Issues include whether FMC Wyoming Corp.'s (FMC) violation of 30 CFR § 57.5002 was a significant and substantial contribution to a mine health hazard and the result of FMC's unwarrantable failure to comply and whether FMC violated 30 CFR § 57.18002)
2. *Consolidation Coal Company,* Docket No. WEVA 87-343. (Issues include whether Consolidation Coal Company was properly found liable for the violation of its independent contractor)

Any person intending to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR § 2706.150(a)(3) and § 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 653-5629/(202) 566-2673 for TDD Relay.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 89-16926 Filed 7-14-89; 1:21 pm]

BILLING CODE 6735-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 11:00 a.m., Monday, July 24, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS:

MATTERS TO BE CONSIDERED:

1. Policy regarding annual leave program for officers.
2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
3. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: July 14, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-16958 Filed 7-14-89; 3:33 pm]

BILLING CODE 6210-01-M

UNITED STATES INTERNATIONAL TRADE COMMISSION

[USITC SE-89-25]

TIME AND DATE: Thursday, July 27, 1989 at 2:00 p.m.

PLACE: Room 101, 500 E Street, SW., Washington, D.C. 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda
2. Minutes
3. Ratifications
4. Petitions and Complaints:
   Certain Imported Artificial Breast Prostheses and the Manufacturing Processes Thereof (Docket No. 1513).
5. Any items left over from previous agenda.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary, (202) 252-1000.

Kenneth R. Mason,

Secretary.

July 12, 1989.

[FR Doc. 89-16927 Filed 7-14-89; 1:22 pm]

BILLING CODE 7020-02-M

UNITED STATES INTERNATIONAL TRADE COMMISSION

[USITC SE-89-26]

TIME AND DATE: Thursday, August 3, 1989 at 11:00 a.m.

PLACE: Room 101, 500 E Street, SW., Washington, D.C. 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda
2. Minutes
3. Ratifications
4. Petitions and Complaints
5. Inv. No. 731-TA-423 (F) (Generic Cephalexin Capsules from Canada)—briefing and vote.
6. Any items left over from previous agenda.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary, (202) 252-1000.

Kenneth R. Mason,

Secretary.

July 12, 1989.

[FR Doc. 89-16928 Filed 7-14-89; 1:22 pm]

BILLING CODE 7020-02-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of July 17, 24, 31, and August 7, 1989.

PLACE: Commissioner's Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of July 17

Wednesday, July 19

2:30 p.m.
Briefing on Status of Browns Ferry-2 (Public Meeting)
4:00 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of July 24—Tentative

Wednesday, July 26

10:00 a.m.
Briefing on Integration of Policy Statements for Severe Accidents, Advanced Reactors, Safety Goals, and Standardization (Public Meeting)
2:00 p.m.
Briefing on Proposed 1989 Waste Confidence Decision (Public Meeting)
3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of July 31—Tentative

Tuesday, August 1

10:00 a.m.
Briefing on Status of EPRI Design Requirements Document for Advanced Light Water Reactors (Public Meeting)

Wednesday, August 2

10:00 a.m.
Briefing on Status of Nine Mile Point-1 (Public Meeting)

Thursday, August 3

2:00 p.m.
Briefing on NRC Thermal-Hydraulic Research Program (Public Meeting)
3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of August 7—Tentative

Thursday, August 10

2:00 p.m.
Periodic Briefing by Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting)
3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Friday, August 11

10:00 a.m.
Discussion/Possible Vote on Full Power Operating License for Limerick-2 (Public Meeting)

ADDITIONAL INFORMATION: By a vote of 3–0 (Commissioner Roberts not present) on July 7, the Commission determined pursuant to 5 U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that Commission business required that "Affirmation of Revision to Order in Response to Philadelphia Electric Company Request for Clarification of Licensing Status of Limerick Unit 2" (Public Meeting) scheduled for July 7, be held on less than one week's notice to the public.

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERITY THE STATUS OF MEETINGS CALL (RECORDING)—(301) 492–0292.

CONTACT PERSON FOR MORE INFORMATION: William Hill, (301) 492–1661.

William M. Hill, Jr.,

Office of the Secretary.

July 13, 1989.

[FR Doc. 89–16941 Filed 7–14–89; 8:45 am]

[BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

Agency Meeting

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: [54 FR 29636 July 13, 1989].

STATUS: Closed meeting.

PLACE: 450 Fifth Street, NW., Washington, D.C.

DATE PREVIOUSLY ANNOUNCED: Tuesday, July 11, 1989.

CHANGES IN THE MEETING: Addition.

The following item will be considered at a closed meeting on Wednesday, July 19, 1989, at 2:30 p.m.

Litigation matter.

Commissioner Cox, as duty officer, determined that Commission business required the above change.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Karen Burgess at (202) 272–2000.

Jonathan G. Katz,

Secretary.

July 14, 1989.

[FR Doc. 89–16962 Filed 7–14–89; 3:54 am]

[BILLING CODE 8010–01–M

federal register

Tuesday
July 18, 1989

Part II

Department of Housing and Urban Development

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

Agency Information Collection Activities Under OMB Review; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N-89-2019]

Agency Information Collection Activities Under OMB Review

AGENCY: Department of Housing Development Grants.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject comments proposal.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone number (202) 755-6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). It is also requested that OMB complete its review within seven days.

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the name and telephone number 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).

Date: June 29, 1989.

James E. Schoenberger,

General Deputy Assistant Secretary for Housing.

NOTICE OF SUBMISSION OF PROPOSED INFORMATION COLLECTION TO OMB

Proposal: Housing Development Grant (HDG) Program: Application Packet.

Office: Housing.

Description of the Need for the Information and its Proposed Use: The application and addendum will be used by the applicants participating in the 1989 Funding Round.

Respondents: State or Local Governments, Businesses or Other Non-Profit and Non-Profit Institutions.

Frequency of Submission: As Invitation for Application specifies.

Reporting Burden:

	Number of respondents	×	Frequency of response	×	Hours per response	=	Burden hours
Application	54		1		82		4,428
HUD-90031 and 90031-A	200		1		4		800
Total Estimated Burden Hours							5,228

Total Estimated Burden Hours: 5,228.

Status: Revision.

Contact:

Freda Nicolosi, HUD (202) 755-6142.
John Allison, OMB (202) 395-6880.

Date: June 29, 1989.

Supporting Statement

Housing Development Grant Application (Project Application Form HUD 90031 and Packet.)

A. Justification.

1. *Need for Reinstatement.* The HDG Application Packet and Application Form (HUD 90031) were reinstated in FY 1986 and extended through September 30, 1987. The HUD Form 90031 was once again reinstated to expire October 30, 1991, in order to accommodate updates for existing grantees. Since that time HUD has decided to reuse accumulated recaptured funds through a funding round. This funding round will be held in the summer of 1989 and will utilize the HUD Application Packet as approved in 1987. Therefore, the Packet must be reinstated immediately.

2. *Necessity of Information.* The information is necessary to continue implementation of the Housing Development Grant Program in Title III, Section 301 of the HURRA legislation. The statute requires a competitive selection (based upon certain factors and limitations) of applications containing specified material. The application packet provides guidance to applicants interested in preparing an application which contains the required material so that it can be competitively ranked against other applications under all the appropriate criteria. The applications submitted will be evaluated by the Department to determine initial compliance with program requirements and will be ranked competitively. The highest ranked proposals will be awarded funds under the program.

3. *Information Technology.* Improved information technology is not applicable to the collection of application data. The requirements of the statute and regulations preclude reducing the burden below the level required by the application.

4. *Duplication.* We have made every effort to design the application to avoid duplication of data. For example, when two separate statutory or regulatory provisions have requested data on similar items, these items have been combined in the application to avoid repeating contextual material. The material requested does not duplicate material otherwise available to the Department except in the case of Census material which the applicant must also be aware of and may wish to alter with local data, and the Form HUD-92264 (submitted only in HUD insured cases) which is not available in HUD Headquarters where much of the application review is accomplished.

5. *Alternative Data.* There is no substitute for the application required by the program. Each application must contain information required by the specific statute and project specific data not otherwise available.

6. *Small Business.* The application is submitted by a State or unit of general local government, no small businesses are burdened by the application requirements.

7. *Frequency.* Applications will be submitted only once for each funding cycle. Frequency cannot be reduced.

8. *5 CFR 1320.6.* We are aware of no inconsistencies.

9. *Outside consultation.* The HDG program has been through four funding cycles. In our dealings with local and State government officials and from first hand, in house experience, we have provided clarifications for several Parts in the Packet and have been more specific about what constitute firm financial commitments.

10. *Confidentiality.* No assurances of confidentiality can be given. Personal financial statements received as a part of any application, however, will be maintained as confidential in the same manner as those received in HUD insurance cases.

The project close out documents will contain no sensitive materials.

11. *Sensitive Materials.* The application will contain no sensitive material.

12(a). *Cost to Federal Government—Application Packet*

Invitation for Applications	1
Review Hours per Application	+100
Total Hours per Application	101
Number of Applications	×54
Total Hours	5,454
Cost per Hour	$19.45
Overhead Percentage	20%
Total cost per Hour	$23.33
Hours times Cost	5,454×$23.33
Cost	$127,241.82

12(a). *Cost to Federal Government—Forms HUD–90031 and 90031–A*

Number of Applications	200
Review Hours per Application	×4
	800
Cost per Hour	$10.00
Hours times Cost	800×$10.00
Cost	$8,000
Total Cost	$135,241.82

12(b). *Estimated Annual Cost to Respondents—Application Packet*

Number of Applications	54
Hours per Application	82
Total Hours	4,428
Cost per Hour	$20
Overhead Percentage	20%
Total Cost per Hour	$24
Hours times Cost	4,428×$24
Total Cost	$106,272

12(b). *Estimated Cost to Respondents—Forms HUD–90031 and 90031–A*

Number of Applications	200
Hours per Application	×4
	800
Total cost per Hour	$6.00
Hours times Cost	800×$6.00
Cost	$4,800
Total Cost	$111,072

13. *Application Packet Burden.* Following is the best estimate in terms of hours for completing each Part of the application:

Part	Applicants	Owner	Total
A	2	0	2
B	4	0	4
C	5	5	1
D	2	0	2
E	4	0	4
F	3	0	3
G	4	0	4
H	8	0	8
I	3	3	5
J	5	0	5
K	2	2	4
L	3	0	3
M	5	32	37
Total Burden			82

82 Hours Per Application
54 Applications
4,428 Total Burden Hours
Application Forms 90031 and 90031–A
4 Hours per Application
200 Applications
800 Total Burden Hours
Total Application and Forms—5,228 Hours

14. *Reason for change in Burden Hours.* N/A. An addendum has been added to the Housing Development Grants Application Packet, Revised May 1987. The addendum does not add to the work required, but simply updates the information.

15. *Publication for Statistical Use.* N/A.

Addendum to Application Packet (Revised May, 1987) Housing Development Branch

Part B–3. Additional Assistance to Lower Income or Very Low-Income Tenants

Points will be assigned (Selection Factor F.2.) to applications proposing additional assistance through a subsidy mechanism which:

(a) assists tenants with incomes below 50% of median (very low-income) to pay no more than 30% of their income for rent and utilities. (The relevant comparison is the percentage of very low-income units to total units with the higher percentage receiving more points.)

Note: When such assistance is provided in order to comply with the relocation requirements of Part I of this packet, no points will be assigned.

(b) assists the project so that the market rate units have rent levels which are within the Section 8 Existing Fair Market Rents (FMR) (The relevant comparison is the percentage of market rate units within the FMRs to the total with the higher percentage receiving more points.)

(c) extends the period of assistance for all of the lower income units to 25 or more years.

To receive points under (a) or (b), the applicant must:

(1) specify the number and size of units to receive the assistance; and

(2) provide a signed statement from the owner to give occupancy priority to very-low income households in the case of option (a) and to lower and very lower income households (80 percent of median income) in the case of option (b); and

(3) a commitment from the applicant or the owner to provide the resources necessary to compensate for the resulting revenue loss. Other Federal assistance, including Vouchers or Certificates, is not an acceptable source of additional assistance under this part. If the owner elects to absorb the revenue loss, an estimate of the loss must be provided and it must be demonstrated that the project's financial feasibility will not be jeopardized.

Restrictions

The additional assistance under this part must not require HDG funds beyond that required to maintain the units at HDG formula and market rate rent levels.

Exhibit C–1—Applicant Certifications

(Other Than Equal Opportunity/Non Discrimination and Moderate

Rehabilitation Certifications Which Appear Separately.)

The Applicant hereby assures and certifies that it will comply/has complied with the following:

1. The submission of the application is authorized under State and local law (as applicable), and the applicant posseses the legal authority to apply for the grant and to carry out the responsibilities of a grantee in the program.

2. It developed its rental development program after consultation with the public.

3. The project will not cause the involuntary displacement of very low income households by households that are not very low-income households.

4. If a State is the applicant, it is applying for assistance on behalf and with the concurrence of, a specified unit of local government.

5. Its chief executive officer or other officer of the applicant approved by HUD:

(a) Consents to assume the status of a responsible Federal official for environmental review, decision making and action pursuant to the National Environmental Policy Act of 1969, and other authorities listed in 24 CFR 58.5 insofar as the provision of such Act or other authorities apply to the Housing Development Grant program.

(b) Is authorized and consents on behalf of the applicant and himself/herself to accept the jurisdiction of the Federal courts for the purpose of enforcement of his/her responsibilities as such official.

6. The application is consistent with any applicable Housing Assistance Plan.

7. Check one of the following:

☐ The project will be constructed or substantially rehabilitated in accordance with applicable State and local building codes.

☐ Given the absence of these codes, the project will be completed in accordance with the following nationally recognized model building code(s): _____

8. It will comply with the requirements if Part 850.35 of HUD regulations regarding:

(a) Environmental and Historic Preservation requirements of Section 104(f) of the Housing and Community Environmental Policy Act, implementing regulations and related laws and authorities.

(b) Labor standards.

(c) OMB Circulars A–102, A–128, A–87, and A–122.

(d) The Lead-Based Paint Poisoning Prevention Act and implementing regulations at 24 CFR Part 35.

(e) The intergovernmental review requirements of Executive Order 12372 and implementing regulations at 24 CFR Part 52.

(f) Conflicts of interests.

(g) Use of debarred, suspended or ineligible contractors or subcontracts.

(h) The flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973.

(i) It will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1870, as amended and the Federal implementation regulations at 49 CFR Part 24.

9. The prohibition in Paragraph 850.17(b) of the HUD regulation against use of grant funds for administrative costs incurred by an applicant or grantee in carrying out its Housing Development Grant Program responsibilities.

_____

Signature

_____

Date

_____

Title

H–3. Neighborhood Development

This represents a significant change in the relative emphasis on Neighborhood Development as necessary to improve the program's response to the one of the Departmental priorities, i.e., economic development. The goal is give greater advantage to those projects which will significantly enhance the economic base of the neighborhood in which it is located.

There are two considerations to be taken into account when responding to this Part.

A. The applicant should describe the physical, social and economic effects of the project on the neighborhood. If HUD determines that the project will have a negative effect on the neighborhood, the project may be rejected based on Threshold 12.

Typical considerations in determining the neighborhood effect include: compatibility with existing land uses, increased demand on traffic and other environmental burdens, complementary effects on employment patterns, and/or the likely effect of the project on recent changes in neighborhood character and investment patterns.

HUD will view any unmitigated displacement resulting from such an effect as negative.

B. The effect on the neighborhood will be evaluated to determine points to be assigned under Selection Factor C. The applicant should provide the Neighborhood Identification and Description required under Part H–1 if it intends to receive points under this factor. (This description can also be used by HUD to make determinations under A above.) There are three criteria for awarding a maximum of eight (8) points.

1. Projects that "anchor" a neighborhood. It must be clearly demonstrated that the neighborhood where the project is to be located is undergoing severe physical, social or economic decline and that the proposal will help alleviate the conditions. Supporting documentation must clearly demonstrate at least three of the following conditions:

* A major portion of the existing housing stock is in need of substantial repair or replacement

* The neighborhood has lost its economic base to include such factors as a large proportion of its middle income households, supportive commercial/retail services (e.g., grocer, pharmacy) and other investment patterns. Substantial deterioration of its infrastructure is occurring (i.e., street repairs).

* The average income level for the neighborhood is below 80 percent of median income for the community as a whole

* The neighborhood has been largely abandoned as evidenced by high vacancy rates

Or

2. Projects which will effect neighborhood "stabilization". It must be clearly demonstrated that the neighborhood in which the project is located is threatened with moderate decline and that the proposed project will abate such decline. Supporting documentation must clearly demonstrate that:

* The multi- and single-family housing stock is beginning to show clear signs of deterioration as demonstrated by the need for moderate and substantial rehabilitation with a limited amount of the stock in need of replacement.

* The income characteristics of the households have shown a downward trend over the past 5 years reflecting a flight of middle income households and the loss of supportive commercial/retail services.

And/Or

3. Projects which promote an existing neighborhood development, redevelopment, or revitalization plan which is already under implementation. The plan must contain a coordinated strategy of land uses, including a housing component. For purposes of this section, the requirements of 24 CFR 805.15 as elaborated upon in Part E, Neighborhood Preservation Purpose

Applications, may be used. Development of some of the land use components must have already begun; the HDG project cannot be the first activity under the plan.

Examples of appropriate plans under this scenario include, Community Development Block Grant Target Areas, Enterprise Zones and a mixed use waterfront development plan with community wide comprehensive planning which includes a neighborhood, land use, and a housing component.

Examples of neighborhoods which would not qualify for points under this factor include gentrifying neighborhoods (i.e., neighborhoods on the incline rather than decline), stable or stabilized neighborhoods where, although the project may expand lower income housing opportunities, it will not enhance the economic base or effect a change in the character of the neighborhood.

Failure to respond to the requirements of this section will result in no points under Selection Factor C for Neighborhood Development. Please make all explanations concise, but with sufficient data for HUD to make determinations.

Part M–7. Firm Financial Commitments and Site Control

All requirements of Part M–7 of the Application Packet (Revised May, 1987) must be adhered to for maximum points in the rating and ranking process. However, the deadline for submission of these requirements and certain minimum requirements to fulfill the HDG thresholds are changed as follows:

1. The deadline for any requirements under this Part, except under Part M–7.A. Equity Sources, is September 8, 1989. This includes minimum requirements as well as requirements for Additional Points. Failure to provide the requirements for Equity Sources by the August 21, 1989 deadline will result in rejection of the application on thresholds.

2. Minimum requirements for tax-exempt bond financing is changed. The application submission must contain either an inducement resolution as defined in the Application Packet or a firm commitment from an investment banker or underwriter to purchase the bonds as specified in the Application Packet. A bond counsel's opinion will not be required.

ATTACHMENT 2—PROJECT SELECTION FACTORS

Criteria	Points
A. *Shortage of Housing.* Based on review of Part G of the application, HUD will award points on a sliding scale, with higher points awarded for the lower vacancy rate. Projects in areas with an overall rental vacancy rate of less than 4.5 will be entitled to half the points or more. Projects with lower income or overall vacancy rate of over seven percent will not be entitled to any points in the respective category.	20
1. *Lower Income Vacancy Rates.* The average rental vacancy rate for census tracts in the unit of general local government (or market area, if applicable) with median family incomes below 80 percent of area median. Maximum points in this subcategory will be awarded to projects with a 2.5 percent vacancy rate or less. (8 points)	
2. *Overall Vacancy Rates.* Overall rental vacancy rate within the unit of general local government (or market area, if applicable). Maximum points in this subcategory will be awarded to projects with a 2.5 percent vacancy rate or less. (12 points)	
B. *Leveraging Ratios.* Points will be awarded on a sliding scale—highest ratios receive the highest points based on HUD's review of Exhibit M–9. For maximum points, the average of the two ratios described below must equal 6:1. Leveraging ratios of 2.5:1 will receive half the points and no points will be assigned for an average leveraging ratio of less than 1.3:1.	15
1. Project leveraging ratio (7.5 points). Non-Federal public *plus* private contributions divided by the grant amount.	
2. Private leveraging ratio (7.5 points). Private contributions divided by the grant amount.	
C. *Neighborhood Development/Mitigation of Displacement.*	6
1. Neighborhood Development (5 points)—HUD will award points for projects which can substantiate criteria as described in Part H–3 of this Addendum as follows: Criteria 1 alone (3 points) Criteria 2 alone (3 points) Criteria 3 alone (2 points) Criteria 3 combined with 1 or 2 (5 points)	
2. Mitigation of Displacement (1 point)—Based on Part I HUD will grant the maximum points to projects which cause no displacement or provide effective mitigation of displacement. Applicants will be rated according to the level of assurance provided that potential displacement will be mitigated.	
D. *Applicant Performance and Capacity.*	2
1. Performance (1 point)—Based on Part B–2 and HUD's own experience, HUD will rate the applicant's past performance in meeting Housing Assistance Plan goals, where they exist, and in administering Federally assisted housing programs.	
2. Capacity (1 point)—HUD will review Part B–2 to assess the applicant's ability to administer the program (i.e., to start and monitor the project through to completion and to meet the grantees' responsibilities under Subparts D, E and F of the regulations).	
E. *Maximum Units for the Least Cost to the Federal Government.* Based on HUD's processing of data in Exhibit M–1.	10
1. HDG Loan (2 points)—Points will accrue if the applicant proposes to loan rather than grant the HDG funds to the owner. To receive points in this category, at least fifty percent of the HDG must be repaid and payments on the HDG loan principal must begin no later than the twenty-first year of project operations. For any portion of the HDG which is invested in a PIA, "fifty percent of the HDG" means fifty percent of the sum of all funds disbursed to the project from the PIA during the Project Term.	
2. Adjusted Per Unit Grant Amount (8 points)—HUD will adjust the per unit grant amount for construction cost differences among geographic areas and among units of various bedroom sizes. Based on a sliding scale, lowest adjusted per unit grant amount will receive the most points. (Refer to discussion in Part M–14 of this Packet.)	
F. *Mechanism to Assure Affordable Rents.*	12
1. Maintenance of Affordable Rents (1 point)—HUD will review Part B–2 as to how well the applicant's proposed method to supervise rent increases for designated units and resale structures for cooperative or mutual housing shares will enforce program requirements concerning lower income occupancy and rents. Failure to sign the Rent Mechanism, Exhibit B–1 will render the application ineligible for points under Selection Factor F.2.	
2. Additional Assistance to Lower Income and Very Low Income Families—Based on a review of Part B–3, HUD will award points for commitments to serve lower and very low-income families. Points for commitments to provide additional assistance under a or b below will be awarded on a sliding scale with the percentage of total units committed receiving the most points.	
(a) where the applicant/owner commits to set aside a specified number of units to assist tenants below 50 percent of median income with additional state, local or owner-provided resources for at least 20 years. (up to 4 points)	
(b) where the applicant/owner commits to establish a specified number of market rate unit rents at or below 110 percent of the effective Fair Market Rate rents with any necessary financial resource other than the HDG for at least 20 years. (up to 4 points)	
(c) where the applicant/owner commits to extend the designated lower income rents and occupancy for at least 25 years. (3 points)	
G. *Financial Feasibility.*	10

ATTACHMENT 2—PROJECT SELECTION FACTORS—Continued

Criteria	Points
Based on a review of Part M of the Application, HUD will score the project as to overall feasibility based on the following: 1. Firmness of Financial Commitments (4 points)—While all projects must present adequate documentation of firm financial commitments to meet program threshold requirement 15, the strength of these commitments, e.g., the level of documentation and absence of qualifying conditions above and beyond the minimum threshold, will determine how many points the project receives in this sub-category. 2. Rents, Costs and Expenses (6 points)—Based on application data, especially Parts M-1, M-3, M-10, and M-12, and HUD's review, projects will be rated as to: (a) plausibility of rents, costs and expenses, e.g., is there any question of unit marketability at the rents proposed? Are costs and expenses underestimated? Are project costs too high resulting in an inflated grant request?; and, (b) Financial feasibility over the Project Term, e.g., will project income be sufficient to cover debt service and expenses over the life of the project?	
H. *Equitable Share of Funds for Families Especially Large Families With Children.* Points will be assigned in this category based upon the average bedroom count. There are two criteria: (1) if the average overall (total project) bedroom count is equal to at least 2.0, up to 10 points will be assigned with the highest average receiving the full 10 points; (2) if the average lower income bedroom count is at least 2.5, up to 5 points will be assigned, however, to qualify for the full five points the average lower income bedroom count must be 3.0 or more.	15
I. *Minority and Women's Business Enterprise.* This is an all or nothing category. Based on HUD's review of Exhibit K-3 and Exhibit M-1, points will be awarded to applications which demonstrate that controlling project ownership will be vested in and exercised by minority persons or women.	5
J. *Locational Housing Opportunities.* Points will be awarded to projects which meet at least one of the three criteria listed in Part H-2 of the application...	5
Factor a alone or combined with b or c (5 points) Factors b and c combined (4 points) Factor b only (3 points) Factor c only (3 points)	

Priority Projects

Up to 15 priority bonus points will be awarded where:

(a) Based on a review of Section D of Exhibit M-1, HUD finds that more than 25 percent of project units are designated for lower income rents and occupancy, *and*

(b) Based on HUD's review of Part L of the application and other available information, HUD determines that the project is located in a jurisdiction where assisted housing waiting lists are long and where housing assistance certificate holders required excessive time to locate housing.

Higher percentages of lower income units will receive more points. One point will be awarded for each full percentage point of lower income households above 25% up to a maximum of 15 points for 40% lower income or higher percentage.

Application	Regulations	Statute	Explanation/Justification (1) Housing Development Grant Program
Packet-Introduction.	N/A	N/A	Pages iv through vi of the Packet briefly describe what constitutes a project; outlines what is needed to pass Threshold requirements; references the Project Selection Factors used in ranking competitive applications; and encourages applicants to read the Packet thoroughly so that all required forms and exhibits are submitted. These pages also clearly state that no waivers to the HDG regulations or Packet will be granted prior to or during the application review and selection process. In addition, the applicant and project owner are advised that HUD may reduce the grant amount requested if the review process determines the amount to be excessive. Finally, the Introduction addresses where and when applications are to be submitted.
Preparation of the HDG Application.	N/A	N/A	Page vii of the Packet identifies how the application must be packaged and the number of copies required. Five copies are needed because of the unusual need for simultaneous review of the application by both Headquarters and Field Offices. The format of the application submission was developed in consideration of two things: (1) ease of preparation and avoidance of duplication by the applicant, and (2) efficiency of review by HUD. (Necessarily, the format does not follow the structure of the regulations or statute though all paperwork requests are based directly on them.) Example of item (1): Selection Factor F, Rent Affordability, requires consideration of the administrative capacity of the applicant to review requests in future years for rent increases submitted by the owner. Rather than request this information separately, we have requested that it be included with the description of capacity to administer the program which is needed for Selection Factor D, Performance and Capacity. This avoids any duplication of the description of administrative structure by the applicant. Example of item (2): Both the information on Minority/Women Business Enterprise and the non-discrimination/E.O. certifications will be reviewed by HUD's E.O. staff.

Application	Regulations	Statute	Explanation/Justification (2) Housing Development Grant Program
B-3 Additional Assistance to Lower Income or Very Low-Income.	Section 850.33(j) [Section 850.33(k)].	Section 17(d)(5) [Section 17(d)(4)(c)].	The Packet discusses two mechanisms that may involve additional assistance to the lower income or very low-income. The first is a 20-year provision of assistance to prospective tenants with incomes *below* 50% of the median. The second extends the period of assistance for the lower income to 25 years. Such provisions are optional, but if elected, provide additional points under Selection Factor F-affordable rents. If additional assistance to the very low-income is required as a result of relocation/displacement, provision for same would be discussed in Part I.
B-4 HAP Compliance.	Section 850.33(r)	N/A	Though certification is required by regulation, it was felt that a brief description of HAP compliance was necessary to assure early consideration of this element by applicant and owners; to avoid any confusion in HUD's determination of compliance; and to provide the opportunity of submitting 213 letters with the application to avoid later debate and additional staff intensive efforts by HUD.

Application	Regulations	Statute	Explanation/Justification (2) Housing Development Grant Program
Packet—Part C Certifications (Excl. E.O.).	Section 850.33(q) (Owner), Section 850.33(r) (Applicant), Section 850.17(c) (Owner), Section 850.17(b) (Applicant).	Section 17(d)(3)(B), Section 17(d)(4)(C), Section 17(d)(4)(D), Section 17(d)(4)(E), Section 17(e)(3), Section 17(i), Section 17(k)(5), Section 17(d)(8).	Certification forms are provided for both applicant and owner to assure conformity and completeness and reduce applicant burden. E.O. Certifications are provided in Part K of the Application.
	.....	Various other statutes and circulars, Executive Orders. etc..	
Packet—Part H-2 Locational Opportunities Data.	Section 850.39(b)(10), Section 850.33(e)(2).	Section 17(d)(4)(H).	Applicants seeking points under one or more of the elements in Selection Factor J are requested to submit evidence on the applicable criteria. If none of the criteria apply, no information is required.
Packet—Part H-3 Effect on Neighborhood Development.	Section 850.33(n), Section 850.39(b)(3).	Section 17(d)(5)(C)	Self-explantory.
Packet—Part I Relocation/ Displacement.	Section 850.35(d), Section 850.39(b)(3).	Section 17(d)(5)(C), Section 17(d)(4)(C), Section 17(g), Uniform Act.	Relocation plan is necessary to establish degree of mitigation of displacement under Selection Factor C, and to assure compliance with the limitation on displacement of very low-income tenants, and compliance, where applicable, with Uniform Relocation Act.
Packet—Section J Environmental Determination.	Section 850.35(e), Section 850.33(m), Section 850.33(r)(5)(i).	Section 17(i)	Self-Explanatory.
Packet—Section K Equal Opportunity.	.....	.....	
K-1 Equal Opportunity Certifications.	Section 850.33(q), Section 850.35(a), Section 850.37(n), Section 850.35(c).	Section 17(d)(4)(H).	Certifications (Exhibits K-1 and K-2) are self-explanatory.
K-2 Minority/ Women Business Enterprise.	Section 850.35(b), Section 850.33(o), Section 850.39(b)(9).	E.O. 11625, 12432, 12138.	Certification (Exhibit K-3) is self-explanatory. If project selected and points awarded for Selection Factor I, additional information may be required subsequently.
Packet—Part L Waiting List/ Search Time.	Section 850.39(c)....	Section17(d)(6).....	To avoid excessive effort on the part of the applicant and others (and to assure that waiting list and search time data are relevant to the lower income units being produced by the project), we are requesting data only on the unit sizes which are the same as the proposed lower income units. (Waiting lists are normally maintained by bedroom size.) Requested information concerning waiting list data compensates for the more efficiently operated housing programs. Inefficient program operation could produce very long and outdated waiting list information. Applicants proposing no more than 20 percent assisted units and which do not have experience with assisted housing programs which involve a search time factor are not eligible for priority bonus points.
Packet—Part M Project Information Project Application Form.	Section 850.33(f).....	Section 17(d)(6).....	Highlights information and documents necessary to define a project's financial and physical structure.
Packet M-1 Project Application Form (Exhibit M-1).	Section 850.33(f), Section 850.33(g), Section 850.33(h), Section 850.37(k).	Section 17(d)(4)(A)(B), (E), (F), Section 17(d)(5)(B)(E), (G), (H), Section 17(d)(8)(A), Section 17(d)(9).	Sections A, B, C, and D of Exhibit M-1 provide basic data on the project. Such data helps determine reasonableness of costs, rents, and expenses for a specific project given its construction type, building characteristics, construction problems, etc. Section D also establishes the total number of units, lower income units and unit sizes proposed for the project as well as information on commercial space to assure compliance with program limitations. Sections E and F provide information on equipment and services, utilities, and data for estimating the PBE. This data ensures that the PBE is accurate so that the correct amount may be deducted from the 30% of 50% calculation to arrive at the correct maximum rent amount for the lower income units.
	Same	Same	Sections G, H, I, J and K provide general (nonitemized in most cases) information on costs, annual income and expenses, amount required for settlement and identification of all sources of funds for the project. All information is necessary to make a general determination of project feasibility.

Application	Regulations	Statute	Explanation/Justification (2) Housing Development Grant Program
	Section 850.33(b), Section 850.37(i), Section 850.33(o), Section 850.39(b)(9).	Section 17(d)(3)(A), Section 17(d)(4)(G).	Section L provides a schedule of project completion necessary to comply with both statutory restrictions listed. Section M identifies all participating parties and assessment of acceptability of data on Minority/Women Business Enterprises and basic information needed to assess firm commitments (see M–7 below).
M–2 Narrative Feasibility Assessment.	Section 850.33(g)(i), Section 850.33(g)(4),(5),(7), Section 850.33(h), Section 850.37(k).	.....	Required as a part of feasibility assessment to ensure understanding by HUD of the project's financing package and how the various identified resources relate. This section also addresses any payback provisions for the HDG loan.
M–3 Appraisal or HUD Mortgage Insurance Commitment.	Section 850.33(f), Section 850.33(g), Section 850.33(h), Section 850.37(b), Section 850.37(g).	Section 17(d)(3)(C), Section 17(d)(4)(F), Section 17(d)(9).	Project feasibility determination by both HUD and the applicant cannot be made without estimates of projected costs, rents, and expenses. (Rent means the market rate units since the lower income unit rents are by formula.) We have provided choices to the applicant on how to obtain these estimates. The appraisal will not be necessary for HUD insured cases where the HUD–92264, issued with the commitment, provides the same data. An appraisal is necessary to ensure that the grant amount does not exceed the limitation of (d)(9) of the statute, and that the project value does not exceed the limitation of (d)(4)(F).
M–12 Long Term Feasibility and Project Investment Account (PIA).	Section 850.33(g), Section 850.33(h).	Section 17(d)(5)(B), Section 17(d)(5)(G).	Pro forma provides analysis with respect to long term feasibility of project. Project Investment Account controls the flow of funds to the project to ensure long-term feasibility. Long term feasibility is Selection Factor G.
M–13 Commercial Space.	Section 850.33(f)(6).	Section 17(d)(4)(A) .	Commercial space must be self-supporting. Test to determine such support is self-explanatory.
M–14 Maximum Units for Least Cost.	Section 850.39(b)(5).	Section 17(d)(5)(E)..	Test of maximum units for least cost is self-explanatory and is a Selection Factor E.
M–15 Rent Control..	Section 850–153	N/A.....	Self-explanatory.

Addendum #1 to the HDG Application Packet (Revised, May 1987)

The following is supplementary guidance to the section on Site Control, p.47, under Part M–7, *Firm Project Commitments and Site Control* in the Application Packet:

The first sentence of the second paragraph reads "Applications containing a commitment to convey city-owned sites, or sites owned by local public bodies are acceptable provided that the application contains evidence that any official action (i.e. City Council/Board of Commissioners resolution) which is necessary to convey the site to the owner has been taken."

Since time constraints of the funding round will not permit many communities to take the official actions (i.e. City Council/Board of Commissioners resolution) which are necessary to convey city-owned sites or sites owned by local public agencies, the Department has determined that a letter in the application submission from the Mayor or Director of a local public agency indicating their approval of conveyance of the site to the owner contingent upon City Council/Board of Commissioners approval is acceptable. However, in order to be considered for preliminary funding approval, the evidence of the official action and any other requirements of the above cited section must be received by Headquarters not later than Close of Business September 1, 1987.

Public reporting burden for this collection of information is estimated to average *82* hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410–3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502–), Washington, DC 20503.

Supplement—Interfacing HDG With the Tax Credit

A new low-income housing tax credit was created by the Tax Reform Act of 1986. Under the Act, tax credits are provided to individuals and corporations who invest in low-income rental housing. While the tax credit program is administered by the Treasury Department and tax credit authority is allocated to owners and developers by States, HUD has received many inquiries about the potential for using tax credits with projects subsidized by the Housing Development Grant (HDG) program. This Supplement to the HDG Application Packet, Revised May 1987, addresses some concerns regarding use of the tax credits with the HDG program.

The low-income housing tax credit legislation provides that the Federal portion of any grant made with respect to a project must be deducted from a project's eligible basis as defined by the tax credit legislation. The Conference Report accompanying the legislation specifically states:

Examples of grants which may not be included in eligible basis include Community Development Block Grants, Urban Development Action Grants, Rental Rehabilitation Grants, and Housing Development Grants.

Since the HDG is a Federal grant, it must be deducted from a project's eligible basis. Even when the HDG is used for costs which are not associated with the depreciable basis of the project—e.g., land acquisition or the HDG Project Investment Account, this rule still applies. It is unclear, however, whether the recycled Program Income from a Federal grant or interest from a HDG Project Investment Account will be considered Federal funds that must also be deducted from the tax credit eligible

basis of a project. Only Treasury regulations can clarify these matters.

Once the HDG has been deducted from the project's eligible basis, it qualifies for the 70 percent present value credit (9 percent in 1987). If the project is "federally subsidized" in addition to the HDG, the eligible basis and/or the amount of the credit will be further affected.

Within the context of the tax credit legislation, a project is federally subsidized if it is financed with tax-exempt bond proceeds (or, although not permitted by the HDG regulations, with another direct or indirect below-market rate Federal loan, such as the Farmer's Home Administration Section 515 program). If a project is federally subsidized by this definition, it qualifies for the 70 percent credit if the federally subsidized loan is deducted from the remaining eligible basis; or for the 30 percent credit (4 percent in 1987) if the loan is not deducted from the remaining eligible basis.

Tenant Eligibility and the Lower Income Requirement

Two areas of concern about the interface between HDG and Tax Credit relate to the level of income for qualifying tenants and the minimum number of lower income units. In both cases the two programs are basically compatible.

An eligible tax credit project must provide at least 20 percent of the units for families with incomes at 50 percent of median or below, 20/50 rule, or 40 percent of the units for families with incomes at 60 percent of median or below, the 40/60 rule. In conjunction with the income level of tenants at either 50 or 60 percent of median, there is a rent cap which requires the owner to charge a rent which does not exceed 30 percent of the 50 or 60 percent of median income level.

HDG requires that at least 20 percent of the units be made available to lower income tenants with incomes of 80 percent of median or below and a rent cap of 30 percent of 50 percent of median. Therefore, projects using the 20/50 tax credit rule will also satisfy the HDG criteria. In fact, an owner could elect to provide 40 percent of the units for tenants below 50 percent of median, be eligible for tax credit for those units and benefit under HDG by earning 15 bonus points. An additional two points can be earned for serving very low-income families (an irrevocable commitment) under the HDG rating criteria provided the tenants pay no more than 30 percent of their income for rent. Alternatively, an owner could elect to use the 40/60 rule and further restrict rents for half of those units to 30 percent of 50 percent to meet the HDG criteria (i.e., 20/60 plus 20/50). Either of these alternatives can result in a feasible project which provides substantial benefits to the project in terms of potential syndication proceeds.

The tax credit provisions permit tenant incomes to rise by as much as 40 percent above the 50 percent of median income level. This permits tenant incomes to rise to 70 percent of median, and remain tax credit eligible as well as HDG eligible. Under HDG, when a tenant's income rises above the lower income limit (80 percent of median) the tenant must move out of the unit. In addition, the HDG restrictions must remain in place for 20 years, while the tax credit has a 15 year compliance period.

Determining Rents for the Lower Income Units

Congress established rent caps on tax credit eligible units. Rents under HDG and tax credit programs are limited to 30 percent of the income of a family whose income is 50 (or 60) percent of median for the area. Even though it is anticipated that Treasury will adopt HUD's method of estimating 50 percent of median income, the rent calculations for determining 30 percent of 50 percent of median income are not the same for tax credits as for HDG. Consequently, owners who plan to use the two programs together should be aware of the potential consequences.

Important differences in the calculation of rents arise because HDG uses net income of the family size *expected* to occupy the units as the basis for rent determination while Treasury uses gross income of the family size *actually* occupying the unit. The attached table, "HDG and Tax Credit Rent Comparisons," illustrates the potential impact on HDG rents when the rent computations also have to meet tax credit caps.

Under tax credit provisions, gross incomes are not adjusted before determining rent as is required by the statute for HDG and other assisted housing programs. Line A of the attached table uses the national average estimate of 50 percent of median income for the illustration with gross income adjusted for family size (Columns 1–8). Line B reflects the maximum rent allowable under tax credit at 30 percent of gross income. HDG, on the other hand, establishes maximum rent at 30 percent of "adjusted" family income (Line C; see Exhibit M–5 of the Application Packet for computation). The income adjustment is based upon the number of persons expected to live in the completed unit. For underwriting analysis, HDG has fixed the rents for various unit sizes.

As shown on Line D of the Table, variations in the maximum rent to be collected with tax credits occur if the number of persons occupying the unit is not the same as projected by HDG. The HDG projection for three persons in a two bedroom unit, for example, would generate a maximum rent of $320 (line C3). If the family size in that same unit were actually four rather than three, the tax credit provisions would allow a maximum rent of $380 (line B4). On the other hand, a family of two in a two bedroom unit would be charged a maximum tax credit rent of $304. This analysis demonstrates that when the number of household members exceeds the HDG projection, owners will be in violation of the HDG requirements if they charge higher rents as allowed with tax credits. On the other hand, when the actual number of households is less than the HDG projection, the maximum tax credit rent will be lower than the HDG maximum. In the latter case, the owner must charge the lower rent to remain in compliance with the tax credit provisions and will experience per unit revenue losses similar to those estimated on Line E of the Table. These revenue losses are not extensive. A project containing 30 lower income units, equally distributed between two and three bedroom units, for example, would have a maximum yearly impact of $7,020 (15 units×$16+15 units×$23) in the unlikely event that the family size were smaller than the HDG projection in all of the units for a whole year.

Although the owner is free to charge the lower rents, the HDG cannot be used as an escrow for the losses nor can the HDG be used to write down the costs to allow for this potential shortfall. Therefore, the owner is at risk. HUD is working with Treasury on issues relating to tax credit and HUD programs. For now, at least, owners and investors should prepare for this potential revenue loss.

Rehabilitation Projects

Although tax credit can be used with other assisted housing programs such as Sections 8 and 236, the HDG regulations do not permit the use of HDG with other Federal housing assistance programs except Section 8 Existing Certificate and Housing Voucher Programs. On the other hand, HDG and tax credit may work very well with existing projects which have, by natural occupancy patterns, become low-income projects over time.

The HDG test for substantial rehabilitation is more stringent than Tax Credit provisions. HDG requires that the per unit rehabilitation costs be more than $6,500, adjusted by the applicable high cost factor, or that there be replacement of more than one major building system that fails local codes to qualify. Under tax credit, projects qualify with expenditures of $2,000 or more per unit. Hence, a project that meets the HDG substantial rehabilitation test will be tax credit eligible.

Financing

HDG does not require that a commitment be provided for tax credit *unless* it affects the project's ability to obtain financing. Where a firm commitment cites tax credit as a condition for financing, then the application must reflect such a commitment as specified in Part M–7 of the Application Packet, Revised May 1987.

Syndication proceeds are not an acceptable source of committed equity at the application stage (unless subscriptions are provided in Part M–7). In the event that syndication does not generate sufficient funds to meet the equity committed in the application, the owner's commitment is irrevocable. Moreover, at the evidentiary stage HDG will count as equity only those syndication payments to be contributed during the construction period. Therefore, any cash commitment for equity must be supported by the owner's net worth statement reflecting assets equal to at least three times the cash to be contributed or a letter of credit or a commitment for a letter of credit in the amount of the owner's equity.

TABLE: HODAG AND TAX CREDIT RENT COMPARISONS

Line		1	2	3	4	5	6	7	8
A	National 50 percent median income by family size for 1987.	$10,640, 1 person.	$12,160, 2 persons.	$13,680, 3 persons.	$15,200, 4 persons.	$16,150, 5 persons.	$17,100, 6 persons.	$18,050, 7 persons.	$19,000, 8 persons
B	Maximum monthly tax credit rents by family size.	$2,66, 1 person.	$304, 2 persons.	$342, 3 persons.	$380, 4 persons.	$404, 5 persons.	$428, 6 persons.	$451, 7 persons.	$475, 8 persons
C	Maximum monthly HoDAG rents by unit size with prototypical income adjustments.	$246, for 0 BR, 1 person.	$284, for 1 BR, 2 persons.	$320, for 2 BR, 3 persons.	.....	$365, for 3 BR, 5 persons.	.....	$412, for 4 BR, 7 persons.	$424, for 5 BR, 8 persons
D	Range of Treasury rents for smaller families with *negative* impact on HoDAG rental income.	N/A.....	$266, for 1 person in 1 BR.	$304, for 2 persons in 2 BR.	.....	$342, for 3 persons in 3 BR, 4 persons N/A.	.....	$380, for 4 persons, $404 for 5 persons in 4 BR, 6 persons N/A.	$404 for 5 persons in 5 BR, 6 to 7 persons N/A
E	Maximum per monthly/per unit effect on HoDAG.	.....	−$18.....	−$16.....	.....	−$23.....	.....	−$32.....	−$20

N/A: Not Applicable, i.e., Treasury rents are higher than HoDAG rents so HoDAG maximums presumably apply.

Changes to the Application Packet From 1986 to 1987

The following items represent substantive changes and deletions to the 1986 Housing Development Application Packet. There are other minor editorial changes, but the submission requirements are the same unless noted herein.

Introduction

Page iv

Added, the following paragraphs:

e. "Commercial space in * * * limitation on commercial space."

f. "A building developed with HDG * * * family housing, i.e., condominiums."

g. "HDG funds may not * * * the Urban Development Action * * *."

Page v

Added, the following paragraph:

h. "Manufactured home * * * systems contained therein." *Inserted,* last full paragraph, third sentence:

"* * * and that all exhibits/documents * * * oversight by HUD reviewers."

Part B–1

Page 3

Inserted, second paragraph, ninth sentence:

"* * * or an official who * * * sign the application,"

Part D

Page 6

Changed, first paragraph, third sentence:

"HUD does, however, * * * written comments or concerns."

Part E

Page 7

Added, second paragraph, first sentence:

"Vacancy rate information * * * vacancy data in Part G."

Part G

Page 9

Added, second paragraph under Part G:

"The 1980 and estimated * * * narrative provided for Part G."

Page 10

Added, first line and formula at the top of the page.

Page 11

Added, first paragraph (i), last sentence:

"The appropriate 1980 * * * field office economist."

Inserted, second paragraph (ii), first sentence:

"* * * or housing market area, * * *"

Part H–2

Page 14

Inserted, first paragraph, fourth sentence:

"* * * FmHA 515, HDG with 40% or more lower income."

Part J. Environmental Determination

Page 18

Inserted, into second paragraph:

"* * * including HUD approval * * * Release of Funds"

Part K–2. Minority and Women Business Enterprise

Page 19

Added, first paragraph under "Submission Content", second sentence:
"Failure to submit either * * * for Selection Factor I."

Part M. Project Information

Page 23

Added, under item number 3, third sentence:
"When it becomes necessary * * * 24 CFR 207.19 can be met."

Part M–1. Project Application Form

Section G

Page 30

Added, under Line 30, second paragraph:
"The total of both legal * * * whichever is lower."

Page 30

Inserted, under Line 34, first sentence:
"* * * but not the escrow * * * reflected in Section K."
Added, under Line 35–38, last sentence:
"Other projects are * * * list marketing expenses."

Page 31

Added, under Line 40, last sentence:
"If there is less * * * of the purchase price."

Section J

Page 33

Added, under Line 2, last sentence:
"For a leasehold * * * paid during construction."

Page 34

Added, under Line 7, last sentence:
"Such reserve shall not * * * FHA allowance where applicable."

Section K

Page 35

Inserted, under Box 4, paragraph 1:
"* * * or for an escrow account * * * ."

Page 36

Added, under Box 4, paragraph 2:
"This figure will * * * an equity contribution."
Added, under Box 5, 2nd sentence:
"In the event such * * * whichever is greater."
Added, in last paragraph under Box 5, second item: "Developer's fee."

Page 37

Inserted, into first paragraph at the top of the page:
"* * * cooperative, mutuals, or for profit projects * * *"
Added, under Box 7, second sentence:
"Funds committed to * * * to the current HDG project."

Part M–2. Narrative Feasibility Assessment

Page 38

Part M–2 was restructured and reflects minor changes throughout this PART.

Part M–7

Page 42

Revised, first paragraph:

Page 44

Added, under paragraph B 3., entire last paragraph:
"Where future year's * * * three-year CDBG plan."
Added, under paragraph C, second sentence:
"HUD will expect to * * * purchase the bonds."

Page 45

Added, under paragraph D 2. "For Additional Points", first sentence:
"Before consideration can be * * * all of the following:"
Added, under paragraph E. 1. a. *Tax-Exempt Bond Financing*
"The inducement resolution * * * amount of the bonds."
Added, under paragraph E 1. a., *Tax-Exempt Bond Financing,* third paragraph:
"[Definition. For purposes of this * * * by the Board of Directors.]"

Page 46

Added, under paragraph c., second sentence:
"The commitment must * * * of the financing."
Added, new fourth paragraph:
"2. Special Considerations for State Housing Finance Agencies.
Projects with an inducement * * * Threshold 16 (see Attachment 1)."

Page 47

Added, the following two new sections:
"F. *Taxable Bond Financing"* and
"G. *Tax Credits Under the Tax Reform Act of 1986"*

Page 47

Revised, entire section on *SITE CONTROL,* last paragraph which continues on page 48:
"Evidence of site * * * prohibited by 24 CFR 850.31(f)."

Part M–12

Page 50

Added, under paragraph A. *Pro Forma Contents, Return on Equity,* second sentence:
"The applicant may * * * as at project closeout."

Part M–13

Page 52

Added, second paragraph, fourth sentence:
"The marketability of * * * review of the application."

Exhibit G

Page 66

Added, a new exhibit to the 1987 Application Packet.

Exhibit J

Page 67

Added, new third paragraph:
"This is to certify * * * have been met."

Exhibit K–1

Page 68

Changed, at item number (v):
"* * * Section 504 of the Rehabilitation Act of 1973."

Exhibit M–8

Page 81

Added, under *ACQUISITION TEST,* paragraph number 2., second sentence:
"In order to determine * * * and then refinance."

Page 82

Inserted, into last paragraph:
"* * * in accordance with the * * * shown in Line h above."

Exhibit M–9

Page 83

Added, under paragraph A. *Instructions,* second paragraph, last sentence which continues on page 84:
"Such amounts may not * * * on Line 1. a. (see * * * below)."

Attachment 2

Page 93

Added, under E. 1., last sentence:
"For any portion of * * * during the Project Term."

Housing Development Grant Program Application Packet

Introduction

Guide for Preparation of Application

APPLICATION DOCUMENTATION

Part A. Instructions for Standard Form 424 and Executive Order 12372
Part B.
  Applicant Information
  Additional Assistance
  HAP Compliance
Part C. Applicant and Owner Certifications
Part D. Applicant's Project Selection Method and Program Description
Part E. Application Eligibility
Part F. Infeasibility of Moderate Rehabilitation
Part G. Housing Shortage
Part H.
  Neighborhood Identification and Description
  Locational Opportunities Effect of Proposed Project on Neighborhood Development
Part I. Relocation/Displacement Information
Part J. Environmental Determination
Part K.
  Applicant and Owner Non-Discrimination Certifications
  Minority/Women Business Enterprise
Part L. Assisted Housing Waiting List and Certification Holders Search Time
Part M. Project Information
  M-1 Project Application Form
  M-2 Narrative Feasibility Assessment
  M-3 Instructions to the Appraiser
  M-4 Substantial Rehabilitation Test
  M-5 Determination of Maximum Rents for Lower Income Units
  M-6 Determination of Maximum Value
  M-7 Firm Project Commitments and Site Control
  M-8 Determination of Maximum Grant and Minimum Equity
  M-9 Leveraging Ratio
  M-10 Architectural Information
  M-11 Cooperatives and Mutuals Only
  M-12 Long-Term Project Feasibility and Periodic Payments
  M-13 Determination of Acceptability of Commerical Space
  M-14 Determination of Maximum Units for Least Cost
  M-15 Rent Control

Exhibits

Exhibit A Standard Form 424
Exhibit B-2 Rent and Tenant Eligibility Determination
Exhibit C-1 Applicant Certification
Exhibit C-2 Owner Certification
Exhibit F Moderate Rehabilitation Determination
Exhibit G Rental Vacancy Rates for Housing Shortage
Exhibit J Certification of Environmental Assessment
Exhibit K-1 Applicant Non-Discrimination Certification
Exhibit K-2 Owner Non-Discrimination Certification
Exhibit K-3 Certification of Minority/Women Ownership
Exhibit M-1 Project Application (Form HUD-90031)
Exhibit M-4 Substantial Rehabilitation Eligibility Test
Exhibit M-5 Determination of Maximum Rents for Lower Income Units
Exhibit M-6 Format for Determination of Maximum Value
Exhibit M-8 Determination of Maximum Grant and Minimum Equity Contribution
Exhibit M-9 Leveraging Ratios
Exhibit M-12 Constant Payment Project Investment Accounts
Exhibit M-13 Commercial Test—Required only where Commercial Income is Involved
Exhibit M-14 Format for Determining Maximum Units for Least Cost

Attachments

Attachment 1 Threshold Requirements
Attachment 2 Project Selection Factors
Attachment 3 Program Flow Chart
Attachment 4 Schedule of High Cost Percentages for Base Cities
Attachment 5 Required Forms and Exhibits Checklist

Introduction to the HDG Application Packet

Thank you for your interest in the Housing Development Grant (HDG) program. This Application Packet provides instructions for preparing an application submission for the HDG program. The provisions of the regulations (24 CFR Part 850) and the most recent Invitation for Applications (IFA) published in the **Federal Register** as elaborated upon in this Packet are also binding.

The first determination to be made is whether the proposed project is eligible for an HDG award. The definition of a project is as follows: One or more buildings containing similarly constructed units, the site(s) on which the building(s) is located, and any functionally related facilities. Multiple buildings will constitute a project only if they are bound together as a result of proximate location, common ownership, and common financing.

The following conditions *must* also be met:

a. For a project with two or more sites, all sites must be located within the same neighborhood and generally within a THREE block radius of each other. Further, each site must contain both lower income and market rate units;

b. The lower income units must be of the same construction type, but need not contain the same interior amenities or the same amount of floor space as long as livability is maintained. The exterior of the lower income units must be indistinguishable from the exterior of the market rate units;

c. The project must be non-transient, residential, rental, cooperative or mutual housing and may not contain special purpose space, e.g., medical facilities requiring specialized features which increase the cost of construction.

d. The project must contain not less than 20 and no more than 200 units.

e. Commercial space in the project is limited to 10 percent. Up to 20 percent of the gross floor area may be designated for commercial use with adequate justification. Portions of the project building cannot be legally separated through establishment of a condominium regime to circumvent the 20 percent limitation on commercial space.

f. A building developed with HDG funds cannot be legally separated through establishment of a condominium regime for the purpose of creating a legally separated portion which can be used for non-rental, single family housing, i.e., condominiums.

g. HDG funds may not be used in conjunction with a project which is currently, or anticipated to be, assisted under any other Federal housing assistance program including the Urban Development Action Grant. Section 312 and Farmers Home Administration Section 515 programs. (This does not include the Section 8 Existing Housing Certificate and Voucher programs.) Projects which were formerly assisted under Section 305 or 313 of the National Housing Act, or projects which were formerly HUD-held or HUD owned are also not eligible to receive HDG funds.

h. Manufactured home parks and manufactured (mobile) homes are not eligible for the program. For HDG purposes, "manufactured home parks" are defined as rental communities of single-family manufactured (mobile) homes, where the occupants either own their manufactured home and rent the site on which the home is placed, or where both the home and the site are rented. For HDG purposes, "manufactured home" means a structure, transportable in one or more sections, which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein.

In addition to meeting the definition of an HDG project, every application must pass all nineteen threshold requirements as set forth in 24 CFR 850.37 and as described in Attachment 1 of this Packet. Failure to meet any one of the threshold requirements or the requirements stated above will result in rejection of the application and no further consideration will be given for funding.

Once you have determined that the application meets all of the threshold

requirements, you should review the competitive Project Selection Factors included in Attachment 2 of this Packet. A flow chart of the program is also included so that you will know the approximate timing of the entire HDG process from the Invitation for Applications through Project Closeout (see Attachment 3).

Since the HDG awards are highly competitive, we encourage you to review this entire Packet carefully before proceeding. Information included in your application submission must be clear, comprehensive and sufficiently documented to permit HUD to make all of the necessary determinations and to ensure adequate consideration of the application. Be certain that all documents are submitted, the proper forms and formats have been used, that the application and certifications have been signed as appropriate and that all exhibits/documents are placed in the designated parts of the application to avoid possible oversight by HUD reviewers. Since HUD will "look behind" any certification that appears questionable, explanatory material may be appropriate even when not requested in the Packet. During the application review process, HUD *may* request clarification after the submission deadline has passed. Where there is no documentation, or the documentation provided is clearly insufficient to make appropriate determinations, the application will be rejected under Threshold No. 2. *Absolutely no waivers will be granted to permit deviations from the regulatory requirements or Application Packet prior to or during the application review or selection process.*

Owners and applicants should review the requirements on limitations and uses of the grant, project financing, appraisals and drawings in Part M of the Packet. Potential applicants (i.e., cities, counties, towns, townships, units of local government) not included in the list of Designated Eligible Areas applicable to the current funding round, and States applying on behalf of units of local government should review Parts B-1, E, and F to determine if a Special Housing Need or a Neighborhood Preservation Purpose application can be supported.

HUD reserves the right to evaluate a project's economic structure to determine that the grant amount requested is not *clearly* in excess of the amount needed to provide decent rental or cooperative housing of modest design that is affordable to families without other reasonable and affordable housing alternatives in the private market. This will include an assessment of the owner's return on equity, project costs, rents, terms and conditions of financing and the amount of the owner's equity to determine if they are reasonable and appropriate. The amount of the grant requested may be reduced at the time of application review, preparation of the HUD/Grantee Grant Agreement or Cost Certification or an application may be rejected where clear excesses exist. *Under no circumstances will a grant request be increased.*

THE DEADLINE FOR APPLICATION SUBMISSION IS CLOSE OF BUSINESS ON THE DATE SPECIFIED IN THE MOST RECENT FEDERAL REGISTER PUBLICATION OF THE INVITATION FOR APPLICATIONS FOR THE HDG PROGRAM. THE APPLICATION SUBMISSIONS MUST BE RECEIVED AT BOTH HEADQUARTERS IN WASHINGTON, DC AND THE HUD FIELD OFFICE covering the jurisdiction in which the project is located. Close of business for Headquarters is 5:15 P.M. EST. Addresses and telephone numbers of the appropriate HUD field offices may be found in the Invitation for Applications. Contact the appropriate office to determine close of business. Applications must be received by HUD at those times and a receipt should be requested. Applications which have postmarks prior to that time but which are not received by BOTH Headquarters *and* the field office by the deadline will be returned.

Applications to Headquarters must be submitted to and requests for information should be addressed to :

Director, Housing Development Grant Division, Room 6110, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410

While general information will be available by calling the HDG staff at (202) 755-6142, only written answers will serve as grounds for appealing any subsequent HUD determinations. The most recent Federal Register publication of the Invitation for Applications announces the expected date of Notification of Preliminary Grant Awards and Project Rejections. No information as to processing status will be provided during the review and selection process.

Guide for Preparation of the Housing Development Grant Program Application

The Department has developed an application format and Checklist (Attachment 5) to assist the applicant in preparing the application and enable the Department to complete its reviews expeditiously

1. The Checklist will assist the applicant in identifying required data and assembling the application. The Checklist will also be used by HUD in its initial review of the application.

2. The Checklist should be used as the Table of Contents in the application.

3. Each application MUST be separated, tabbed and bound in a manner that permits the separation of various components for review (NO SPIRAL BINDERS) in accordance with the Checklist. The Parts must be labelled A through M, including M–1 through M–15. The instructions in this Packet have been prepared and identified in the same order and provide assistance in preparing Parts A through M. The Exhibits are identified by the letter of the Part in which they are to be inserted in the application.

4. Three copies of the application must be submitted: *two* for the appropriate HUD field office and *one* for HUD Headquarters.

A SEPARATE APPLICATION (THREE COPIES) MUST BE SUBMITTED FOR EACH PROJECT. Applicants submitting more than one application may submit the same information for Parts B–1 and 2, D, G, and L, if appropriate.

For additional guidance, you should consult the following Federal Register publications applicable to this funding round:

List of Designated Eligible Areas, Invitation for Applications, Program Regulations, 24 CFR 850

Part A.1. Standard Form 424

Standard Form 424 (Exhibit A) should be completed as follows:

1. "Type of Submission" is Application
2. Leave blank
3. To be completed by State Clearinghouse
4. Name, address and contact person of Applicant (i.e., unit of general local government or State, as appropriate)
5. Leave blank
6. a. 14.174
   b. Housing Development Grant
7. Name of proposed Project
8. Enter A or D or E only
9. Name of locality
10. Leave blank
11. Enter A or C
12. a. Enter amount of HDG requested
    b. Enter the amount of funds the applicant is providing to the Project
    c. Enter the amount of funds the State may be providing to the Project
    d. Leave blank
    e. Enter the amount of private financing
    f. Total funding for Project

13.a. Enter Congressional Districts for applicant
b. Enter Congressional District where project is located
14. Enter A
15. Enter date construction/rehabilitation is expected to start
16. Enter a minimum of 240 months
17. Leave blank
18. Enter Application deadline date
19.a. Enter DHUD, Development Grant Division
b. Leave blank
c. 451 7th Street, SW., Room 6110, Washington, DC 20410
20. Leave blank
21. Leave blank
22.a. Enter date application forwarded to State clearinghouse
b. Self-explanatory
23 a. Type name and title of local official submitting application
b. Signature of local official
24. through 33. Leave blank

Part A.2 Executive Order 12372 ("Intergovernmental Review of Federal Program")

An application is subject to the intergovernmental review requirements of Executive Order 12372 and HUD's implementing regulations at 24 CFR Part 52 if (1) the state in which the project is to be located has established a "state process" for carrying out intergovernmental review of applications for Federal financial assistance, and (2) the Housing Development Grant Program is among the programs the state has specifically identified for coverage by the "state process." (There are no project size exclusions.) For any application that is subject to the requirements of Executive Order 12372, the applicant must initiate the intergovernmental review process by sending a copy of the application to the appropriate state review coordinating official or entity before submitting it to HUD. The name and address of the appropriate state review coordinating official or entity may be obtained from the HUD field office in whose jurisdiction the proposed project will be located. A copy of the transmittal letter to the state along with any review comments already available from the state "single point of contact" or other commenting parties should be included in the application.

Part 52 allows clearinghouses 30 days in which to comment, hence, applicants are encouraged to submit applications to the appropriate clearinghouse as early as possible.

Part B. Applicant (and Jurisdiction) Information; Additional Assistance to Lower Income or Very Low-Income Tenants

Part B–1. Eligibility of the Applicant

This section deals only with the eligibility of the applicant, not the eligibility of the application. This section should include a narrative statement indicating the basis for eligibility and, in the case of state applicants, the additional information discussed below. Any unit of general local government, including cities, counties, towns, townships, parishes, villages, or other general purpose political subdivision of a state, and any state, acting on behalf of and with the concurrence of a unit of general local government, is an eligible applicant. States applying on behalf of units of general local government must submit evidence of concurrence of the unit of general local government generally in the form of a letter from the chief executive officer (CEO) of the jurisdiction. Such applications must be signed by the Governor.

A state or local housing finance agency (HFA) or any other independent public agency (IPA) is not eligible to apply but may serve as an agent of an eligible applicant (a state or unit of general local government). HFA's/IPA's may administer the program provided that: (1) the HFA/IPA enabling legislation clearly permits the ability to act as program administrator, *and* (2) the CEO of the grantee (the Governor, in the case of a state applicant) has delegated to the HFA/IPA the authority of program administration which could include preparation of the application. Notwithstanding program administration by the HFA/IPA, the CEO or an official who is authorized to commit the applicant to such agreements, must sign the application, execute the HUD/Grantee Grant Agreement and the Owner/Grantee Agreement and expressly agree to maintain ultimate responsibility for enforcement of program requirements.

The applicant and the owner must be separate and distinct entities. The applicant may not be the owner. Additional information on eligibility is provided in the HDG regulations at Section 850.3.

Part B–2. Performance, Capacity and Rent Mechanism

Discuss the applicant's (a) performance in meeting assisted housing needs, and (b) its capacity to administer the HDG program.

In the section on performance, describe the applicant's past performance in the area of housing assistance, including achievements in meeting Housing Assistance Plan goals and in administering any federally assisted housing programs in its jurisdiction such as Section 8, Public Housing, housing UDAGs, FmHA, HDG, or CDBG housing related activities.

The capacity of the applicant to administer the HDG program should be addressed in detail. Describe the administrative structure which will be responsible for HDG activities: how the applicant will clear any known impediments (e.g., zoning, sewer taps, alley abandonment) to a timely construction start; the staff available or to be made available; how construction or rehabilitation progress will be monitored; how grant funds will be requisitioned and handled (see 24 CFR 850.65); and generally, how the post-construction responsibilities of the applicant (grantee) identified in Subparts D, E, and F of the regulations will be met.

A document for Rent Mechanism and Tenant Eligibility Determination has been included (Exhibit B–2) in this Packet. In order to receive the one point assigned to this requirement (Selection Factor F.1), and to be eligible to receive up to three points for Selection Factor F.2, Exhibit B–2 must be executed by the chief executive officer or designee. At the time of Grant Agreement preparation, this exhibit may be modified to reflect the particular characteristics of the project.

Part B–3. Additional Assistance to Lower Income or Very Low-Income Tenants

Points will be assigned (Selection Factor F.2.) to applications proposing additional assistance through a subsidy mechanism which:

(a) assists tenants with incomes below 50% of median (very low-income) to pay no more than 30% of their income for rent and utilities. (The relevant comparison is the percentage of very low-income units to total units with the higher percentage receiving more points.) OR

(b) extends the period of assistance for all of the lower income units to 25 or more years. (The greater number of years will receive more points.)

To receive points under item (a) above, applicants must include (in Part B–3 or Part M–7) a signed statement which:

(1) specifies the number and size of units to receive the assistance; and

(2) commits the owner to give occupancy priority to the very low-income for these units; and

(3) commits the applicant or the owner to provide the resources necessary to compensate for the resulting revenue loss. (If the owner elects to absorb the revenue loss, an estimate of the revenue loss must be provided and it must be demonstrated that the project's financial feasibility will not be jeopardized.)

To receive points for (b) above, applicants must include (in Part B-3 or Part M-7) the commitment identified in (3) above. WHEN ASSISTANCE TO VERY LOW-INCOME TENANTS IS PROVIDED IN ORDER TO COMPLY WITH THE RELOCATION REQUIREMENTS OF PART I OF THIS PACKET, NO POINTS WILL BE ASSIGNED.

Restrictions

1. The additional assistance must not require HDG funds beyond that required to maintain the units at HDG formula rent levels or beyond 20 years.

2. Points will not be given where the additional assistance is in the form of vouchers, certificates, or other Federal assistance.

Part B-4. HAP Compliance

Applications must include:

1. Comments from the chief executive officer (CEO) of the unit of general local government solicited in accordance with Section 213 of the Housing and Community Development Act of 1974, and either

2. Evidence that the proposed project is consistent with the three-year goals and the general locations set forth in the most recently approved Housing Assistance Plan, if any; OR

3. For localities where no Housing Assistance Plan is in effect, a letter from the unit of general local government indicating that the project is consistent with the need for housing assistance and that public facilities and services for the project are adequate.

Variations on HAP Goals and General Locations

1. Applications proposing a site not included in a general location specified in the HAP will be considered by HUD only if an approvable (to be determined during the application review process) HAP amendment was submitted to the field office *prior to* submission of the HDG application.

2. Applications which propose to exceed the three-year HAP goals by no more than 20 percent will be considered if HUD approval is necessary (a) to obtain a project of feasible size and type; or (b) to meet urgent unforeseen needs (e.g., displacement due to natural disasters); and (c) the application contains a written statement from the CEO in compliance with 24 CFR 791.

3. Applications which propose to exceed the three-year HAP goals by more than 20 percent will be considered only if an approvable (to be determined during the application review process) HAP amendment was submitted to the field office prior to submission of the HDG application.

Part C. Applicant and Owner Certifications

Certifications and assurances are required of applicants and owners. These certifications and assurances are included in this Packet as Exhibits C-1 and C-2 and must be signed by the appropriate parties.

Part D. Applicant's Project Selection Method and Program Description

Briefly describe the method used to select the project(s) submitted under the program and indicate what consideration was given to the items listed in 24 CFR 850.33(c).

Applicants submitting more than one application must briefly describe the overall HDG program including a description of the types of projects proposed and a general schedule for carrying out the program. Submit the same description with each project application.

Applicants must also indicate in this section the method of public consultation used in developing the HDG program. HUD does not specify the method of public consultation. HUD does, however, expect the applicant to do what is necessary to satisfy itself that there has been adequate public consultation to withstand any challenge of failure to consider public views. This could include some mechanism which notifies the general public about the applicant's local HDG program and provides the general public an opportunity to present oral or written comments or concerns. The applicant must certify that this program was developed after public consultation (Exhibit C-1).

Part E. Application Eligibility

Applications may be submitted under one of three categories: (1) Designated Eligible Areas (DEA), (2) Special Housing Need, or (3) Neighborhood Preservation Purpose. DEA applications do not need to address Part E of this Application Packet. Applicants filing under categories (2) or (3) must follow the instructions below.

Special Housing Need Applications

A special housing need application may be submitted where there is (1) a need for housing by a special group of renter households in the jurisdiction or the housing market area, or (2) a special need for rental housing overall as a result of significant changes in the rental housing market *since the 1980 Census.* If a housing market area is used instead of a jurisdiction, the boundaries must conform with Part G, item 3 of this Packet.

Applicants documenting a Special Housing Need are requested to discuss their information, methodologies and data source(s) with the HUD field office economist prior to application submission.

1. Special Renter Group

A special renter group application provides evidence of a need for rental housing by households having specific social, economic, or demographic characteristics. Examples of special renter groups are: large families (five or more persons needing 3 or more bedroom units), or families with physically disabled members in need of barrier-free housing.

In the analysis and documentation of the severity of need, the applicant must provide: (a) information on the duration of the need in the locality, e.g., a chronic on-going need since 1980; (b) information which supports the severity of the need and the lack of available housing to meet that need, e.g., low vacancy rates in units of the size or type needed, long waiting lists for projects with units meeting the need, the number of units of the size or type needed in relation to the number of units in the rental inventory as a whole, or information on the lack of production of such units to meet the special renter group need; (c) a showing that the project is responsive to the needs of the special renter group, i.e., all of the lower income units in the project must serve the special renter group and the remaining units must be compatible in terms of unit sizes and types; and (d) a discussion of why the need cannot be adequately addressed by alternative means considering any Federal, State, local government or private sector opportunities.

Vacancy rate information is not required for Special Renter Group needs in Part E; however, the applicant must provide vacancy data in Part G.

2. Change or Dislocation in the Rental Market

A special housing need application in this category must provide evidence of significant changes in the overall rental housing market *since the 1980 Census.*

The change or dislocation must have affected the entire rental housing market, not just a segment of the market, thereby creating "tight" conditions in the overall rental housing market. The methodology used to determine the current overall rental vacancy rate in this Part E.2. must be the same methodology used in Part G of this Packet.

The analysis of the severity of need must include: (a) an explanation of the current condition of the overall rental market; (b) an explanation of the causes for the change in the market since the 1980 Census; and (c) an estimate of the current rental vacancy rate and the rental vacancy rate in 1980, for the housing market area as a whole.

The analysis of the need should address the causes of the change or dislocation such as: natural disasters, large scale abandonments, deterioration or conversions resulting in significant losses from rental inventory, rapid population and household growth due to increased employment opportunities or in-migration, coupled with little or no production of rental housing to meet the demand, or other factors which have resulted in the current tight rental housing market conditions.

In addition, the applicant should provide information on current market conditions that would give evidence of the severity of need. Such evidence may include an increase in occupancy of units that are of marginal quality and acceptability, large increases in rents in excess of project costs, rapid absorption of new rental units, long waiting lists for projects of all types (assisted and unassisted), or data indicating declining production of rental units in areas showing significant growth of rental households.

The analysis of need should explain how the change or dislocation has affected all renter households in the overall market and lower income renter households in particular. The analysis should also include any information that indicates how long the tight market condition will continue or if it will worsen due to factors such as continued decline in production of rental housing and continued rapid household growth.

The estimated current rental vacancy rate should be derived using: (1) local source data for a substantial portion of the units in the rental market or a sample cross section of all rental units of all types and rent ranges that would be representative of the current rental market in the area as a whole, or (2) local source data on the trend in the rental vacancy rate from 1980 to the present that would, using 1980 Census data as a benchmark, show a significant reduction in the current rate. The current vacancy rate must be compatible to the 1980 Census vacancy definition, representing actual rental units, not solely vacancy by type of structure. *The current rental vacancy rate must be less than seven (7) percent* in the case of a Special Housing Need application based on a change or dislocation in the rental market.

All rental vacancy rates must be calculated as follows:

$$\text{Vacancy rate} = \frac{\text{Units vacant "for rent"}}{\text{Units vacant "for rent"} + \text{Renter occupied units}}$$

Neighborhood Preservation Purpose Applications

An application submitted as a Neighborhood Preservation Purpose application must propose a project which is located in a neighborhood preservation area which meets the standards described in the regulations at Section 850.15(c). Further, the proposed project must advance the particular goals of the neighborhood preservation area strategy. An example of an unacceptable case would be where the goal is to rehabilitate an area of neighborhood commercial structures. The provision of housing in such a neighborhood would not be acceptable. If the goal is to rehabilitate existing low-rise residential rental property, the provision of a newly constructed high-rise structure would not advance the goal of the neighborhood preservation strategy.

The regulations require that public and private efforts be undertaken with a coordinated plan for long-term improvement of the area and that *such efforts be underway at the time of application submission.* Neighborhood Strategy Areas approved under Housing or CDBG programs where activities are underway, would be considered appropriate neighborhood preservation areas for HDG.

It is important that evidence of compliance with all regulatory standards be submitted in as brief a format as possible. Evidence should include a copy of the neighborhood preservation strategy, proof of an ongoing commitment to the neighborhood preservation area, information on funds budgeted for the area and the certainty of such funding.

Part F. Infeasibility of Moderate Rehabilitation to Meet the Purposes of the Proposed Project—Certification and Justification

Special Housing Need or Neighborhood Preservation Purpose applications will be reviewed to determine whether moderate rehabilitation could be used in the project neighborhood (project neighborhood is defined at 24 CFR 850.3 and Part H–1 of this Packet) to produce the same type of lower income units (by bedroom size and occupancy) proposed in the application submission. If moderate rehabilitation will produce the same type of units, a Special Need or Neighborhood Preservation Purpose application will be rejected without further review.

The application must include:

(1) Exhibit F, Moderate Rehabilitation Exclusion Certification, with appropriate box(es) checked and signed by the applicant, and

(2) a justification for the reason(s) checked on the Certification.

The certification and justification will be carefully reviewed by HUD.

Most of the reasons listed in Exhibit F are self-explanatory; however, certain items warrant further discussion.

Item 3 indicates that the definition used for neighborhood under the Rental Rehabilitation Program is different from the definition used in this program (see 24 CFR 850.3, Project Neighborhood) and could well permit a much smaller area. For this reason, the project neighborhood considered in this program could contain within it a project which is currently receiving assistance under the Rental Rehabilitation Program. If the Rental Rehabilitation project is producing the same type of lower income units that are included in the proposed HDG project, the applicant may not check this box.

It is anticipated that there will be few circumstances in when Item 6 will be permitted to justify the infeasibility of moderate rehabilitation. Possible grounds for such certification might be that the entire neighborhood is composed of single family sales-type homes or condominium units, both of which are ineligible under HDG.

Under Items 4 and 5, it is understood that there may be very few single units, scattered throughout the neighborhood, which could be moderately rehabilitated to produce units of the same bedroom size or occupancy type as the proposed lower income units. It is not intended that such very limited, isolated instances would be grounds for rejection of an application.

Part G. Housing Shortage

HUD will give favorable consideration to proposed projects in jurisdictions having lower rental vacancy rates and tighter market conditions relative to the rates and conditions in other applicant jurisdictions. Two criteria will be used: (1) the overall rental vacancy rate in the jurisdiction or housing market area and (2) the aggregate rental vacancy rate in all lower income census tracts in the jurisdiction. For jurisdictions without census tracts and which do not choose to develop current estimates using other data (see 2(b) and 2(c) below), the estimated current overall rental vacancy rate for the jurisdiction or the housing market area in which the project is to be located can be used for both criteria.

The 1980 and estimated current rental vacancy rates for both criteria must be shown in Exhibit G and stated in narrative form for Part G.

1. Overall Rental Vacancy Rates

In order to demonstrate low vacancy rate relative to other jurisdictions, the applicant must submit:

a. The 1980 Census Rental Vacancy Rate for the jurisdiction or the housing market area (see Item 3. below):

All vacancy rates must be calculated as follows:

$$\text{Vacancy Rate} = \frac{\text{Units Vacant "for rent"}}{\text{Renter Occupied Unit's} + \text{Units Vacant "for rent"}}$$

b. Estimate of Current Overall Rental Vacancy Rate for the jurisdiction or housing market area:

The estimated current overall rental vacancy rate should be derivied using (i) data for, or a recent local survey of, a substantial portion of the units in the rental market reflecting a cross section of all rental units of all types and rent ranges that would be representative of the current rental inventory as a whole; or (ii) local source data on the trend in rental vacancies or vacancy rates since 1980, using the 1980 data as a benchmark and applying the trend of change in vacancies or rates from 1980 to the current date to yield a current rate.

Appliants should ensure that the methods and techniques used in gathering and analyzing the data are adequate to yield statistically reliable results and are compatible to methods used in Census definitions and calculations.

Applicants who intend to conduct special surveys should discuss their plan with the local field office economist prior to application submission. In addition, prior consultations is advisable as to data sources, methods and estimates since all data and estimates will be evaluated during the application review and no opportunties for changes will be permitted after application submission.

c. Current Conditions and Change in the Rental Market:

Applicants must provide information that demonstrates the severity or extent of housing shortage. Evidence should address the cause of the changes in the market since 1980 which have resulted in the current tight rental housing market conditions. The description should include such information and data as the rate of absorption of new rental units, length of waiting lists for both new and existing projects of all types (assisted), increases in rents, declines in rental production relative to demand and household growth, significant losses from the rental inventory due to demolition, conversion and other causes. The demonstration should also include any information that indicates that the current tight market will continue or worsen over the next two years.

2. Lower-Income Rental Vacancy Rates

The lower income rental vacancy rate can be determined by the applicant by using either a., b., or c. below.

a. 1980 Census Data

For applicants in areas with census tract data, the process for making this determination involves the following two steps:

1. Using the 1980 Census, determine all census tracts in the jurisdiction having median family incomes at or below 80 percent of the median family income for the area. If an applicant is in a metropolitan jurisdiction, the area should be that currently defined by the Office of Management and Budget as a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA). For a nonmetropolitan jurisdiction, the area is defined as the county. The appropriate 1980 "80 percent of median family income" figure can be obtained from the field office economist.

ii. For each lower income census tract within the jurisdiction or housing market area, calculate the total units reported as "renter occupied" and the vacant units reported as "for rent". Add the totals for all census tracts. Divide the total "renter occupied" units into the aggregate of all units "for rent." The formula is as follows:

$$\text{Vacancy Rate} = \frac{\text{Units vacant "for rent"}}{\text{Units vacant "for rent"} + \text{"Renter Occupied"}}$$

For applicants in jurisdictions without census tracts, the current overall rental vacancy rate may be used for this criterion if the applicant does not choose to develop an estimate using other methods as described in (b) and (c) below.

b. Use of Data Other Than the 1980 Census

Applicants are encouraged to use 1980 Census data to determine the lower

income rental vacancy rate; however, applicants attempting to demonstrate a significant reduction in vacany rates since 1980 may use other more recent data.

Local surveys may be relied upon provided methods and techniques used in gathering and analyzing the data are adequate to yield statistically reliable results and are comparable to methods used for census calculations.

If an applicant's jurisdiction is delineated by census tracts, and it wishes to provide current data on lower income rental housing vacancy rates, it should define lower income census tracts using 80 percent of HUD's most recent estimate of median family income. This estimate can be obtained from the local field office economist.

Applicants who intend to conduct special surveys, or use other data to update census information, are strongly urged to discuss their plans, methodologies and data sources with the local field office economist prior to application submission. Prior consultation is advisable since all survey data will be evaluated during the application review process and no opportunity to make changes will be permitted after application submission. Failure to contact the field office economist may result in refjection of your methodologies and data.

c. Use of Lower Income Vacancy Rates Calculated for Specific Categories of Rental Housing

Applicants who feel that the overall *lower income* rental vacancy rates do not represent the shortage of housing for a particular category of renter units may wish to provide vacancy rate information solely for a specified category. Local data or surveys cited must be confined to the specific category of units that are considered to be in short supply and are being proposed as the lower income units in the application. Calculation of a vacancy rate for a specific category of rental housing will only be considered for the lower income vacancy rate, not for the overall rental vacancy rate.

An example of this situation would be where the lower income vacancy among *standard* quality rental housing is much lower than that for *all* rental housing. It may also be the case that the lower income vacancy rate for a particular size unit is significantly less than the overall rental vacancy rate.

Vacancy rates for cooperative or mutual housing units alone will not be accepted where higher vacancy rates exist for *rental* units of the same size and type.

3. Use of the Housing Market Area

In very unusual circumstances, applications from very large or very small jurisdictions may request that the determination of rental vacancy rates be made for a housing market area. The definitions of housing *market* area, for purposes of this program, are as follows:

a. Jurisdictions subdivided by boroughs, counties, or country equivalents, and are located in large metropolitan areas (MSAs/PMSAs as defined by the Office of Management and Budget), may be considered separate housing market areas. This determination should consider whether the area qualifies as a distinct housing market based on such factors as geographic barriers, large population concentrations, or a separate economic base as determined by commuting patterns and major sources of employment. Applicants should determine overall rental vacancy rates both within the defined market area as a whole, as in 1. above and within lower income census tracts in the defined market area as in 2. above. It is expected that this situation would occur rarely and only in very large metropolitan areas.

b. For very small jurisdictions in both metropolitan and nonmetropolitan areas, the housing market may be larger than the jurisdiction in which the proposed project is to be located. The market area in such cases may include several contiguous communities or an entire country. Such market areas should be used only where there is reasonable expectation that the proposed project would attract households from the entire area. The use of a market area in order to increse the apparent demand for a large project should be avoided in areas where the population is dispersed over a wide geographic area. Typically only localities having populations of less than 25,000 would use housing market area data rather than jurisdiction data. In nonmetropolitan areas where census tracts have been delineated, the applicant should provide the rental vacancy rate based on the lower income census tracts. Where no tract delineations are available, only the current overall rental vacancy rate needs to be calculated for the housing market area unless the applicant chooses to develop other data to indicate the current lower income vacancy rate as described in 2.b and 2.c above.

Where housing market area data rather than jurisdiction data are used in Part G, data used to address Parts E (Special Housing Needs) and H–2 (Locational Opportunities Data), if applicable, must also address the housing market area.

Part H. Neighborhood Information

H–1. Neighborhood Identification and Description

The neighborhood of the proposed project must be identified in accordance with the definition contained in the regulation at 24 CFR 850.3, Project Neighborhood. The neighborhood should first be identified using significant distinguishing features such as those identified in paragraph (b) of the definition. If the neighborhood does not contain a population of 2,500 persons, the boundaries should be expanded in all directions to include residential housing until the minimum population is attained. This area then becomes the neighborhood for determination of the infeasibility of moderate rehabilitation (Exhibit F) and similar neighborhood determinations. A map of the project neighborhood depicting boundaries and delineating any census designations should be included.

A brief description of the neighborhood should be provided including general indications of building construction type and condition, income of residents, public facilities, recent changes in character or investment patterns, and similar information.

H–2. Locational Housing Opportunities Data

Under Selection Factor J, Locational Housing Opportunities, and in compliance with 24 CFR 850.39(b)(10), a maximum of five points may be awarded only to projects which are located:

a. outside areas of minority concentration where the current pattern shows most assisted housing in minority areas; or

b. in project neighborhoods where there is no other assisted housing; or

c. in project neighborhoods undergoing revitalization through public or private investment and in which rental opportunities for lower income households are declining.

An application will be awarded points if acceptable documentation is provided showing that the project meets any one of these criteria. Points will be assigned in accordance with Selection Factor J of Attachment 2 in this Packet. Where no documentation is provided, zero points may be assigned, provided showing that the project meets any one of these criteria. Points will be assigned in accordance with Selection Factor J of Attachment 2 of this Packet. Where no

documentation is provided, zero points will be assigned.

For purposes of the above locational criteria:

• an "area of minority concentration" is an area in which the percentage of the population that is minority is greater than the percentage of the total population, of the unit of local government, that is minority, and

• "assisted housing" includes housing units assisted under Section 8 New Construction, Substantial Rehabilitation or Moderate Rehabilitation; Section 202; Section 23 Public Housing; Section 236; and Section 221(d)(3) BMIR programs, FmHA 515, HDG with 40% or more lower income. Assisted housing does *not* include units assisted under the Section 8 Existing Certificate or Housing Voucher programs or the section 235 program.

To receive consideration for points under the first locational criterion, the applicant should provide racial demographics of the project neighborhood and jurisdiction and data on the distribution of assisted housing projects within the jurisdiction of the unit of local government, including the project neighborhood.

If no other assisted housing exists within the boundaries of the project neighborhood, the applicant should so state in order to receive points under the second criterion.

To receive consideration for points under the third criterion, the applicant should provide racial demographics and incomes of households in the project neighborhood and information on the level of public and/or private investment and on the rate of change and approximate loss of rental housing units for lower income households in the area.

If the proposed project does not clearly provide one of the opportunities for which points will be awarded, the applicant may so state.

Part H-3. Effect of Proposed Project on Neighborhood Development

The applicant should describe the physical, social and economic effects of the project on the neighborhood. If HUD determines that the project will have a negative effect on the neighborhood, the project may be rejected based on Threshold 12. If HUD determines that the project will have a positive effect on the neighborhood, and the project meets all threshold requirements, it will be assigned one point based on Selection Factor C.1.

Typical considerations in determining a positive or negative neighborhood effect include: compatibility with existing land uses, increased demand on traffic and other environmental burdens, complementary effects on employment patterns, and/or the likely effect of the project on recent changes in neighborhood character and investment patterns.

Generally, a positive *social or physical effect* on a neighborhood is one which enhances some valuable cultural, architectural or environmental quality of the neighborhood, especially if the neighborhood is changing. Erosion of such a positive quality would be a negative effect. A positive *economic* effect would enhance the economic stability of a declining or low-income neighborhood; however, HUD will view any unmitigated displacement resulting from such an effect as negative.

Sometimes a project will not be large enough to have a significant positive impact on the surrounding area. Many projects will have both positive and negative effects. In these instances, it is possible that the project might pass the threshold requirement for project acceptability but not qualify for the point.

Part I. Relocation/Displacement Information

24 CFR 850.35(d)(2)(iii)(A) requires that no household, regardless of income, be permanently displaced as a result of the rehabilitation or construction of a project under HDG, unless said household has received advance written notice, appropriate advisory services concerning counseling or housing opportunities, tenant rights under the Federal Fair Housing law, and guidance in searching for suitable replacement housing.

Sites proposed for HDG projects which at the time of application submission house tenants who will be temporarily relocated or permanently displaced must address Part I. Applicants must submit a statement indicating whether there are any residential tenants living on the proposed project site who will be temporarily relocated or permanently displaced as a result of development of the project. In order to comply with 24 CFR 850.35(d)(2), this statement must provide the following information;

1. Number of households by size, income and race expected to be permanently displaced, and in a separate listing, those expected to be temporarily relocated without regard to income level of tenants.

2. Without regard to income levels of tenants, a description of the housing facilities expected to be available for occupancy by temporary relocatees and permanent displacees.

3. A description of the financial assistance, advisory services and any other services to be provided to temporary relocatees and permanent displacees.

4. A chart which clearly defines the estimated cost of all relocation benefits and services, including identification of the source(s) of funding.

5. The anticipated timetable for carrying out all necessary relocation activities.

6. Sample letter to be used informing tenants moving into the project after submission of the HDG application that they may be displaced due to planned rehabilitation activities and that they will not be entitled to any relocation benefits or assistance.

7. A commitment that the applicant will comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), if the site is acquired by a state agency.

[A state agency is defined as any department, agency or instrumentality of a state or of a political subdivision of a state or states. If an applicant acquires property under the HDG program, the Uniform Act will apply. When the Uniform Act applies, and the HDG regulations are more stringent, i.e., one for one replacement of very low-income households, the more stringent regulation will apply.]

If any lower income (80 percent of median or below) household is to be permanently displaced, the applicant or owner is obligated to provide financial assistance in an amount sufficient for that household to obtain affordable replacement housing, as defined under 24 CFR 813.107(a), for a minimum of two years.

If any lower income household is to be temporarily relocated as a result of rehabilitation or construction of a project, the household must be provided with the following:

a. Decent, safe and sanitary temporary housing;

b. Financial assistance sufficient, as determined by the applicant, to cover reasonable expenses, including moving costs to and from the temporary housing, rent and utilities; and

c. A unit of appropriate size in the rehabilitated or newly constructed project at a cost equal to or less than that which would apply under 24 CFR 813.107(a).

If *very low-income tenants* (50 percent of median or below) are to be permanently displaced or temporarily relocated, the following must also be provided:

1. A statement describing how the applicant will ensure compliance with the statutory and regulatory (24 CFR 850.35(d)(1)) restrictions on the involuntary displacement of very low-income households.

The regulation states that no very low-income household, as defined in 24 CFR 813.102, may be displaced by a household which is not very low-income. In the event a very low-income household is displaced, that household must be replaced by another very low-income household.

Upon completion of a project, any very low-income household which has been temporarily relocated as a result of the project will pay rent which is the lower of the HDG rent, or the rent required by 24 CFR 813.107(a). A "replacement" very low-income household will pay the HDG formula rent.

The following example is provided to illustrate this obligation.

At the time of application submission, 15 very low-income households are living in a project. Five choose not to live in the rehabilitated (or newly constructed project), five are permanently displaced because there is no unit to accommodate the family size or composition, and five are temporarily relocated, and then moved back into the completed project.

The completed project is for 50 units. The grant application specifies 10 HDG units, but the project must maintain 15 very low-income households at initial occupancy because there were 15 very low-income households in the project at the time of application.

The five households which were temporarily relocated will return to the completed project and pay the rent required by 24 CFR 813.107(a), or the HDG rent, whichever is lower. The ten households which were permanently displaced must be replaced by other very low-income households who will pay HDG rents. Five of the "replacement" households will live in HDG units and five will live in market rate units.

2. A written commitment from the owner guaranteeing placement in the completed project of at least as many very low-income households as were in residence at the time of application submission. The owner must also agree to comply with all regulations at 24 CFR 850.

This latter obligation may require a further financial commitment from the owner/applicant. The pro forma required in Part M–12 of this Packet must reflect the revenue to be lost as a result of households paying rents in accordance with 24 CFR 813.107(a) and as a result of those occupying market rate units and paying HDG formula rents. The pro forma must also demonstrate financial feasibility to HUD's satisfaction. Where such feasibility cannot be demonstrated, the applicant or the owner must provide an escrow account adequate to cover any shortfall.

To determine the amount to be escrowed, the applicant or owner must use one or both of the following methods, as appropriate, for calculating the required subsidy:

A. For Households Who Will Pay Rents in Accordance With 24 CFR 813.107(a)

(i) Survey each of the existing very low-income households to determine 30 percent of their adjusted income;

(ii) calculate for each household the difference between 30 percent of their income and the formula HDG rent;

(iii) calculate the amount of subsidy required annually for all very low-income tenants in this category;

(iv) calculate the annual subsidy needed for seven years.

B. For Households Who Will Occupy Market Rate Units at HDG Formula Rents

(i) calculate for each household the difference between the HDG formula rent and the market rent;

(ii) calculate the subsidy required annually for the units affected;

(iii) calculate the annual subsidy needed for seven years.

Should the original very low-income households choose to stay beyond the seven-year assumption, the subsidy must continue for the duration of their tenancy. The above computations provide only an estimate for determining the minimum commitment of funds for the subsidy account. The amount needed to subsidize the actual families who reside in the project may vary depending upon actual income levels and the length of tenancy. Once the original very low-income households move from the project, the obligation to these very low-income households is fulfilled.

Part J. Environmental Determination

The environmental requirements in 24 CFR Part 58 and the authorities cited in Section 58.5 are applicable to this program. Applicants unfamiliar with environmental assessments, reviews and compliance findings should seek assistance from the Environmental Officer in the field office in whose jurisdiction the project is to be located. At the very least, under the National Environmental Policy Act (NEPA) regulations, all applicants must complete an environmental assessment and make a finding of significant or no significant impact. In the event the environmental assessment determines the project will have a significant impact, an Environmental Impact Statement (EIS) will have to be prepared. The applicant must identify the measures to be taken to correct any negative impact prior to committing funds and undertaking project action. The publication of a finding and the preparation of an EIS, if needed, may be delayed until such time as the application is selected for HDG funding.

In the event an application is funded, all requirements of 24 CFR Part 58 including HUD approval of the Request for Release of Funds, where applicable, must be complied with prior to start of project construction/rehabilitation.

In some instances, a proposed project may be "categorically excluded" from the NEPA requirements of Part 58 (see 24 CFR 58.35(a)(4)), however, the environmental authorities cited at Sections 58.5 and 58.17 are still applicable. Rehabilitation of buildings, except school buildings, are "categorically excluded" from the NEPA requirements when the following conditions are met:

1. Unit density is not increased by more than 20 percent;

2. Project does not involve changes in land use from residential to nonresidential or vice versa or from one class of residential to another (e.g., from single family attached to high rise multiple dwelling units);

3. Estimated cost of rehabilitation is less than 75 percent of the total estimated cost of replacement after rehabilitation.

As part of its responsibility, the applicant must determine the specific applicability of the authorities cited in Section 58.5, identify and evaluate resources protected, and comply with the governing policies and procedures. Such determination and identification must precede application submittal. The actual compliance can be achieved after project funding approval and documented as provided at Section 58.34(b). In the event a categorically excluded activity may have a significant environmental effect, NEPA requirements must be met.

All applicants must submit Exhibit J of this Packet, a certification that an environmental assessment has been completed in accordance with NEPA regulations, or provide a statement that the project is "categorically excluded" from the environmental requirements.

Part K. Equal Opportunity Information

Part K–1. Applicant and Owner Non-Discrimination and Equal Opportunity Certifications

Exhibits K–1 and K–2 are certifications from the applicant and the owner concerning non-discrimination and equal opportunity requirements with Federal funding. These certifications must be signed by the appropriate officials and included in the application submission. HUD will consider the past efforts of the unit of general local government, the owner, or the State (where applicable) in determining whether past performance in civil rights and equal opportunity has been acceptable.

Part K–2. Minority and Women Business Enterprise

Criteria for Selection Points

Selection Factor I (24 CFR 850.39(b)(9)) provides favorable consideration to projects with controlling ownership vested in minorities and/or women. Points will be awarded if over 50 percent controlling ownership is held by minority persons or women. Points will not be awarded for: (a) minority or women limited partners; (b) other limited non-controlling ownership; and (c) day-to-day management and control absent actual ownership in the controlling entity.

Furthermore, the controlling ownership vested in minorities and/or women must be continuing and substantial, beyond pro forma ownership of the firm as reflected in the ownership documents. Minority and women owners must enjoy the customary incidents of ownership and share in risks and profits commensurate with their ownership interests. They must also possess the power to direct or cause the direction of management, policies and operations of the firm and to make day-to-day as well as major decisions. If it is determined that non-minority owners are disproportionately responsible for the operation of the firm, then the minority and/or women partners will not be considered "controlling owners."

Submission Content

An application which claims to have minority/women controlling ownership of the project must include both of the following in Part K. Failure to submit either of the above will result in zero points for Selection Factor I.

(a) Exhibit K–3 signed by the applicant

(b) A description of the structure of the project ownership entity which identifies with whom control of the entity is vested and exercised as per the above discussion.

Applicant Guidelines for Evaluating Selection Factor I Eligibility

Applicants shall consider the following circumstances in evaluating the legitimacy of minority/women controlling ownership:

1. Date the firm was established and/or control changed from non-minority to minority/women. If the firm was established or a change made after the date of the Invitation for Applications, scrutinize the reasons for same.

2. Determine the minority/women's management responsibilities and capabilities.

3. In the case of a joint-venture, review the interests of both owner entities to ensure there are no conflicts with the ownership, control, management responsibilities, risks and profits and that the minority/women partner(s) are responsible for a clearly defined portion of the work.

4. A certification by an authorized signatory of the owner entity that over 50 percent of the controlling ownership is held by minorities and/or women.

After Selection for Funding

Upon selection for funding, all applicants (Grantees) must submit minority business enterprise (MBE) and women business enterprise (WBE) development plans.

If points are awarded based on Selection Factor I and the project is funded, HUD may request partnership agreements or other evidence after project selection. Failure to show compliance with Selection Factor I criteria at that time could result in withdrawal of funding approval.

For a project which is funded and was awarded points based on Selection Factor I, the original percentage of minority/women ownership may be increased but not decreased for at least seven years after initial occupancy, i.e., if a minority or woman controlling partner withdraws from the owner entity during this period, the replacement partner must be a minority or woman.

Part L. Assisted Housing Waiting List and Certificate Holders Search-Time

Priority will be given to applications which: (1) are located in areas where the waiting lists for housing assistance are relatively long; *AND* (2) where families holding certificates or housing vouchers require an excessive length of time to find housing. If these two conditions can be documented and verified, points will be awarded in accordance with Selection Factor "Priority Projects."

In order to show relatively long waiting lists, an applicant should provide the number and size of units available for assistance in the locality, i.e., public housing units, section 8 new construction/substantial rehabilitation units, Section 8 Existing Certificate and Housing Voucher programs and any other Federal, State or local housing assistance programs. Waiting list information from these same programs must also be provided by number and size of units. Information should be limited to the unit size proposed for HDG assistance. The comparison of availability of units versus the length of the waiting list will assist in eligibility determination for bonus points.

For condition (2), excessive time is generally defined as anything in excess of sixty (60) days. To complete the eligibility determination for bonus points, the applicant must show excessive search time for the size of the units proposed for HDG assistance. If the application proposes HDG assistance for two and three bedroom units, search time information must be provided for two and three bedroom units. In addressing this search time issue, applicants should take into consideration any or all of the following actions that may have taken place over the last two years: (a) The frequency with which extensions are granted to certificate holders who could not find suitable housing within the initial time period; (b) the number of times a single certificate is re-issued to a potential tenant before the certificate holder is successful in locating a suitable unit; (c) the number of times the PHA administering the Section 8 Existing Program may have had to revise the original bedroom composition of its certificates because units of a particular size were not available; (d) the availability of a local housing placement service which shortens search time for certificate holders; (e) any other mitigating factors that impact on a certificate holder's search time.

Part M. Project Information

Sections A through L of this Packet deal with the applicant, the owner, and the neighborhood. Part M of this Packet focuses on the project itself. Following is a brief guide to defining and documenting the project's financial and physical structure.

Prospective applicants should review all elements of Part M in great detail prior to selecting projects for submission. After selecting a project(s),

the applicant should immediately complete the steps outlined below under Preparing Basic Project Information and Technical Determinations. A separate section highlights special considerations for projects using mortgage insurance.

Structuring the Grant. The applicant should determine the most efficient use of the HDG funds. Following are allowable uses of the grant:

1. A one time up-front interest rate reduction payment;

2. An up-front development cost writedown;

3. Investment in a trust account (Project Investment Account—PIA) from which periodic payments will be made to maintain project feasibility in accordance with Part M–12 by:

a. Maintaining the restricted rents on the lower income units for the full Project Term (20 years or more);

b. Lowering the rents of market rate units; or

c. Making periodic interest payments on the debt service.

Applicants electing to use grant funds as a one time up-front interest rate reduction payment will be permitted to make a lump-sum drawdown of HDG funds *only* when the expenditure of non-Federal project funds reaches a level consistent with the Project Leveraging Ratio (Exhibit M–9). It must also be demonstrated that this mechanism is more cost effective to the Federal Government than a development cost writedown.

Where the grant is to be used for a development cost writedown, land costs are an eligible use of funds; however, since the owner must show clear title to the land in the evidentiary material required by Exhibit D of the Grant Agreement such funds will be made available on a reimbursement basis only.

PIAs for Items 3.a. and 3.b., except where Mortgage Insurance is involved, must be structured to reflect the assumption that project net income will increase at a rate which will reduce the required periodic payment over time. PIAs for periodic interest payments (3.c.) may be structured as constant payments provided it is demonstrated (and HUD approves) that it is the most efficient use of the HDG funds.

Other uses of the grant may be permitted subject to HUD approval. Applicants must demonstrate economic feasibility and cost-effectiveness; failure to do so will result in rejection of the application.

Preparing Basic Project Information. After selecting a project(s) which appears to meet the program requirements, the applicant and/or owner should immediately:

1. Order an appraisal. A basic outline of instructions to the appraiser is provided in this Packet, Part M–3. These instructions can be tailored to accommodate the determinations below. Exhibit M–1 can only be completed once the appraisal is prepared.

2. Complete Exhibit M–5, Determination of Maximum Rents for Lower Income Units. The section 8 very low-income limits may be obtained from the appropriate HUD field office; the utility allowance will be provided in the appraisal.

3. Complete Exhibit M–6, Format for Determination of Maximum Value.

4. Complete sections A, B and C of Exhibit M–1. The remainder of Exhibit M–1 will be completed after the appraisal is submitted.

5. Complete the sketch plan, typicals, elevation drawings, general outline specifications, and any special engineering reports. For substantial rehabilitation, the architect's work write-up also should be submitted.

Technical Determinations. After preparing the foregoing, the applicant should determine whether the following items are to be prepared by the appraiser or by a specialist.

The appraiser selected by the applicant or owner must have at least six years of experience as an appraiser, of which at least three must be in multifamily residential appraising. Where an HFA is providing the financing or acting as the state's agent, a staff appraiser of the HFA, who meets the qualifications specified above, may complete the appraisal as described in Part M–3 of this Packet. Qualified cost estimation and management staff of the HFA may also perform the cost and expense estimation functions.

1. The Estimate of Annual Expense. This may be prepared by an independent management firm experienced in the field of multifamily management and supplied to the appraiser.

2. The Estimate of Replacement Cost, Section G of Exhibit M–1. This may be prepared by an independent cost estimator experienced with multifamily cost estimating and supplied to the appraiser.

Any special independent engineering reports required for substantial rehabilitation cases should be supplied to the appraiser.

Projects With Mortgage Insurance. There are several special considerations for use of grant funds in conjunction with mortgage insurance:

1. *Appraisal.* A copy of the Conditional or Firm Commitment, with supporting Forms HUD–92264 and HUD–92264A *must be submitted* and will be used in place of an independent appraisal.

2. *Cash Requirement for Closing.* Where grant funds are needed to meet the cash requirement to close, 24 CFR 207.19(c) requires that the mortgagor deposit with the mortgagee, or a depository controlled by the mortgagee, an amount deemed by the Commissioner to be sufficient, when added to the proceeds of the insured mortgage, to assure completion of the project and to pay the initial service charge, the carrying charges, and the legal and organizational expenses incident to the construction of the project. In lieu of a cash deposit, a mortgagor may provide either an unconditional irrevocable letter of credit issued to the mortgagee in an amount deemed sufficient by the Commissioner or enter into an agreement with HUD, the grantee and the mortgagee. Such agreement shall comply with 24 CFR 207.19(c)(7) which requires either a cash escrow or an unconditional irrevocable letter of credit equal to no less than 10 percent of the writedown portion of the grant proceeds. The escrow or letter of credit shall be held by the mortgagee and drawn upon in the event the grantee fails to advance the grant proceeds in a timely manner. This letter of credit must remain in place until completion of construction.

Where grant funds are needed to clear title to the land, this letter of credit must be sufficient to cover the land cost. If land costs are greater than 10 percent of the grant, the larger amount will be required. Under no circumstance may this letter of credit be applied toward the owner's equity in the project or credited toward Total Settlement Costs (Section J of Exhibit M–1). The interest or cost of the letter of credit, however, may be considered an equity contribution and included in line J–9 of Exhibit M–1.

3. *Early Starts and Closing Procedures.* HUD will not permit early starts for projects using mortgage insurance. Mortgage insurance closings must occur simultaneously with the HDG approval of evidentiary material required by the Grant Agreement (24 CFR 850.63). When it becomes necessary for a project to reach initial endorsement prior to review and approval of the HDG evidentiaries, the grantee may provide a bridge loan to the owner in the full amount of the HDG writedown so that the mortgage insurance closing requirements of 24 CFR 207.19 can be met. Upon approval of the HDG evidentiaries and release of the HDG, the grantee may be reimbursed. On the average, approval of

the evidentiary materials by HUD Headquarters and the field office counsel requires 45 to 60 days after submission.

4. *Project Investment Accounts.* Mortgage insurance in connection with a PIA, may only be used where payments from the account are a constant amount for 20 years. Applicants must complete Exhibit M–12 to demonstrate that the amount needed for the PIA is at least 10 percent less than the amount which would be required if the HDG funds were to be used as a development cost writedown. Also, the use of PIA funds is restricted to the maintenance of the lower income units. The grantee and the owner should review the requirements of a PIA in Part M–12 of this Packet.

5. *Non-Mortgageable Items.* Once the firm commitment for mortgage insurance has been processed, Exhibit M–1 must be amended to reflect the results. The costs shown in Exhibit M–1 may vary from the Form HUD–92264 only to the extent that allowable costs vary between the mortgage insurance and HDG programs. Some examples of items treated differently by the HDG program are: land acquisition costs, off-site construction costs, prepaid leases and leasehold fees and legal and organizational fees. This list may not be all inclusive and is provided only to give examples.

Part M–1. Project Application Form

This part of the application will consist of the Project Application (Exhibit M–1) and the Addendum. The next several pages of this Packet provide instructions for completing the form. While HUD will not subject the HDG application to the level of underwriting analysis completed for mortgage insurance processing, the major categories of costs, rents and expenses will be reviewed to determine that they are reasonable. Substantial guidance is provided to assist the applicant in making decisions about information provided by the owner. HUD will determine the reasonableness of all the information provided.

Projects that have a conditional or firm commitment for mortgage insurance *must* submit the commitment and Forms HUD–92264 and 92264A with the Exhibit M–1. Except for differences attributed to the different methods of calculating eligible costs under the two programs, the mortgage, cost and expense information on Exhibit M–1 must agree with the comparable information on Form HUD–92264.

Section A—Project Identification

Line 1. If the project is an existing project to be rehabilitated and the name is to be changed, include the old name in parentheses.

Line 4. To be completed by HUD.

Line 7. If combination, specify percentage of family and percentage of elderly.

Section B—Location and Description of Property

Line 7. Include lower income and market rate units as revenue. In non-revenue, list only units (for employees) for which rent will not be collected.

Line 11. Check all applicable.

Line 12. If several buildings involved, list range of stories.

Line 15. Examples include steel frame, wood frame, solid masonry, reinforced concrete.

Line 17. Examples include masonry, stucco, siding, prefab panels, etc.

Line 18. Use the following codes. Add "C" to the front of the code for any central system. Add "I" to the code for any individual system:

GFWA—gas, forced warm air
OFWA—oil, forced warm air
EHP—electric heat pump
OFHW—oil, forced hot water

Line 19. Use the following codes: Add "C" to the front of the code for any central system. Add "I" to the code for any individual system:

EHP—electric heat pump
GAC—gas air conditioning
EAC—electric air conditioning

Section C—Information Concerning Land or Property

Line 2. If the site has already been purchased, check the appropriate box and enter the purchase price. If the site has been optioned, check the appropriate box and enter the purchase price set forth in the option. Where the site is to be leased, leave blank.

Line 3. If the property has not produced income since acquisition, you may include rezoning expenses, taxes, improvements made, demolition costs, etc. Otherwise, you may include only the carrying charges. Amounts in this category will be screened by HUD for reasonableness. With a leasehold, enter the amount of ground rent to be paid during construction. Explain entry by attachment.

Line 4. Enter the acquisition cost plus additional costs from line 3. If the land is to be leased, enter the leasehold fee. (Do not include the annual lease payment or ground rent. This amount should be included in Section I, line 5.)

Line 10. Indicate any off-site improvements needed to bring services to the project lot line.

Section D—Estimate of Income

Lines 1 and 2. Before you complete this section, complete the Addendum for Exhibit M–1 in accordance with the following:

Unit Type—Specify unit type by using bedroom count, i.e., 2BR, 3BR, etc. If there are two types of units with the same bedroom count (such as a 2BR unit in a high rise *and* a 2BR unit in a row structure, or a 3BR unit with one bath *and* a 3BR unit with two baths or a den), each unit type should be listed on a separate line.

Lower income and market rate units of the same size and type are to be shown on the same horizontal line. Show market rents in the column labelled "Unit Rent Per Month" and the lower income rents (from Exhibit M–5) in the column labelled "Lower Income Rents."

No. of Living Units—Indicate total units for each type, including lower income and market rate.

No. of Lower Income Units—Indicate number of lower income units for each unit type.

Living Area—Indicate net rentable space within each unit type. Do not include square footage attributable to balconies (use separate lines for units with the same number of bedrooms with different square footages or average the square footage).

Composition of Units—Use the following codes in the order listed.

Number of Bedrooms—#BR
Den, if any—D
Dining Room, if any—DR

Example: 3BR, D, DR, K, 1½B, B

Unit Rent Per Month—Indicate the estimated market rent for each market rate unit type. (In the case of cooperatives, the unit rent per month would be the unit carrying charges.) These rent estimates must be prepared by a qualified appraiser in accordance with Part M–3 of this Packet or the rents must conform to those contained in Form HUD–92264 when a mortgage insurance commitment has been issued.

The estimated rent per month must be based upon and supported by current market rates established for similar units furnishing comparable services in competing areas. Appropriate adjustments must be made to reflect measurable differences between the subject units and comparable units and any variation in the general level of rents expected to occur by the time project units come on the market.

Personal Benefit Expense (PBE) Not Included in Rent—These estimates should reflect all of the utilities and

services checked in Section F of Exhibit M–1. The PBE estimate should be prepared by or reviewed by the appraiser and supported in Exhibit M–3 of the application.

Lower Income Rent—At least a full 20 percent of the total units in the project must be maintained for lower income occupancy for a minimum of 20 years. The rents in these units must be calculated in accordance with Exhibit M–5, Determination of Maximum Rents for Lower Income Units.

Where the applicant proposes a mechanism to lower the rent to give further assistance to very low-income tenants (below 50 percent of median income—See Part B–3), the funds to supplement the tenant's rental or cooperative monthly charges must be explained in Part B of the application. In all cases, Section D of Exhibit M–1, in the column for Lower Income Rents, must be completed using the formula rents calculated in Exhibit M–5.

The rents in all lower income units of the same bedroom count will be the same since the rent determination is based upon income limits and prototypical adjustments established by HUD, rather than a market analysis or square footage.

Total Monthly Unit Rent—(a) Multiply the number of lower income units by the Lower Income Rents. (b) Multiply the market rate units by the Unit Rent Per Month. (c) For each unit type, add the total of (a) and (b) and enter the sum in the last column, Total Monthly Unit Rent. Do *not* include the "PBE not in Rent" in the "Total Monthly Unit Rent" calculation.

EXAMPLE OF COMPLETED ADDENDUM (HUD–90031–A)

Unit type	No. of liv un	No. units lower inc	Living area	Composition of units	Unit rent per month	PBE not in rent	Lower inc rnts	Total mo. unit rent
2BR	3	1	850	2 BR, 1½ BA	650	55	250	1550
2BR	6	2	950	2 BR, 2 BA, DR	700	55	250	3300
3BR	11	5	1100	3 BR, 2 BA, DR	850	75	300	7300
Total	20	8						12150

After you have completed the Addendum, summarize the information in Section D, Items 1 and 2 of Exhibit M–1 as follows: Devote *one horizontal line only* to each bedroom count beginning from the top with 0 BR. Put 0 BR in column 1 under Unit Type on the first horizontal line, 1 BR on the second line, 2 BR on the third line, 3 BR on the fourth line, and 4 BR or more on the fifth line. If there are no units in the project with a particular bedroom count listed in column 1 of a horizontal line, *enter a zero in each column on the horizontal line.*

Where there is more than one unit type with the same bedroom composition listed in the Addendum (such as two types of 2 BR units), *the information for all units with the same bedroom count must be reflected on the same horizontal line.* Square footage and rents of these differing units *must be averaged* based on the number of units in each category, that is, if four market rate 2 BR units rent for $500 and one market rate 2 BR unit rents for $400 per month, the average appearing on horizontal line three under "Unit Rent Per Month" would be (4×$500)+(1×$400) divided by 5, or $480.

It is especially important that Line D–2, the Total Estimated Monthly Rentals for All Living Units, include the total income for all units from the Addendum.

Review the following example of entries in Section D, Items 1 and 2, of Exhibit M–1 (this is the same hypothetical example used above):

Unit type	No. of liv un	No. units lower inc	Living area	Composition of units	Unit rent per month	PBE not in rent	Lower inc rents	Total mo. unit rent
0 BR	0	0	0	0	0	0	0	0
1 BR	0	0	0	0	0	0	0	0
2 BR	9	3	917	See Addendum	683.67	55	250	4,850
3 BR	11	5	1100	3 BR, 2 BA, DR	850	75	300	7,300
4+BR	0	0	0	0	0	0	0	0
								12,150

Lines 3 and 4. Indicate in Line 3 the number of attended and/or self-parking spaces provided and the parking ratio. If covered or open parking spaces are *included* in the rent, list the number of each type of space in Line 4 and indicate zero income.

Line 5. All commercial space must be self-supporting. Where commercial space is proposed, Exhibit M–13 must be completed. This Exhibit indicates total cost attributable to the commercial space, debt service and project expenses attributable to the commercial space, and source of income to support debt service and expenses proposed. The appraisal included in Exhibit M–3 must support the conclusions on income from commercial space or the project may be rejected as infeasible.

Commercial space is generally limited to 10% of total gross floor area. HUD will consider requests for up to 20% commercial. Where such a request is made, attach (to Exhibit M–13) a discussion of the need for inclusion in the project.

Line 8. Gross floor area is the sum of all floor areas of headroom height within the exterior walls, measured to the exterior faces of the walls or to the center line of walls separating attached buildings. Note: built-in garages, commercial areas, basements and all other areas within the exterior walls are to be included.

Items excluded from the gross floor area are recessed, extended, or continuous balconies, carports, accessory buildings, patios, porches, or terraces and all other areas outside the exterior walls.

Line 9. Net Rentable Residential Area is the sum of all living areas within the exterior walls. Living area is the area of

a living unit measured from the inside faces of corridor and exterior walls and from the center lines of partitions separating living and/or commercial areas.

Line 10. Net Rentable Commercial Area is the sum of all commercial area within the exterior walls measured from the interior faces of exterior and corridor walls and from the center lines of partitions separating commercial and/or living areas.

Section E—Equipment and Service

Self-Explanatory.

Section F—Utilities

Self-Explanatory.

Section G—Estimate of Replacement Cost

Line 1. Off-site costs reflected on this line may not exceed one percent of Section G, line 41.

Lines 1–10. If the owner is contracting with an arm's length general contractor, leave Lines 1–10 blank and complete only Line 11, Estimated Total Cost of Construction, by inserting the anticipated construction contract amount.

Line 7 must not exceed 10 percent of Line 5. Generally, builder's profit as a percentage of Line 5 should vary inversely with the size of the project; that is, while 10 percent may be appropriate for small projects, it will exceed the standards of reasonableness for large projects.

Line 13. The applicant should assure that the supervisory architect's fee is sufficient to obtain adequate inspection. The applicant should require monthly reports from the owner's supervisory architect to supplement the applicant's own monitoring.

Line 17. Calculate construction interest by multiplying one-half of the estimated construction loan by the interest rate per month. Multiply this amount by the number of months in the construction contract term plus two months (Line 16).

Lines 18 and 19. Indicate the estimated taxes and insurance for the period in Line 16. Insurance includes fire, windstorm, extended coverage, liability and other risks customarily insured in the community during construction. It does not include workmen's compensation and public liability insurance which should be included in the cost estimate in Line G–4.

Line 20. Include any mortgage insurance premium applicable to the construction loan(s) for the period in Line 16. Indicate the rate, as a percentage, in parentheses.

Line 21. Include fees charged by the construction and permanent lender for the examination and processing of the project loan application and mortgage insurance processing fees. No fees may be charged by the applicant. An HFA may charge its normal examination fee. If the applicant has required the owner to pay for an independent appraisal, engineering report, or cost analysis, this fee may also be included here.

Line 22. Include inspection fees charged by a mortgage insurer or by the construction lender as a condition of making the loan. The owner's inspecting architect's fee is included on Line G–13. The applicant may not charge any fee in this line item.

Line 23. Include any financing fee collected by the construction and permanent lender(s) for making the loan. This fee may not exceed three and one-half percent (3½%) of the amount of the permanent loan. This limit includes all expenses involved in underwriting, issuing bonds, if applicable, discounts, etc. Actual costs may exceed this amount but will not be included in calculations of maximum grant amount. Any amount in excess of 3½% may be reflected on line J–5.

Line 24. Include the costs typically incurred in connection with a mortgage transaction such as recording costs for all loans and mortgages, mortgage and stamp taxes, and the cost of survey and title policies in connection with construction and permanent loans.

Lines 25–27. Include any other charges attributable to the construction period and attach an explanation of any item included for consideration.

Line 29. Legal expenses are those expenses typically incurred by an owner for legal services necessary in the creation of projects of the size and kind proposed in the project market area. Legal expenses are separate from organization expenses and must be estimated and listed separately.

Line 30. Organization expenses are the costs of services typically required of an owner to initiate a project, its planning, financing, construction, and control and management of the construction of the project through final closing of the permanent loan. The organizational services may be performed for the owner by experienced individuals or specialists, or they may be performed by the owner.

The total of both legal and organizational costs must not exceed 2% of total development costs or $90,000 whichever is lower.

The following identifies the type of actions and efforts that qualify for consideration under organization:

1. Collecting and assembling data and documentation for the request for construction and permanent financing, including analysis of market need, selection and optioning of site and project design considerations.

2. Assembling data and documentation for mortgage closings from various parties involved in a project, arranging for execution of documents, and attending to closings. Ensure that only the administrative aspects are reflected so that there is no duplication of items under Line 29, Legal Expenses.

3. Controlling and accounting for disbursement of mortgage and grant proceeds.

4. Placing mortgagor's hazard and liability insurance; coordinating building release for occupancy.

5. Continued contact and dealing with lenders and the applicant through closing of the permanent loan and close out of the grant.

Organization expenses *must not* include costs of zoning changes, any of the costs typically included in the estimate of replacement cost, marketing expenses, or recurring operating expenses.

Line 33. Contingency reserve may be included only in substantial rehabilitation projects. This reserve may be up to five percent (5%) of the construction contract amount to cover change orders that are necessary after the rehabilitation process is begun.

Line 34. Include only relocation/displacement costs specifically justified in Part I of the application; but not the escrow needed to meet the obligation to very low-income persons who remain in the project. This escrow amount should be reflected in section K. HUD will review the estimated relocation/displacement costs and reduce or increase this line item if costs are determined to be out of line.

Lines 35–38. In the case of non-profits, cooperatives and mutuals, enter marketing expenses, normally not to exceed three percent of Line 39, Total Estimated Development Cost. Other projects are not permitted to list marketing expenses.

Non-profits, cooperatives and mutuals (Part M–11) may also enter a consultant fee on a separate line, normally not to exceed one percent of Line 39, Total Development Costs. Consultant's fees for profit-motivated rental projects are *not* an allowable line item, except as appropriate to cover an historic preservation consultant for rehabilitation projects.

The following may not be included in Exhibit M–1 (1) Developer/Sponsor's fee

or Risk Allowance; and, (2) syndication fee or expense.

Line 40. If the site has been purchased within the last three years in a true arms-length transaction, enter the purchase price plus any costs associated with the ownership of the property to date, less any income from the property during the period of ownership, (Section C, Box 4). If there is less than a true arms-length transaction, HUD reserves the right to use the lesser of the appraised value or the purchase price.

If the property was purchased more than three years ago, include an estimate of the property's "as-is" value supported by the appraisal in Exhibit M–3.

If the project is to be located on a leasehold, enter the ground rent during the construction period plus any costs paid for the purchase of the lease.

Section H—Annual Income Computations

Line 2. Include the estimate of long-term collection potential as a percentage of gross income. This figure must be based on consideration of market rate and lower income units as well as commercial space and other income sources and should be supported (in the case of non insured cases) by the appraisal in Exhibit M–3. *In the case of cooperatives,* rather than a vacancy allowance, a five percent operating reserve is normally reflected (a three percent operating reserve and a two percent vacancy factor). This percentage may be higher where commercial income is involved. Lower occupancy percentages during the rent-up period should be reflected in Line J–4, Initial Operating Deficit Reserve.

Section I—Estimate of Annual Expenses

Estimate annual expenses for one full year operating period of the project, not the construction period. It must be based upon actual operating experience of comparable projects, adjusted for differences between the proposed project and the project from which the estimates were developed. This estimate must be developed either by the appraiser or by an independent management firm experienced in the area of multifamily management, and supplied to the appraiser for his review and use in the appraisal. In either case, the estimate included in this section must consider both residential and commercial expenses and be supported by the appraisal in Exhibit M–3 or the mortgage insurance commitment (Form HUD–92264).

Only totals for general categories of expenses as indicated on lines one (1) through seven (7) of this section are required. Guidance is provided, however, on the elements that make up each of these line items to assist the applicant in reviewing the owner's proposal and to provide greater assurance that HUD will find the items reasonable.

Line 1—Total Administrative

Total Administrative includes advertising, management fee and any other administrative expenses associated with the owner in operation of the project. If the owner intends to self-manage the property, an allowance must be made to reflect a paid manager and necessary overhead expense.

Line 2—Total Operating

Elevator Maintenance. This includes the estimated cost of service and repairs required to maintain the elevators. It includes service calls and service inspections of the equipment, lubrication and adjustments, and the replacement of worn or defective parts. Maintenance contracts, often referred to as "parts, oil and grease" contracts, may be used to produce the estimate.

Fuel (Heating and Domestic Hot Water). This estimate may include fuel requirements for both heating and domestic hot water. If the tenant pays for heat, only heat used in public spaces is estimated. The estimate should be based on actual expense data for similar projects with similar heating systems and types of fuel.

Lighting and Miscellaneous Power. This estimate is based on electricity expense paid by similar projects.

Water and Sewer. Tenants' domestic requirements where not included in rent, and common requirements such as laundries, boiler water, yard sprinkling and any other project water needs such as a pool.

Gas. This estimate is based on amounts paid by similar projects.

Garbage and Rubbish Removal. The adequacy of public service, if proposed, should be examined as it may be necessary to provide a supplemental service.

Payroll. This includes all personnel directly employed by the project with the exception of administrative personnel. Only cash outlays are included in the payroll cost estimate. Housing provided in the project in lieu of compensation is *not* included. Payroll data from other projects may be utilized where good maintenance and high occupancy ratios exist. The appropriate number of employees can be determined by comparing the size and needs of the project to similar well-run projects.

Other. Insert any item of operating expense peculiar to the project and not included in other estimates. Include expenses such as janitorial materials and equipment, electric light bulbs, small tools, etc.

Line 3—Total Maintenance Expenses

This estimate includes all items of repair and maintenance which competent management deems necessary to maintain the property in an acceptable operating status. The allowances should represent the probable average expenses per year necessary to preserve and protect the property and its attractiveness at a standard expected by tenants. The estimate should be based on data from similar projects more than three years old.

Decorating Costs. Develop estimates based either on employment of an independent contractor for a fixed price, or on materials only if work is to be performed by employees included in payroll.

Repairs. Include the average annual maintenance cost of all physical parts of structures and equipment (exclusive of grounds maintenance) not estimated elsewhere. Grounds maintenance is separately estimated elsewhere. Repairs and maintenance of many items will not recur yearly; however, a replacement reserve account must be included in the expense estimate. Replacement reserves for noninsured projects are limited to .004 percent of the total mortgage, excluding any PIA. Insured projects must use the allowance approved in the mortgage insurance commitment.

Exterminating. Estimates of local exterminating contractors may be used or the work may be done by project labor.

Insurance. Data for estimating insurance expense is obtained from comparable properties. Public Liability Insurance should be included.

Grounds Expense. Include replacement of plant material, yard maintenance equipment, driveways, on-site streets, lighting standards, playground equipment and the like. Consideration must be given to the composition of the expected occupancy, e.g., the probability of damage to lawns and shrubs by children. This expense is affected by the design and type of project under consideration and the extent of grounds to be maintained.

Other. Estimate expenses not included above, e.g., maintenance of furniture, carpets and/or drapes furnished in the units.

Line 4—Total Taxes

For the preparation of this estimate, basic data is obtained from the local

assessor's methods and data gathered from comparable properties. Taxes are estimated separately for real estate, personal property, payroll and miscellaneous taxes. If tax abatement has been granted it should be reflected here and explained in Exhibit M–2.

Line 5—Special Assessments

Include the annual cost of special assessments and ground rents, if any.

Section J—Total Settlement Requirements

Line 1. Self-explanatory.

Line 2. If property is owned subject to existing mortgage liens, enter amount required to retire outstanding indebtedness. If property is to be acquired, enter the amount of the purchase price less any option fee already paid. If property is owned free and clear, leave blank. If applicant is providing a land writedown enter purchase price (or appraised value, where applicable) less the amount of writedown. For a leasehold, enter the unpaid portion of any leasehold fee plus the lease or ground rent to be paid during construction.

Line 3. Self-explanatory.

Line 4. Enter the estimated amount (if any) required to cover operating and debt service expenses from project completion until full occupancy when project income will be at its maximum. Commitments in this category are not expected to exceed 1 to 6 months debt service depending upon the project type, location and the vacancy rate for the area.

Line 5. Enter the amount of any loan discounts not included on Line G–23 that will be paid to the construction lender and/or the permanent lender.

Line 6. If tax-exempt financing is to be used for the permanent financing only, enter the amount of any anticipated interest yield cost (i.e., the anticipated difference between the interest that will be due on the escrowed bond proceeds and the investment income that will be earned on the escrowed proceeds where a loss is projected).

Line 7. Enter the amount of working capital reserve necessary to cover the cost of equipping and renting the project after completion: accrued taxes, property insurance premiums, mortgage insurance premiums, etc. Such reserve shall not exceed 2½ percent of the mortgage amount including any HUD/Grantee construction writedown or the allowance permitted with mortgage insurance.

Line 8. Enter the cost of required improvements outside the project boundaries (e.g., streets and utilities) that are not reflected on Line G–1 and will not be installed at public expense or at the expense of the utility company.

Line 9. Enter costs not itemized elsewhere; attach an explanation. The restrictions on Lines G–35 through 38 apply to this line item.

Line 10. Self-explanatory.

Line 11. Self-explanatory.

Line 12a. Self-explanatory.

Line 12b. Enter the amount of HDG funds to be used to cover costs associated with the development of the project. Do *not* enter the amount of any HDG funds to be used to provide lump sum interest reduction payments, project investment account, or any other form of assistance that does not help defray the cost of developing the project.

Line 12c. Enter the sum of any non-HDG grant and the value of any in-kind contributions that will cover development costs which otherwise would have been incurred by the owner. Do not include land writedowns, non-development related escrows or tax abatement.

Line 12d. Enter the total amount of funds to be made available by the owner. This amount includes funds to be invested as equity in the project (i.e., the amount shown on Line 4d of Section K *less* any equity in the land value and less any escrow funds put up by the owner for non-development related costs, *plus* additional funds, such as cash or letter(s) of credit, to be made available to cover items such as the working capital reserve, the initial operating deficit reserve, and any other type of closing cost contingency reserve not included in the project replacement cost in Section G). This total should equal the total shown on line J–11.

Section K—Source of Project Funds

Box 1. Self-explanatory.

Box 2. Check one box in the first column *and* at least one box in the second column. In the first column, check "Loan" if at least one half of the HDG funds will be repaid and if payments on the HDG loan principal balance will begin no later than the 21st year of project operation. (For projects using a Project Investment Account (PIA), half the funds will be considered repaid *only* if half of the funds disbursed to the project from the PIA are repaid.) Otherwise, check "Grant." Do *not* check both "Grant" and "Loan."

In the second column, for interest reduction mechanisms, check the first box in the second column only if the HDG funds will be escrowed to make periodic interest reduction payments. If, however, funds will be provided through an up-front interest "buy-down mechanism, such as discount points (see discussion under Part M, General Information), check 'Other' and explain.

Box 3. If the applicant intends to provide HDG assistance to the owner in the form of a loan, provide a summary of the terms of repayment and describe the repayment structure in Part M–2.

Boxes 4 and 5 (General Guidance)

See instructions for completing Exhibit M–8 to determine the amount of equity contribution required.

Housing Development Grant profit motivated and limited distribution project owners must provide at least a 10 percent equity contribution. Cooperatives, mutuals and non-profit owners do not have to comply with this requirement except when such an entity creates a for-profit structure or when a for-profit corporation is involved in the project ownership.

Box 4. Identify all principals of the owner entity responsible for equity capital and specify the amount to be provided. The following types of owner contributions should be included as "equity" in this Box 4:

1. Cash investment by the principals for project replacement costs (Section G of Exhibit M–1), additional loan discounts (Line J–5), interest yield costs (Line J–6) and off-site construction costs (Line J–8), or for an escrow account as necessary to offset debt service or to meet the relocation requirements of Part I. "Syndication proceeds" are not an acceptable category because the owner must demonstrate an independent capacity to provide identified funds.

2. Land equity may be included. To value such equity for sites owned more than three years, include the appraised value less any debt owed on the property. Where the site has been held for less than three years, the purchase price less any debt owed may be used as equity. Adequate evidence of this equity should be provided in Part M–7 or be supported by the Appraisal in M–3, as appropriate. This figure will be identical to Section J Line 2 above, except where the appraised value is acceptable as an equity contribution.

3. Where the owner has an identity with the builder or the architect, the builder or architect may contribute a portion or all of the fee to the project in exchange for future project earnings or syndication proceeds.

The amounts identified in this section constitute an irrevocable commitment by the owner to contribute such equity toward development costs of the project. These amounts may not be reduced, notwithstanding any changes in total costs or financing. All items listed will

be included in the computation of the project leveraging ratio calculation.

Where an owner funded escrow account is required (e.g., to finance the difference between project net income and debt service or very low-income, or relocation subsidies) the amount of the escrow account included in Box 4 will be computed in the project leveraging ratio but will not be counted as a part of the owner's 10 percent equity contribution.

Box 5. Indicate the sources and amounts of any owner equity contributions which shall be made available on a contingent or "as needed" basis, such as letters of credit for working capital or operating deficit reserves. In the event such amounts are not needed to meet the contingent obligation or other project overruns, the owner is obligated to make an equivalent cash contribution to the grantee (not as payment on the HDG loan) as necessary to meet the minimum equity required (10%) or the amount committed in Box 4, whichever is greater.

Funds which will not be considered an equity contribution in either Box 4 or Box 5 include the following:

- Debt service reserves required in connection with the issuance of bonds.
- Developer's fee.
- Grants by public organizations.
- Any debt against the project or the "Sole Purpose" owner entity of the project.
- Builder-Sponsor Profit and Risk Allowance (BSPRA) as calculated in mortgage insurance processing Form HUD–92264. Risk allowance is not an allowable cost and will not be considered equity; however, Builder's Profit may be left in the project as specified in the Section K, Box 4 instructions.
- Other ineligible expenses include marketing expenses (except in the case of cooperatives or mutuals), consultant fees (except in the case of non-profits, cooperatives, mutuals, or projects involving historic preservation), rent-up expenses, utility deposits, syndication fees and all refundable fees and escrows.
- Any letter of credit or cash escrow required in connection with mortgage insurance under 24 CFR Part 207.

Box 6. Indicate the amounts and sources of all *permanent* loans (excluding the HDG loan) to be provided to cover costs associated with project development. Indicate for each loan the anticipated annual debt service amount (i.e., payment for principal, interest and, if applicable mortgage insurance premium), and whether the source of the loan is "private", "federal" or "other public."

One of the three boxes, "private", "federal" or "other public" *must be checked* if the project is to get credit for the loan in HUD's calculation of the project leveraging ratio. Loans funded from the proceeds of tax-exempt bonds and loans with insured mortgages should be classified "private."

On the same line, indicate whether the loan will be insured. If the loan is to be funded by tax-exempt bond proceeds, indicate whether tax exemption will be sought under HUD's section 11(b) or section 103 of the IRS Code.

Box 7. Indicate the amount and source of any non-HDG grant to be provided to cover costs associated with the development of the project, as well as the value and source of any in-kind contribution or land write down to be provided to offset costs that the owner would otherwise incur. Funds committed to carry out activities such as "related off-sites" or "water and sewer lines" may not exceed the amount necessary to complete that portion which directly benefits the project. For example, the installation of an access road to benefit other development activity must be credited proportionally to the current HDG project.

Indicate for each grant, in-kind contribution or write down whether the source is "private", "Federal" or "other public" (CDBG funds and revenue sharing should be classified as "other public").

The value of non-HDG public subsidies committed for project operation (e.g., tax abatement, rent subsidies, operating subsidies and interest reduction payments) may also be listed in Box 7. Include the actual amount of such subsidy if it is to be fully expended during the development period and/or the first four years of full project operation. If the subsidy is to be disbursed over a period more than four years of full project operation, include the present value of the subsidy payments based on a 10 percent discount.

Section L—Project Schedule

Provide the projected schedule for the project. For projects that are to be completed in stages, indicate the number of units in each stage beside the projected date. ALL PROJECTS MUST START CONSTRUCTION WITHIN 24 MONTHS OF THE HUD NOTIFICATION OF SELECTION OF PROJECT FOR PRELIMINARY FUNDING APPROVAL OR LOSE HDG FUNDING.

Section M—Project Principals

This section of the application requests the names, roles, percentage of ownership, minority status and gender of individual principals. "Percentage of Ownership" means percentage of controlling ownership. For a limited partnership, list the interest percentage of the "general partner" only (as opposed to his/her percent of ownership of the "limited partner" interest) and do *not* include anyone whose sole role in the project is as a limited partner.

When identifying project principals, pay particular attention to the conflict of interest regulations at 24 CFR 850.35(k). If a project principal has any business or family tie to the applicant (or the jurisdiction in which the project is located) or if the project principal is an employee, agent, consultant, officer or elected or appointed official of such an entity, such a connection must be publicly disclosed and a written exception to the conflict of interest must be requested *prior to* application submission. All information required by this regulation cite must be addressed. The granting of an exception will be considered on a case-by-case basis. Should there be any question of a conflict, seek advice from the HDG Division staff prior to application submission. When completing the minority identifier, one of the following numbers must be indicated in the box provided on the form:

1. White, not Hispanic
2. Black, not Hispanic
3. Asian or Pacific Islander
4. Hispanic
5. American Indian or Alaskan Native

In completing the Gender portion, the letter F should be used for female and the letter M for male.

If it is intended that the project qualify for the five points under Selection Factor I, Minority and Women's Business Enterprise, all project principals with a minority identifier other than "1" or with a gender listed as "F" must have their project role documented with an executed certification (Exhibit K–3) included in this Packet.

Part M–2. Narrative Feasibility Assessment

This section describes the financing structure of the project. This section, together with Exhibit M–1 and the Part M–12 long term narrative and pro forma analysis, should provide an adequate understanding of project financing and demonstrate, to HUD's satisfaction, financial feasibility for the Project Term.

HUD will also review these sections to determine if the grant request, contrary to the HDG statute, is "clearly in excess of the amount necessary to provide decent rental or cooperative housing of modest design". HUD reserves the right to make grant reductions, as necessary, during Application Review or preparation of the Grant Agreement in accordance with sound project economics. Any and all materials presented in the application or requested thereafter will be used to determine the extent of such reductions.

The discussion of the financing structure in part M–2 should include, at a minimum, a description of all sources of debt financing, the distribution of residual receipts in the case of profit-sharing, the impact of the owner/applicant's intent to charge rents that are lower than the market rents set forth in the appraisal, arrangements for a land writedown, the value of a local tax abatement program, a Payment In Lieu of Taxes (PILOT) program and any state or local subsidy to be used in conjunction with the project.

If the HDG funds are to be loaned to the owner, the terms and conditions of repayment must be discussed in this Part. The repayment terms must meet certain criteria in order to receive the two points under Selection Factor E–1 in the rating and ranking process. The criteria are described in paragraph E–1 in Attachment 2 of this Packet and in the Instructions to Exhibit M–1 Box K–2.

All projects must have the assurance of adequate financing for the Project Term (minimum 20 years or Project Term specified in Part B–3). Amortized mortgages that are paid off in less than 20 years are permissible; however, balloon payments which must be refinanced during the Project Term are not allowed. Call provisions, uncapped variable rate mortgages, and the like, are also unacceptable. On the other hand, put provisions or variable rate mortgages with a definitive cap, i.e., a stated percentage cap, will be accepted provided that financing and feasibility can be assured (in this Exhibit M–2 or M–12) with some reasonable level of confidence for the Project Term. Failure to provide such assurance will result in rejection of the application.

Any proposal to charge rents for the HDG units which are less than Exhibit M–5 rents must: (1) estimate the income loss to the project (i.e., the cumulative total of the difference between Exhibit M–5 rents and the proposed lower rents for the Project Term for the number of units subject to the lower rents); (2) identify a source to subsidize the loss of income from charging rents less than Exhibit M–5 rents; and (3) include a firm commitment from the identified source to provide the necessary subsidy. HDG funds cannot be used to subsidize rents below the Exhibit M–5 rents. Project income in Parts D and H of Exhibit M–1 must reflect the Exhibit M–5 rents.

Part M–3. Instructions to the Appraiser. (Appraisal not required where mortgage insurance commitment has been issued.)

An appraisal is required as part of a Housing Development Grant (HDG) application to be submitted to HUD. The HDG program provides grant funds for the development of rental, cooperative or mutual housing. Projects must provide a minimum of twenty percent of the units for occupancy by lower income households for a minimum of twenty years. If the application is awarded a grant, the funds will be used to [Applicant, insert a brief description of the project, how the grant funds will be used, i.e., a loan or grant; development cost writedown or project investment account].

The appraisal must be prepared by a professional who has at least six (6) years of experience, three (3) of which must be in multifamily. Furthermore, the appraisal must be no more than one year old. The appraisal must also determine value by all three approaches: Cost, Market and Income. The document must also provide a determination of land value upon project completion.

In addition, the appraisal must address the following:

1. *Estimate Fair Market Rents.* Estimate the fair market rents for the market rate units. The estimated rental rates per month must be based upon and supported by current market rates established for similar units in comparable projects furnishing comparable services in competing areas. A separate analysis must be made for each unit type proposed in the HDG project application form. Appropriate adjustments must be made in each analysis to reflect measurable differences between the subject units and the comparable units and to account for market increases expected to occur by project occupancy which is scheduled in [Applicant, insert month and year of anticipated first occupancy].

2. *Composite Occupancy Rate.* Estimate the long-term collection potential of the project as a percentage of gross income. This figure must take into consideration any varying rates of collection for the market rate units, [commercial space], and lower income units.

3. *Estimate of Commercial Income.* The estimate of anticipated commercial income should be supported by market data and should include a discussion of the most likely commercial tenants.

4. *Determination of Maximum Rents for Lower Income Units.* Using the data supplied in Exhibit M–5, and estimating the PBE in consideration of the data provided or developed on tenant-paid utilities, complete Exhibit M–5. The M–5 rents constitute the maximum rents which may be charged for the lower income units and will serve as the maximum income to be derived from the lower income units in any debt service analysis. HDG rents must be calculated according to Exhibit M–5 and are *not* to be projected to date of expected occupancy.

5. *As-Is Value of the Site.* Provide an estimate of the fair market value of the property in its current condition.

6. *Conclusion of Total Value of Completed Property.* Using the data supplied concerning the physical construction of the project, the rents for the lower income units, the estimate of rents developed for the market rate units and commercial space, prepare a statement of total value. Any capitalization rates used should be supported by market data. This statement of value should take into consideration:

a. the existence of the 20 year rent restriction for the lower income units; and,

b. any restrictions on value such as limitations placed on the project as a result of bond issuances, limitations on project rentals resulting from additional assistance (over and above the assistance provided to lower income units) to accommodate very low-income tenants, encumbrances on the property as a result of secondary financing or the conditions of the HDG grant funds, etc.

The total value of the project, by statute, cannot exceed the maximum value calculated in Exhibit M–6. The determination of value based on the income approach is the value compared to the Exhibit M–6 value. If the income approach to value exceeds the Exhibit M–6 value, you should contact the applicant immediately so that the project may be redesigned or other steps taken to comply with the statutory requirements. This computation should *not* include the value or the amount of the HDG request in any form.

7. *Estimate of Annual Expense.* Where an independent specialist will not be used, provide an estimate of annual expenses anticipated during the first full year of occupancy; the maintenance and repairs estimate will reflect the first full cycle of maintenance. This estimate should be based upon actual operating experience of comparable projects,

adjusted for differences between the proposed project and the projects from which the estimates were developed. Consider residential and any commercial expenses (separately identified) and reflect items in Section I of Exhibit M–1.

8. *Estimated Replacement Cost.* Provide an estimate of the proposed replacement cost reflecting the items identified in Exhibit M–1. Costs for any commercial space should be listed separately. The replacement cost estimate may be subcontracted out to a reputable cost estimator, and supplied to you for your consideration in making the required determinations.

9. *Use of Independent Specialists.* An estimate of annual expenses and total replacement cost has been ordered and will be provided for consideration in making the required determinations. These estimates should be reviewed and determined acceptable prior to use. Any problems with these estimates should be brought to the applicant's attention immediately.

Part M–4. Substantial Rehabilitation Eligibility Test (Not Applicable to New Construction)

Projects may be developed through New Construction, Substantial Rehabilitation or a combination thereof. If a project includes rehabilitation, it must meet the definition of "substantial rehabilitation" which requires:

A. repairs, replacements and improvements that cost more than the *greater* of (1) 15 percent of the property's value after completion or (2) $6,500 per dwelling unit adjusted by the supportable high-cost factor (see Attachment 4) or

B. the replacement of more than one major building component (includes roof structures; ceilings, walls or floor structures; foundations; plumbing systems; heating and air conditioning systems; or electrical systems).

The test for substantial rehabilitation must be addressed in one of two ways:

For A above, complete Exhibit M–4 in this Application Packet.

For B above, provide a narrative in Part M–4 which describes the rehabilitation work to be completed.

Part M–5. Determination of Maximum Rents for Lower Income Units

The format included as Exhibit M–5 must be completed and submitted with the application. Information required on line 1 must be obtained from the appropriate HUD field office. Line 5 is to be completed by the appraiser after consideration of the utilities to be paid by the tenant in each unit type. The computed rents are the maximum rents chargeable for the lower income units regardless of family size or the income of individual households.

Enter the rents from Exhibit M–5 in Section D of Exhibit M–1 under the column headed "Lower Income Rents." Do *not* project the rents calculated on Exhibit M–5 to the date of occupancy. Updating rents using the most current HUD issued income limits may occur 60 days prior to initial occupancy.

Part M–6. Determination of Maximum Value

The statute and the regulations at 24 CFR 850.37(9) establish a maximum value for projects assisted under the HDG program. Project value cannot exceed the amount which would be insurable using the statutory cost limits of Section 207 of the National Housing Act. Value for the HDG Project is defined as the income approach to property valuation. This determination must be completed as part of the appraisal (Exhibit M–3). The value does not include the HDG or any other Federal, state or local subsidy anticipated as a result of this application.

All applicants must complete and submit Exhibit M–6. This form determines the limit which must be greater than or equal to the appraised income approach to value.

Information on high cost factors are included in Attachment 4. If your community is not listed, contact your local HUD field office for a locality adjustment.

Part M–7. Firm Project Commitments and Site Control

Applications will not be considered for preliminary approval unless they contain evidence of firm financial commitments. All of the guidance necessary to meet the definition of a "firm commitment" is provided in this Part. This guidance specifies the minimum requirements for financial commitments for *all* projects. Commitments which do not reflect the minimum requirements described herein will result in a determination of project infeasibility which will eliminate the project from competitive consideration. Projects that meet the minimum criteria are entitled to one (1) point under the rating system. More points are earned by meeting some or all of the requirements for Additional Points.

Requirements for all Projects

Every owner, lender, investment banker, or other party providing funding or in-kind contributions to the project must provide a firm commitment to make such resources available in the event the HDG is awarded. A general letter of interest or support is not a firm commitment. For example, a commitment which may be withdrawn due to "adverse economic conditions," or "adverse profit position of the developer" or which is subject to "confirmations of the project's economic feasibility," is not a firm commitment. A statement from the Housing Finance Agency (HFA) indicating that the loan board has not met to approve the inducement resolution, but that the project has received staff-level endorsement, is not a firm commitment.

Commitments which contain unreasonable conditions or conditions which are unlikely, in HUD's opinion, to be met in a timely manner, will result in rejection of the application on grounds of infeasibility. Financing commitments may provide reasonable timing constraints, e.g., the commitment expires at a future date which provides sufficient time for HUD reviews and notification of awards, or a range of interest rates, provided there is a ceiling on the rate. In the latter case, the applicant must explain the effect of increased interest rates on the project's financial feasibility in Part M–2.

All projects must have the assurance of adequate financing for 20 years or the Project Term, if longer than 20 years. Amortized mortgages that are paid off in less than 20 years are permissible; however, balloon payments requiring refinancing during the Project Term are not allowed. Call provisions, uncapped variable rate mortgages, and the like, are unacceptable. On the other hand, put provisions or variable rate mortgages with a definitive cap, i.e., a stated percentage maximum, will be accepted provided that financing and feasibility can be assured (in Exhibit M–2 or M–12) for the Project Term.

Where the cost of acquisition has been included in the determination of the maximum grant amount for a substantial rehabilitation project (Part M–8), the financial commitment from the primary lender must reflect *refinancing* in accordance with 24 CFR 850.37(d). The commitment must identify the amount of the existing debt to be paid off where there is an identity of interest between the owner of the site and the owner of the project. In the case of an arms length sales transaction, the commitment must reflect the amount of an existing mortgage which is to be assumed by the HDG owner. In each case, the full amount borrowed must be applied to the construction costs of the HDG.

Requirements by Type of Financing

A. Equity Sources

The following must be provided:

1. Evidence of capacity to provide the committed equity as shown by financial statements (e.g., balance sheets, net worth statements, income statements) showing a net worth exceeding three times the committed cash equity, or a letter of credit or commitment from a lending institution to provide a letter of credit in the event the HDG is funded. (Where an owner has other HDG submissions the net worth test will be applied to the combined equity requirements.)

2. A signed commitment(s) from the builder and/or architect that their fees will remain in the project, if applicable.

3. A statement that the equity committed will be used for project development costs as determined eligible under instructions for Exhibit M–1, Section K.

4. If land equity is committed, provide evidence of land acquisition, date of purchase, purchase price and any outstanding indebtedness. For sites held more than 3 years, the appraisal (Exhibit M–3) must reflect the estimated "as is" value.

B. Commitments from Public Bodies

A commitment from the public sector is an agreement from a unit of general local government, county, or state to provide (1) a grant, loan and/or a loan guarantee for a particular amount of money for the proposed project, such as a State/local financed periodic payment account to be used after construction; (2) a commitment to carry out certain activities such as related off-site improvements, or a land writedown; and/or (3) for the absorption or forgiveness of certain expenses related to the project such as tax abatement or waiver of certain local fees. Commitments from public bodies must consist of:

1. A resolution adopted and signed by the appropriate officials stating the purpose, the nature of the assistance, the amount of the commitment and the source of funds committed, e.g., CDBG.

2. In the case of tax abatement, a letter from the appropriate local official citing the local statute, conditions and term (number of years) of the abatement and an estimate of the approximate dollar value of the abatement. (The discounted value at 10 percent is recorded on Line K–7 of Exhibit M–1.)

3. A statement that the public body will enter into a legally binding commitment.

Where future year's resources, such as CDBG funds, are committed, provide an opinion from applicant's counsel that the applicant has the authority to commit a future year's resources and that the commitment is legally binding and consistent with requirements governing the use of such funds, e.g., an approved three-year CDBG plan.

C. Credit Enhancement

When credit enhancement is required as a condition of a firm financial commitment of any kind, evidence of such enhancement *must* be provided. HUD will expect to find evidence of credit enhancement for all taxable bond financing unless there is a firm commitment to purchase the bonds. Commitments conditioned upon mortgage insurance must provide a Conditional or Firm Commitment as evidence. Failure to provide evidence of such enhancement will result in rejection of the application on the grounds of infeasibility.

D. Private Debt Financing (Except Bonds)

1. Minimum Requirements

Projects must provide a commitment from a permanent lender. Such commitment *must* contain the term(s), interest rate and any other conditions required by the lender and must be signed by the lender's chief executive officer (CEO) or authorized designee.

2. For Additional Points

Before consideration can be given to points beyond the minimum, the application *must* contain a commitment from the interim (construction) lender. Once this criteria has been met, maximum points will be awarded to projects with commitments which contain all of the following:

a. A full statement of any terms, conditions, interest rates or range of rates, disbursement conditions, security requirements, and repayment provisions.

b. A statement that the necessary feasibility reviews or studies of the project are complete and its financial structure *does not warrant a higher financial commitment.*

c. Evidence that there are no conditions on the commitment except the awarding of the HDG to the applicant and the availability of other resources for which firm project commitments are provided in the application.

d. The commitment must be signed by the lending institution's CEO or his designee and contain assurance that the required approval steps, such as action by a loan committee, approval by a parent company, or resolution of a board have been completed.

e. Where there could be any question that the committed resources will be available, submit evidence that such resources are available to the project or identify a firm source for such resources. A firm project commitment from such source must also be provided. For example, mortgage brokers which normally do not hold (or warehouse) long-term loans, should provide evidence of financial capacity to fund the loan or evidence of a take-out loan.

f. A statement or owner's signature on each commitment evidencing the owner's understanding and acceptance of the commitment as stated.

E. Tax-Exempt Bond Financing

1. Minimum Requirements

Projects to be financed with revenue bonds (tax-exempt securities) must meet the following *minimum requirements*:

a. The issuing authority must provide a signed copy of the inducement resolution approving the issue. The inducement resolution must state the term and approximate amount of the bonds.

[Definition. For purposes of this program, an inducement resolution is a document which has been approved by the agency issuing the bonds and which states the amount of the bond issue and any state/local requirements for the use of the bond proceeds. This document must identify the project and contain some indication that the agency has evaluated and accepted the financial feasibility of the project (this assurance may be provided in a separate document, if necessary,) and that the resolution has been approved by the Board of Directors.]

b. Bond counsel must provide an opinion that the issuing authority can legally issue the bonds and the interest earned on the bonds is exempt from Federal income taxation.

c. An investment banker or underwriter must provide a firm commitment to purchase the bonds either for their own account and/or for reoffering. The commitment must state the anticipated interest rate and the amount of the financing. The commitment must state that the analysis has been completed, State and Federal regulatory requirements have been satisfied and that there are no findings or conditions (except state "blue sky" clearances to sell securities) which would prevent marketing of the issue. Terms and conditions of the offering must be limited to reasonable timing considerations and relatively narrow floor/ceiling terms reflective of market conditions.

State and local agencies which propose to use revenue bond proceeds already on hand must provide the following as minimum requirements:

i. A copy of the executed inducement resolution approving the bond issue from which the funds were derived.

ii. A certification from the issuing authority that adequate funds are available and committed to this project.

iii. A copy of the bond counsel opinion that this bond issue was exempt from Federal income taxation.

iv. Evidence that the issue was underwritten and that the bonds were sold.

2. Special Considerations for State Housing Finance Agencies

Projects with an inducement resolution (see definition above) provided by a State Housing Finance Agency and meets the minimum requirements for tax-exempt bond financing will pass Threshold 15, Financial Feasibility. HUD is still required, however, to make a determination that project costs, terms and conditions of the financing (including the proposed mortgage interest rate), and the owner's proposed equity contribution are appropriate and reasonable before the project can pass Threshold 16 (see Attachment 1).

3. For Additional Points

The application must contain a commitment from a financial institution for both the construction and permanent financing. If the issuing authority intends to provide either or both, the resolution or certification must so state. In addition, the inducement resolution, certification, and/or the underwriter's commitment must contain the following:

a. A statement as to whether the interest rate is fixed or variable and, if variable, the maximum rate and benchmark for changes.

b. A statement as to whether credit enhancement is required. If required, a commitment for credit enhancement and a description of the provisions which allow the financing to stay in place for 20 years or the Project Term, whichever is longer, must also be provided. Bonds with less than a 20 year credit enhancement are not acceptable.

F. Taxable Bond Financing

1. Minimum Requirements

Projects proposing the use of taxable bonds must provide the following:

a. A commitment from the issuer that the bonds will be/have been issued for the purpose of financing this HDG project. This commitment must state the term and the anticipated interest rate of the bonds and *whether credit enhancement* is required.

b. A description of the provisions which allow the financing to stay in place for 20 years or the Project Term, whichever is longer.

c. Either: (i) A commitment for credit enhancement which specifies the nature of the credit enhancement and length of the enhancement; or, (ii) a commitment from an investment banker or underwriter which provides a firm commitment to purchase the bonds in accordance with F.1.b. of this part.

2. For Additional Points

Projects must provide a commitment from both the interim (construction) and permanent lenders. Such commitment must contain the term(s), interest rate and any other conditions required by the lender and must be signed by the lender's CEO or authorized designee. If one lender is providing both the interim and the permanent financing, the commitment must so state.

G. Tax Credits Under the Tax Reform Act of 1986

No commitment for tax credit is required unless one or more of the project's firm financial commitments requires a tax credit allocation as a condition of financing. In this case, this part of the application *must* contain a written commitment from the governor (or his designee) or the chief executive officer of the agency which is authorized to administer the tax credit program. The written commitment must do the following:

1. Commit the State to allocate the necessary tax credits to this project subject only to the award of the HDG.

2. Identify the number of tax credit eligible low income units to be provided.

3. Identify the year of the tax credit allocation, i.e., the year in which the units are to be placed in service.

4. Cite the authorization (Executive Order, legislative action) which delegates responsibility for administering the tax credit, where applicable.

Site Control

Evidence of site control must be provided in the form of a contract of sale for the site, a copy of the site option agreement, or a deed or other legal commitment conveying the site to the owner. The application must also include a legal description of the site which will be attached to the Grant Agreement.

Applications containing a commitment to convey city-owned sites, or sites owned by local public bodies are acceptable provided that the application contains evidence that any official action (i.e. City Counsel/Board of Commissioners resolution) which is necessary to convey the site to the owner has been taken. In cases where a site is to be acquired by the city/local public body through the eminent domain process, the application must contain evidence that 1) any official action which is necessary to take possession of the site has taken place; 2) the purchase price has been negotiated and agreed upon; and, 3) a legally binding commitment exists to acquire and convey the site to the owner upon award of the grant.

Failure to exercise an option to purchase, or lease, or a local commitment to acquire and convey after grant award, may result in recision of the grant. Encumbrances to site conveyance or project development including protective covenants, zoning, or other barriers to acquisition, should be investigated prior to submission. Changes in site after award of the HDG are prohibited by 24 CFR 850.31(f).

Part M–8. Determination of Maximum Grant and Minimum Equity

All applications must contain a completed Exhibit M–8.

Determination of Maximum Grant

The statute and regulations at 24 CFR 850.37(d) require that grant amounts not exceed 50 percent of HUD's determination of costs associated with new construction or substantial rehabilitation of the project. Acquisition costs are generally excluded from this determination. *In the case of new construction projects,* acquisition costs may be included when at least *one* of the following public purposes are met:

1. The project has *at least* 30 percent of the units available to lower income families; *Or*

2. The lower income units have an average bedroom count of 3.0 or more; OR

3. The rents on the "market rate" units are written-down to within 110% of the Section 8 Existing fair market rents (FMRs) to assist moderate income households.

In the case of substantial rehabilitation projects, acquisition costs may be included when at least *one* of the above public purposes is met *AND* the owner demonstrates that the debt on the project is being refinanced. In order for this to occur, the application must show that there is *either*: i) an identity of interest between the owner of the structure and the owner of the project and that the project owner intends to obtain new financing to pay off existing

debt; or, ii) an arms-length sales transaction where the new owner will assume the existing mortgage and then refinance.

In the case of an identity of interest, the financing commitment must specify the amount of existing debt to be paid off. In the case of an arms-length transaction, the financing commitment must specifically state that the existing debt will be assumed by the project owner.

Determination of Minimum Equity Contribution

The bottom half of Exhibit M–8 enumerates components of development costs which are included in determining the owner's minimum equity contribution. Refer to Exhibit M–1 to complete the Exhibit M–8, item 2. The sum of the amounts shown in Exhibit M–1, Sections K–4 and K–5, less any owner funded escrow account, must equal or exceed the amount computed in line 2.h. of Exhibit M–8.

Part M–9. Leveraging Ratio

The applicant must compute the Leveraging Ratios included in Exhibit M–9. Instructions are provided with the form. Read the instructions carefully.

Part M–10. Architectural Information

A sketch of the site plan, typical building elevations, typical unit floor plans, outline specifications and the work write-up for substantial rehabilitation projects must be submitted with the application. As certified in Exhibit K–1, item (v), the plans must reflect compliance with the minimum percent of units designed for the handicapped as required by the Rehabilitation Act of 1973.

Part M–11. Cooperatives and Mutuals Only

All projects for which tenants purchase a share in project ownership must identify the project ownership during development, provide a schedule and description of any planned changes to the ownership structure during project operation, indicate any restrictions on the sale of cooperative shares and describe how increases in rents or "carrying charges" and any special assessments over the Project Term will be allocated among units.

Such narrative statement must demonstrate to HUD's satisfaction that: (1) the housing is best classified as a cooperative or mutual rather than as a condominium project, (2) the monthly "carrying charge" for lower income units, including any cooperative fees or assessments, will remain at HDG formula rent levels without endangering project feasibility for the Project Term; (3) the initial and resale prices of lower income cooperative shares shall remain affordable to lower income households for the Project Term; and (4) the project qualifies to be exempt from the HDG program ten percent equity requirement. In cases where any equity has been committed, the owner must meet the minimum net worth and/or letter of credit requirements for equity sources described under Part M–7 of this Packet.

In order to assist the applicant in completing this Part, we are providing the following definitions of cooperative and mutual housing along with guidelines for exemption from the ten percent equity requirement:

"Cooperative housing" refers to joint control by the residents of multi-unit housing. A cooperative corporation retains undivided ownership of the housing. Purchase of a certificate or share of stock in the cooperative corporation entitles a household to exclusive occupancy of the unit as a tenant of the corporation and participation in operation of the corporation either directly as an elected Board Member or indirectly as a voter.

Many cooperative housing projects are initiated by for-profit developers who construct or rehabilitate the project and subsequently transfer ownership either through a single transaction or gradually over a period of time to a newly formed cooperative. In such cases, the Part M–11 narrative must describe the intended schedule and terms of ownership transfer between the owner and the cooperative corporation. These projects will *not* be exempted from the HDG program 10 percent owner equity requirement unless the following guidelines are met: (1) transfer of ownership to the cooperative corporation must be completed within three months after the project achieves sustaining occupancy; and, (2) the total price paid to the owner by the cooperative corporation may not exceed the certified total project cost (costs covered by Item J–11 of Exhibit M–1), plus any operating losses sustained by the owner prior to the ownership transfer, plus a reasonable rate of return on the owner's equity in the project less any portion of the HDG not scheduled for repayment during the Project Term.

"Mutual housing" refers to housing which is developed and owned by mutual ownership of a corporation. A mutual ownership corporation is similar to a cooperative corporation but owns and engages in multiple economic enterprises. Purchase of a share in a project owned by a mutual ownership corporation entitles a household to exclusive occupancy in a unit, participation in the operation of the project and participation in operation of the parent mutual ownership corporation.

Part M–12. Long-Term Project Feasibility and Periodic Payments

Each HDG project must provide a pro forma analysis which demonstrates long-term financial feasibility for the Project Term. Where the grant or a portion of the grant is to be invested to provide periodic payments from Project Investment Accounts (PIA) to maintain project feasibility, the pro forma becomes the Investment Plan prescribed below. In addition, each project with a constant payment PIA must demonstrate (complete Exhibit M–12) that the PIA is at least ten percent (10%) less expensive to the government than a development cost writedown.

A. Pro Forma Contents

The pro forma must project economic conditions over the Project Term and predict their effect on project feasibility. The economic conditions must be based upon a reasonable set of assumptions including, but not limited to, rental income, operating expenses, changes in rental income and operating expenses, occupancy rate, and a reasonable return on equity for the owner. Project feasibility as reflected in the pro forma must demonstrate that the project can generate sufficient revenue to meet all financial obligations for the Project Term.

Return on Equity. The owner's return on equity (ROE) is negotiable between the owner and the applicant. The applicant may restrict the owner's return on equity and thereby participate in the net proceeds. Notwithstanding any additional restrictions on the ROE by the applicant, HUD will assess compliance with the guidelines below in the review of the M–1 and project pro forma at the application stage as well as at project close-out.

1. For 100% elderly projects: the initial year ROE may not exceed 6 percent.

2. For 100% non-elderly projects: the initial year ROE may not exceed the greater of 10% *OR* the debt service constant.

3. For Projects which contain both elderly and non-elderly (family) units: Compute the ROE separately for the elderly and family portions using the limits identified above. Add the two returns together for a maximum initial ROE.

Example: Project is 60% family and 40% elderly

Equity	$1,000,000
Debt Service Constant	10%

Compute: $1,000,000 × 60% × 10%	$60,000
$1,000,000 × 40% × 10%	$24,000
Initial ROE	$84,000

4. For projects which use a PIA, the initial year ROE is restricted as above. Any subsequent year ROE may not exceed 13 percent for the life of the PIA.

Any ROE which exceeds these guidelines may result in a grant reduction which can occur either during the application review process or during preparation of the final grant agreement.

B. Project Investment Accounts (PIA)

Projects with PIAs must have an Investment Plan which includes all of the above pro forma requirements. In addition, the Investment Plan must describe the amount to be invested, the type and quality of the investment(s), the anticipated interest rate to be earned and the period of investment. The Investment Plan must also set forth a disbursement schedule for making periodic payments which includes assumptions used to arrive at payment amounts.

PIA Disbursements. The Investment Plan disbursement schedule must provide for declining payments except when mortgage insurance is provided or when PIAs provide constant payments for interest writedowns as described in Part M, Structuring the Grant. Where PIAs are proposed, the disbursement schedule must show that both the principal of the HDG and all interest earnings from the investment will be completely amortized. The periodic payments from the PIA may not include amounts for initial operating deficit reserves or HDG repayments. Such reserves, where necessary, must be funded through other sources.

PIAs for projects with mortgage insurance must provide for constant payments for 20 years. Constant PIA payments may also be used for interest rate buydowns provided it can be demonstrated (subject to HUD approval at either the application review or grant agreement stage) that this mechanism is more efficient than declining payments. Applicants using constant payment PIAs must complete Exhibit M–12.

Where constant payments are used, any portion of the payment which is in excess of debt service plus a predetermined reasonable ROE to the owner will be considered residual receipts. A Residual Receipts Note will be executed and the trust agreement for the PIA will clearly define disbursement procedures. The Residual Receipts Note and disbursement procedures are discussed in detail in a separate document entitled "Conditions Precedent to the Drawdown of Funds." Where declining payments are used, any portion of the payment in excess of debt service plus a predetermined reasonable ROE to the owner must remain in the PIA for future shortfalls which may exceed the scheduled payment. Any balance remaining in the PIA at the end of the PIA term must be returned to the applicant as program income, except in the event of an involuntary loss, including foreclosure. In the case of such a loss, the HDG restrictions may be released and any balance in the PIA must be returned to HUD.

In all cases, it is the responsibility of the applicant to demonstrate project feasibility in the application submission by showing that there is no further need for PIA funds at the end of the PIA term (a maximum of 20 years) and that the PIA payments are sufficient when needed. The pro forma and Investment Plan must show that project income from any relevant source (e.g., interest earnings from a bond debt service reserve) will be sufficient to support the project after the PIA terminates. Failure to demonstrate such feasibility may result in rejection of the application.

Grant funds for PIAs will be released 60 days prior to initial occupancy provided the expenditure of project funds is in accordance with the Project Leveraging Ratio. The PIA funds may be invested by the grantee in a separate interest-bearing account, or by a trustee on behalf of the grantee, or transferred to the owner for investment by a trustee. The primary lender (construction or permanent) may not serve as Trustee of the PIA nor can the PIA be used as collateral for the primary loan. The investment strategy and disbursements from the PIA must be in accordance with the approved Investment Plan (such plans are given final approval during preparation of the final grant agreement) and, where a trustee is involved, such Plan must be incorporated in an executed Trust Agreement and submitted as one of the evidentiary documents required by the grant agreement.

Part M–13. Determination of Acceptability of Commercial Space

Commercial space must be self-supporting. All projects with commercial space must submit Exhibit M–13.

Commercial space is generally limited to 10 percent of total gross floor area. HUD will consider requests for up to 20 percent commercial. Where such a request is made, attach (to Exhibit M–13) a discussion of the need for inclusion in the project. The marketability of commercial space as well as the residential units will be taken into consideration during the technical review of the application.

Portions of the project building cannot be legally separated through establishment of a condominium regime to circumvent the 20 percent limitation on commercial space.

Part M–14. Determination of Maximum Units for Least Cost

Complete Exhibit M–14 and submit with the application. This Exhibit will be used in awarding points under Selection Factor E.

Points will only be awarded to projects where the overall average bedroom composition does not exceed the average lower income bedroom composition by more than 20 percent. This procedure avoids awarding points to projects where the grant would disproportionately assist the "market rate" units. Part M–15. Rent Control

24 CFR 850.153 states that rent control laws or ordinances passed after November 30, 1983, are preempted for projects funded under the HDG program. Rent control requirements or agreements in effect prior to November 30, 1983, are applicable if they would normally apply to projects not funded under HDG.

BILLING CODE 4210–27–M

EXHIBIT A

OMB Approval No. 0348-0043

APPLICATION FOR FEDERAL ASSISTANCE

1. TYPE OF SUBMISSION: *Application* ☐ Construction ☐ Non-Construction; *Preapplication* ☐ Construction ☐ Non-Construction	2. DATE SUBMITTED	Applicant Identifier
	3. DATE RECEIVED BY STATE	State Application Identifier
	4. DATE RECEIVED BY FEDERAL AGENCY	Federal Identifier

5. APPLICANT INFORMATION

Legal Name:	Organizational Unit:
Address (*give city, county, state, and zip code*):	Name and telephone number of the person to be contacted on matters involving this application (*give area code*)

6. EMPLOYER IDENTIFICATION NUMBER (EIN): ☐☐ – ☐☐☐☐☐☐☐

7. TYPE OF APPLICANT: (*enter appropriate letter in box*) ☐

A. State — H. Independent School Dist.
B. County — I. State Controlled Institution of Higher Learning
C. Municipal — J. Private University
D. Township — K. Indian Tribe
E. Interstate — L. Individual
F. Intermunicipal — M. Profit Organization
G. Special District — N. Other (Specify) _____

8. TYPE OF APPLICATION:

☐ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es): ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration Other (*specify*): _____

9. NAME OF FEDERAL AGENCY:

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: ☐☐ ☐☐☐

TITLE:

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:

12. AREAS AFFECTED BY PROJECT (*cities, counties, states, etc.*):

13. PROPOSED PROJECT: Start Date	Ending Date	14. CONGRESSIONAL DISTRICTS OF: a. Applicant	b. Project

15. ESTIMATED FUNDING:

a. Federal	$	.00
b. Applicant	$	.00
c. State	$	.00
d. Local	$	.00
e. Other	$	.00
f. Program Income	$	.00
g. TOTAL	$	.00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON

DATE _____

b. NO ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes If "Yes," attach an explanation. ☐ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT. THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a. Typed Name of Authorized Representative	b. Title	c. Telephone number
d. Signature of Authorized Representative		e. Date Signed

Previous Editions Not Usable

Standard Form 424 (REV. 4-88)
Prescribed by OMB Circular A-102

INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item: Entry:

1. Self-explanatory.
2. Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable).
3. State use only (if applicable).
4. If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.
5. Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.
6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.
7. Enter the appropriate letter in the space provided.
8. Check appropriate box and enter appropriate letter(s) in the space(s) provided:
   - "New" means a new assistance award.
   - "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.
   - "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.
9. Name of Federal agency from which assistance is being requested with this application.
10. Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.
11. Enter a brief descriptive title of the project. if more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.

Item: Entry:

12. List only the largest political entities affected (e.g., State, counties, cities).
13. Self-explanatory.
14. List the applicant's Congressional District and any District(s) affected by the program or project.
15. Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.
16. Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.
17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.
18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)

SF 424 (REV 4-88) Back

BILLING CODE 4210-27-C

Exhibit B–2—Rent and Tenant Eligibility Determination

Grantee Rent Mechanism

1. Section 17 of the United States Housing Act of 1937 and the HDG regulations promulgated thereunder and contained in 24 CFR Part 850, restrict rents charged for lower income units during the Project Term to not more than thirty percent of the adjusted income of a family whose income equals fifty percent of the median income for the area, as determined by HUD with adjustments for smaller and larger families. Section 17 and the HUD/Grantee Grant Agreement require the Grantee to review and approve rents proposed by the owner to be charged for lower income units. The grantee also is required to assure that the type and number of units specified in Section 1.01(e)(2) of the Grant Agreement are occupied or available for occupancy by lower income families during the Project Term. The Grant Agreement requires the grantee to have established a Rent Mechanism to implement the above responsibilities of the grantee.

2. The grantee acknowledges that HUD periodically will determine the income limits for lower income and very low-income families. Based upon the Very Low-Income limits, the HUD occupancy standards limiting the number of persons in each bedroom size category (i.e., 0-Br, 1-Br, etc.), the prototypical adjustments to income established by HUD, and the owner's estimate of the monthly cost of utilities and other essential housing services (utility allowance) to be paid for directly by the tenant, the owner will determine the maximum monthly net rent for each lower income unit. In calculating this amount the owner will follow the format contained in Exhibit M–5 of this packet.

3. Except as noted below, the initial rent schedule for lower income units and the utility allowances shall be as contained in the application approved by HUD.

4. The Owner shall recalculate the rent schedule and the utility allowances and submit the recalculated schedule and allowances to the grantee for review not later than 60 days prior to initial occupancy. The rent schedule recalculation shall be based upon the most recent HUD determination of the Very Low-Income limits and prototypical adjustments. The utility allowances shall approximate a reasonable consumption of utilities by an energy conscious household of modest circumstances.

5. In estimating reasonable consumption levels, the owner shall use, as appropriate, the following sources of information on the cost of utilities and services:

(a) Consumption data on residential use of utilities obtained from utility suppliers or other sources (such as public service commissions, real estate and property management firms, state and local agencies).

(b) Engineering calculations based on technical data concerning energy requirements of appliances and equipment.

(c) Data obtained from energy audits.

6. In establishing allowances, the owner shall take into account relevant factors affecting consumption including

(a) The equipment and functions intended to be covered by the allowance.

(b) The climatic location of the project.

(c) The size of the dwelling units and the number of occupants per dwelling unit.

(d) Type of construction and design of the housing project.

(e) The energy efficiency of owner supplied appliances and equipment.

(f) The physical condition, including insulation and weatherization of the housing project.

(g) Temperature levels intended to be maintained in the unit during the day and at night, and in cold and warm weather.

(h) Temperature of domestic hot water.

(i) If a utility (e.g., garbage collection) is charged on a fixed price basis, the full amount of the price shall be incorporated into the allowance.

7. The Grantee shall review the owner's calculations of the maximum monthly net rent and utility allowances and the information sources used.

8. If the Grantee determines that the calculations are correct and the utility allowances are reasonable, the owner shall be so notified.

9. If the Grantee fails to notify the owner within 60 days after receiving the rent schedule, including the utility allowances, that the schedule and/or allowances are not approved, they shall be deemed approved if they are within the permissible maximum allowed by the Grant Agreement.

10. In the event the owner is notified of the Grantee's disapproval, the recalculated schedule and utility allowances shall not be used. Both parties shall promptly meet to resolve their differences.

11. Subsequent to the initial recalculation, described in item 4 above, of the rent schedule and utility allowances, the maximum monthly net rent for each lower income unit may be recalculated by the owner and submitted to the Grantee for review whenever the HUD determination of Very Low-Income limits, applicable person limits by unit size, or prototypical adjustments to income are revised. Utility allowances may be revised if there is a rate change. In any event, the owner shall recalculate and submit to the Grantee, for review, the maximum monthly rent to be charged each lower income unit, and the utility allowances, twelve months from the date of the first recalculation by the owner, and annually, thereafter, on this date.

12. Any increase in rents for lower income units is subject to the provisions of outstanding leases. In any event, the owner must provide tenants of those units not less than 30 days prior written notice before implementing any increase in rents.

Tenant Eligibility

1. The owner may lease a lower income unit only to a tenant that is a lower income household at the time of its initial occupancy.

2. In order to determine whether a prospective tenant or a tenant is a lower income household, the owner shall ascertain the annual income of the family. Annual income is the anticipated total income from all sources to be received by the family head and spouse and by each additional member of the family, including all net income derived from assets, for the 12-month period following the effective date of initial determination or reexamination of income, exclusive of income that is temporary, nonrecurring or sporadic, as defined in 24 CFR 813.106(c) and exclusive of certain other types of income specified in 24 CFR 813.106(d). As necessary, the owner will consult with the HUD field office to obtain advice and guidance with respect to income determinations.

3. The owner must verify all income, assets, household characteristics, and circumstances that affect eligibility. Written verification directly from the source must be obtained when possible. The owner must maintain documentation of all verification efforts for at least three years after the effective date of the determination.

4. In verifying income the owner shall to the extent feasible:

(a) Maintain a checklist for each tenant documenting verification efforts and tracking progress.

(b) Develop standard verification forms for all information that must be verified. Such forms should: (1) explain why the information is being requested; (2) contain the tenant's authorization to

release information; and (3) ask specific questions that will solicit the specific information required.

(c) Ask applicants/tenants to sign two copies of each verification form.

(d) Send self-addressed, stamped envelopes with the request for verification.

(e) Make personal contacts with large employers and public agencies from whom a large number of tenants receive income.

(f) Give the family an opportunity to explain any significant differences between the amounts they reported on their application and amounts reported on third-party verifications.

5. The owner shall reexamine the income of each tenant household living in lower income units at least once a year.

6. The Grantee shall review the owners verification efforts at least annually to determine whether eligible families are occupying lower income units.

7. In the event a tenant is determined over income, the owner will take one of the following actions, as appropriate: (a) If the unit occupied by the tenant must be leased to a lower income household to maintain the percentage of lower income units specified in the Grant Agreement, the owner must notify the tenant that he/she must move when the current lease expires or six months after the date of the notification, whichever is later; (b) If the owner can meet the lower income unit percentage without the unit occupied by the tenant (by leasing another unit to a lower income family at the appropriate formula rent), the owner may continue to lease to the formerly lower income family, but is free to renegotiate the rent at the expiration of the current lease.

8. The owner shall market the units in accordance with the HUD approved Affirmative Fair Housing Marketing Plan and all fair housing and equal opportunity requirements.

9. With the exception of the income limit requirements, the standards and criteria for tenant selection shall be the same as those used for the market rate units.

Date

Signature

Exhibit C–1—Applicant Certifications

(Other than Equal Opportunity/Non Discrimination and Moderate Rehabilitation certifications which appear separately.)

The Applicant hereby assures and certifies that it will comply/has complied with the following:

1. The submission of the application is authorized under State and local law (as applicable), and the applicant possesses the legal authority to apply for the grant and to carry out the responsibilities of a grantee in the program.

2. It developed its rental development program after consultation with the public.

3. The project will not cause the involuntary displacement of very low income households by households that are not very low-income households.

4. If a State is the applicant, it is applying for assistance on behalf and with the concurrence of, a specified unit of local government.

5. Its chief executive officer or other officer of the applicant approved by HUD:

a) Consents to assume the status of a responsible Federal official for environmental review, decision making and action pursuant to the National Environmental Policy Act of 1969, and other authorities listed in 24 CFR 58.5 insofar as the provision of such Act or other authorities apply to the Housing Development Grant program.

b) Is authorized and consents on behalf of the applicant and himself/herself to accept the jurisdiction of the Federal courts for the purpose of enforcement of his/her responsibilities as such official.

6. The application is consistent with any applicable Housing Assistance Plan.

7. Check one of the following:

☐ The project will be constructed or substantially rehabilitated in accordance with applicable State and local building codes.

☐ Given the absence of these codes, the project will be completed in accordance with the following nationally recognized model building code(s):

---

8. It will comply with the requirements of Part 850.35 of HUD regulations regarding:

a) Relocation requirements for mitigating displacement caused by the project.

b) Environmental and Historic Preservation requirements of section 104(f) of the Housing and Community Environmental Policy Act, implementing regulations and related laws and authorities.

c) Labor standards.

d) OMB Circulars A–102, A–128, A–87, and A–122.

e) The Lead-Based Paint Poisoning Prevention Act and implementing regulations at 24 CFR Part 35.

f) The intergovernmental review requirements of Executive Order 12372 and implementing regulations at 24 CFR Part 52.

g) Conflicts of interest.

h) Use of debarred, suspended or ineligible contractors or subcontractors.

i) The flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973.

9. The prohibition in Paragraph 850.17(b) of the HUD regulation against use of grant funds for administrative costs incurred by an applicant or grantee in carrying out its Housing Development Grant Program responsibilities.

Title

Signature

Date

Exhibit C–2—Owner Certifications

(Other than non-discrimination and equal opportunity certifications which are included as a separate submission)

The Owner hereby assures and certifies that it will comply/has complied with the following:

1. Housing Development Grant Program project restrictions listed in § 850.151 of HUD regulations:

(a) Mandating an owner-grantee agreement requiring the owner and any successors in interest to carry out requirements of the regulation and the grant agreement;

(b) Preventing the owner from converting project units to condominium ownership for 20 years after project availability for occupancy;

(c) Prohibiting discrimination in tenant selection against households with children unless the project is for elderly housing;

(d) Restricting occupancy in the units designated as "lower income units" to lower income households for 20 years after 50 percent of the units are first occupied;

(e) Limiting rent levels for designated "lower income units" to 30 percent of the adjusted income of a family earning 50 percent of the area median (adjusted for family size) as defined by HUD;

(f) Requiring annual income recertifications for households living in lower-income units and specifying owner actions for such households no longer qualifying as lower-income; and

(g) Prohibiting local residency requirements and restricting residency preferences.

2. Paragraph 850.35(m) of HUD regulations requiring compliance with the flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973.

3. Paragraph 850.17(c) of HUD regulations prohibiting Housing Development Grant funds from assisting construction or substantial rehabilitation of housing currently assisted or anticipated to be assisted under any HUD housing programs or the Urban Development Action Grant program, assisted under section 305 or 313 of the National Housing Act, Farmers Home section 515, or formerly owned by HUD.

3. Any other requirements of Part 850 of the HUD regulation.

Signature

Title

Date

Exhibit F—Moderate Rehabilitation Exclusion—Area Determination

(This certification is mandatory for special need and neighborhood preservation applications.)

The Applicant hereby assures and certifies that the type of housing need addressed by the project cannot be met by moderate rehabilitation of existing units in the project neighborhood as evidenced by the applicability of the following statement(s) (check at least one).

1. ☐ The unit of general local government made reasonable efforts to obtain assistance under each Federal program providing assistance for moderate rehabilitation of real property that could be used to meet the proposed occupancy of the lower income units in the project, but was unsuccessful in obtaining the assistance. (These programs include the section 8 Moderate Rehabilitation Program under CFR 882, Subpart D, and the Rental Rehabilitation under 24 CFR Part 511); or

2. ☐ In the case of a unit of general local government that receives assistance under any such Federal program, the unit of government solicited for moderate rehabilitation projects in the project neighborhood to meet the proposed occupancy of the lower income units in the project under the program, but was unable to obtain any responses; or

3. ☐ The project neighborhood does not meet the requirements for assistance under such Federal program. (For example, the project neighborhood does not meet the neighborhood eligibility requirements for the Rental Rehabilitation Program under § 511.10(d) of HUD's regulation. Because of differences between areas that qualify as a project neighborhood under different programs, a determination that the proposed occupancy of the lower income units in the project cannot be met through moderate rehabilitation on the basis of neighborhood ineligibility under the Housing Development Program will be made only if no activities under the moderate rehabilitation programs are being, or are anticipated to be, carried out in the project neighborhood); or

4. ☐ The project neighborhood lacks housing stock in size or design appropriate to the proposed occupancy of the lower income units in the project; or

5. ☐ The housing stock in the project neighborhood that count be used to meet the proposed occupancy of the lower income units in the project is too deteriorated that the moderate rehabilitation of such stock is not feasible; or

6. ☐ Other reasons (subject to HUD review and approval)

Signature

Date

Title

Exhibit G—Rental Vacancy Rates for Housing Shortage

1. Define the area of housing shortage used (specify name of jurisdiction or define the housing market area)

2. Overall Rental Vacancy Rate
   a. 1980 Census Rental Vacancy Rate _____%
      (1) for the jurisdiction ☐
      or
      (2) for the housing market area ☐
   b. Current Overall Rental Vacancy Rate _____%
      (1) for the jurisdiction ☐
      or
      (2) for the housing market area ☐

3. Lower-Income Rental Vacancy Rate
   a. 1980 Census Lower-Income Rental Vacancy Rate _____%
      (1) for the jurisdiction ☐
      or
      (2) for the housing market area ☐
   b. Current Lower-Income Rental Vacancy Rate _____% (Item 3.b. is optional. See Part G.2.b. and c. of the Package.)
      (1) for the jurisdiction ☐
      or
      (2) for the housing market area ☐

Note: If data for the "jurisdiction" is used in 2.a., then data for the "jurisdiction" must be used in 2.b.

Exhibit J—Certification of Completion of Environmental Assessment

☐ This is to certify that we, the applicant, have completed an environmental assessment for _____ Project, in accordance with the National Environmental Policy Act (NEPA) regulations (40 CFR 1500–1508), and have made a finding of Significant ☐ or No Significant ☐ impact. Upon selection of this project for Housing Development Grant funding, we will complete all remaining requirements found at 24 CFR Part 58. We will not proceed with construction/rehabilitation prior to requesting release of funds under the Part 58 regulations.

☐ This is to certify that we, the applicant, have determined that no environmental assessment is necessary for the _____ Project as it meets all conditions cited at 24 CFR Part 58.35(a)(4) and is "categorically excluded" from the Part 58 NEPA environmental requirements. A determination and identification of the affected applicable environmental authorities cited in § 58.5 has been made. Upon selection of this project for Housing Development Grant funding, we will complete all remaining requirements found at 24 CFR Part 58.34 (b).

☐ This is to certify that we, the applicant, have determined that the _____ Project is a "categorically excluded" activity as defined at 24 CFR Part 58.34(a) but find that specific circumstances and conditions exist that may have a significant environmental effect. Hence, we will not proceed with rehabilitation until all NEPA requirements have been met.

_____

Chief Executive Officer

_____

Date

Exhibit K—Applicant Equal Opportunity and Non-Discrimination Certifications Housing Development Grant Program

The applicant hereby assures and certifies that:

(i) It will comply with Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352) and regulations pursuant thereto (24 CFR Part 1) which states that no person in the United States shall, on the ground of race, color, or national origin, be excluded from particiation in, be denied

the benefits of, or be otherwise subjected to discrimination under any program or activity for which applicant receives financial assistance; and will immediately take any measures necessary to effectuate this agreement. With reference to the real property and structure(s) thereon which are provided or improved with the aid of Federal financial assistance extended to the owner, this assurance shall obligate the owner, or in the case of any transfer, the transferee, for the period during which the real property and structure(s) are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(ii) It will comply with Title VIII of the Civil Rights Act of 1968 (Pub. L. 90–284), as amended, which prohibits discrimination in housing on the basis of race, color, religion, sex or national origin; and, regulations pursuant thereto (24 CFR Parts 108 and 200) requiring that the applicant assure that the owner prepares and implements an AFHM Plan, to be approved by HUD prior to drawdown of the grant funds and that it will provide HUD with its evaluation of the owner's implementation of the plan.

(iii) It will comply with Executive Order 11063 and regulations pursuant thereto (24 CFR Part 107) on Equal Opportunity in Housing which prohibits discrimination because of race, color, creed, or national origin in housing and related facilities provided with Federal financial assistance.

(iv) It will not discriminate in the procedures used to mitigate displacement caused by the project as required by 24 CFR 850.35(d).

(v) It will comply with section 504 of the Rehabilitation Act of 1973.

(vi) It will comply with Executive Order 11246 and all regulations pursuant thereto (41 CFR Chapter 60–1.5) which states that no person shall be discriminated against on the basis of race, color, religion, sex or national origin in all phases of employment during the performance of Federal contracts and subcontracts (contracts or subcontracts in amounts less than $10,000 are exempt) and shall take affirmative action to insure equal employment opportunity.

(vii) It will comply with section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u) which requires that, to the greatest extent feasible, opportunities for training and employment be given to lower income persons residing within the unit of local government or the metropolitan area (or nonmetropolitan county), as determined by the Secretary in which the project is located; and contracts for work in connection with the project be awarded to business concerns which are located in or owned in substantial part by persons residing in the same metropolitan area (or nonmetropolitan county) as the project.

(viii) Jointly with the owner it will prepare minority and women-owned business plans, to be submitted to and reviewed by HUD, prior to drawdown of funds and that these plans will be implemented throughout the construction period.

(ix) It will comply with the prohibitions against age discrimination under the Age Discrimination Act of 1975 and discrimination prohibitions against handicapped individuals under section 504 of the Rehabilitation Act of 1973.

(Date) (Title) (Signature)

Exhibit K–2—Owner Equal Opportunity and Non-discrimination Certifications Housing Development Grant Program

The owner hereby assures and certifies that:

(i) It will comply with Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352) and regulations pursuant thereto (24 CFR Part 1) which 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 otherwise subjected to discrimination under any program or activity for which the applicant receives financial assistance; and will immediately take any measures necessary to effectuate this agreement. With reference to the real property and structure(s) thereon which are provided or improved with the aid of Federal financial assistance extended to the Owner, this assurance shall obligate the Owner, or in the case of any transfer, the transferee, for the period during which the real property and structure(s) are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(ii) It will comply with Title VIII of the Civil Rights Act of 1968 (Pub.L. 90–284), as amended, which prohibits discrimination in housing on the basis of race, color, religion, sex or national origin; and, regulations pursuant thereto (24 CFR Parts 108 and 200) requiring marketing in accordance with an Affirmative Fair Housing Marketing Plan, Form HUD 935.2, submitted to and approved by HUD prior to the applicant's drawdown of funds.

(iii) It will comply with Executive Order 11063 and regulations pursuant thereto (24 CFR Part 107) on Equal Opportunity in Housing which prohibits discrimination because of race, color, creed, or national origin in housing and related facilities provided with Federal financial assistance.

(iv) In establishing the criteria for the selection of tenants, the Owner will not utilize preferences or priorities which are based upon the length of time the applicant has resided in the jurisdiction. The Owner shall treat non-resident applicants who are working, or have been notified that they are hired to work in the jurisdiction, as residents of the jurisdiction.

(v) It will comply with Executive Order 11246 and all regulations pursuant thereto (41 CFR Chapter 60–1.5) which states that no person shall be discriminated against on the basis of race, color, religion, sex or national origin in all phases of employment during the performance of Federal contracts and subcontracts (contracts or subcontracts in amounts less than $10,000 are exempt) and shall take affirmative action to insure equal employment opportunity.

(vi) It will comply with Section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u) which requires that, to the greatest extent feasible, opportunities for training and employment be given lower-income persons residing within the unit of local government or the metropolitan area (or nonmetropolitan county), as determined by the Secretary in which the project is located; and contracts for work in connection with the project be awarded to business concerns which are located in or owned in substantial part by persons residing in the the same metropolitan area (or nonmetropolitan county) as the project.

(viii) Jointly with the Applicant it will prepare minority and women-owned business plans, to be submitted to and reviewed by HUD prior to drawdown of funds and that these plans will be implemented throughout the construction period.

(ix) It will comply with the prohibitions against age discriminated under the Age Discrimination Act of 1975 and the discrimination prohibitions against handicapped individuals under Section 504 of the Rehabilitation Act of 1973.

(Date) (Title) (Signature)

Exhibit K–3—Certification of Minority/Women Ownership

This is to certify that we, the Applicant, have examined ownership documents for the owner entity, _____, and are satisfied that the minority/women entity or partner(s) is clearly the controlling party for the

_____ project and that we, the Applicant, are committed to the enforcement of the minority or women participation for at least seven years after initial occupancy. In accordance with the guidance provided in Part K–1 of the Packet, Selection Factor points are warranted for this minority/women controlled entity.

_____

Chief Executive Officer

_____

Date

BILLING CODE 4210-27-M

EXHIBIT M-1

Project Application for Housing Development Grant

U.S. Department of Housing and Urban Development
Office of Housing
Federal Housing Commissioner

OMB No. 2502-0323(Exp 9/30/91)

Section A - PROJECT IDENTIFICATION

1. Name of Project

2. Type of Project: ☐ Eligible Area ☐ Special Needs ☐ Neighborhood Preservation

3. Type of Tenancy: ☐ Rental ☐ Cooperative ☐ Mutual

4. Project Number

5. Name of Applicant

6. Type of Applicant: ☐ City/Town/Township ☐ Urban County ☐ State on behalf of (specify)

7. This Project will be for: ☐ Nonelderly Families ☐ Elderly Only ☐ Combination

Section B - LOCATION AND DESCRIPTION OF PROPERTY

1. Street Address | 2. Municipality | 3. County | 4. State and ZIP Code | 5. Congressional District

6. Type of Construction* ☐ Proposed ☐ Rehabilitation
Year Built 19 ____

7. Number of Units: Revenue ..... ____ Nonrevenue .. ____ TOTAL ..... ____

8. Number of Buildings

9. List Accessory Buildings Area: ____ Sq. Ft. ____

10. List Recreation Facilities Area: ____ Sq. Ft. ____

11. Type of Buildings: ☐ Elevator ☐ Walkup ☐ Row(Townhouse) ☐ Detached ☐ Semi-Detached

12. No. of Stories

13. No. of Elevators

14. Type of Foundation: ☐ Slab on Grade ☐ Crawl Space ☐ Partial Basement ☐ Full Bsmt.

15. Structural System | 16. Floor Systm | 17. Exterior Finish | 18. Heating System | 19. Air Conditioning System

Section C - INFORMATION CONCERNING LAND OR PROPERTY

1. Date: ☐ Acquired ☐ Optioned / /

2. Price: ☐ Purchase ☐ Option $

3. Additional Cost Paid or Accrued $

4. Total Cost $

5. Outstanding Balance $

6. Relationship Between Seller and Buyer (Personal or Other):

7. Site Area

8. Zoning (If recently changed, submit evidence)

9. If leasehold, show annual ground rent ... $ ____ lease term, remaining years ....

10. Off-Site Facilities:

	Public	Comm.	At Site	Ft. from
Water	☐	☐	☐	____ ft.
Sewer	☐	☐	☐	____ ft.
Paving	☐	☐	☐	____ ft.
Gas	☐	☐	☐	____ ft.
Electrical	☐	☐	☐	____ ft.
Other	☐	☐	☐	____ ft.

11. Unusual Site Features: ☐ None ☐ Cuts ☐ Fill ☐ Erosion ☐ Poor Drainage ☐ Retaining Walls ☐ Rock Foundations ☐ High Water Table ☐ Other ____ ☐ Other ____

12. Special Assessments: a. ☐ Prepayable b. ☐ Nonprepayable
c. Principal Balance .....$ ____
d. Annual Payment .....$ ____
e. Remaining Term ..... ____ years;

Section D - ESTIMATE OF INCOME (See * Note)

1. Unit Type	No. of Living Units	No. of Units Lower Income	Living Area (Sq. Ft.)	Composition of Units	Unit Rent per Mo. ($)	PB E not in Rent (Sec. F)	Lower-Income Rents	Total Monthly Unit Rent ($)
Employee(s) Living Units								
TOTALS				2. TOTAL ESTIMATED MONTHLY RENTALS FOR ALL LIVING UNITS				$

3. Number of Parking Spaces: ☐ Attended ☐ Self Park
Total Spaces ... ____
Parking Ratio .... ____

4. Parking and Other Income (Not Included in Rent):
Open Spaces ____ @ $____ per month = $ ____
Covered Spaces ____ @ $____ per month = $ ____
Laundry ____ sq.ft., or Living Units @ $____ per month = $ ____
Other ____ @ $____ per month = $ ____
TOTAL ANCILLARY INCOME ..... $

5. Commercial Space (Describe):
Area Ground Level ____ sq.ft. @ $ ____ per sq.ft., per month = $ ____
Other Levels ____ sq.ft. @ $ ____ per sq.ft., per month = $ ____ TOTAL COMM ... $

6. TOTAL ESTIMATED MONTHLY GROSS INCOME AT 100-PERCENT OCCUPANCY ..... $

7. TOTAL ANNUAL RENT (Line 6 above x 12 months) ..... $

8. Gross Floor Area ____ Sq. Ft.

9. Net Rentable Residential Area ____ Sq. Ft.

10. Net Rentable Commercial Area ____ Sq. Ft.

* IF ADDITIONAL SPACE IS NECESSARY, THE ATTACHED ADDENDUM MUST BE USED

HUD-90031 (5-84)
Sec. 17 PL 98-181

Section E — Equipment and Services (Check Items Included in Rent, Listed Below):

Equipment:

- ☐ Range and Oven
- ☐ Microwave Oven
- ☐ Refrigerator
- ☐ Laundry Facilities:
  - ☐ In Common Area
  - ☐ In Living Unit
  - ☐ L.U. Hookup Only
- ☐ Carpet
- ☐ Drapes
- ☐ Swimming Pool
- ☐ Air Conditioning Equipment
- ☐ Trash Compactor
- ☐ Disposal
- ☐ Other:

Services	Gas	Elec.	Oil
☐ Heat	☐	☐	☐
☐ Hot Water	☐	☐	☐
☐ Cooking	☐	☐	☐
☐ Air Conditioning	☐	☐	
☐ Lights, etc., in Unit			
☐ Cold Water			
☐ Parking	☐ Other:		

Section F — Utilities (Not in Rent)

Personal Benefit Expenses (PBE): Check Utilities and Services Not Included in the Rent and Paid Directly by the Tenant:

- ☐ Electricity
- ☐ Heating
- ☐ Gas
- ☐ Decorating
- ☐ Repairs
- ☐ Water
- ☐ Other _____

Section G — Estimate of Replacement Cost

1. TOTAL LAND IMPROVEMENTS ..... $ _____
2. TOTAL STRUCTURES (Includes Main, Accessory, Garage and Other Buildings) ..... $ _____
3. SUB TOTAL (Line 1 + Line 2) ..... $ _____
4. General Requirements (Line 3 x _____ percent) ..... $ _____
5. SUBTOTAL (Line 3 + Line 4) ..... $ _____

Fees

6. Builder's General Overhead (Line 5 x _____ percent) .. $ _____
7. Builder's Profit (Line 5 x _____ percent) ..... $ _____
8. SUB TOTAL (Sum of Lines 5 through 7) ..... $ _____
9. Bond Premium ..... $ _____
10. Other Fees ..... $ _____
11. ESTIMATED TOTAL COST OF CONSTRUCTION (Sum of Lines 8 through 10) ..... $ _____
12. Architect's Fee - Design (Line 8 x _____ percent) .. $ _____
13. Architect's Fee - Supervisory (Line 8 x _____ percent) . $ _____
14. TOTAL FOR ALL IMPROVEMENTS (Sum of Lines 11 through 13) ..... $ _____
15. Cost per Gross Square Foot (Line 14 divided by Item 8, Section D) ..... $ _____
16. Construction Time _____ months ÷ 2 = _____ months.

Charges and Financing During Construction

17. Interest on $ _____ .00 @ _____ percent for _____ months ..... $ _____
18. Taxes ..... $ _____
19. Insurance ..... $ _____
20. Mortgage Insurance Premium ..... $ _____
21. Examination Fee ..... $ _____
22. Inspection Fee ..... $ _____
23. Financing Fee (_____ percent) ... $ _____
24. Title and Recording ..... $ _____
25. _____ $ _____
26. _____ $ _____
27. _____ $ _____
28. TOTAL CHARGES AND FINANCING ..... $ _____

Legal, Organization and Audit Fee

29. Legal ..... $ _____
30. Organization ..... $ _____
31. Cost Certification Audit Fee ..... $ _____
32. TOTAL LEGAL, ORG., & AUDIT FEES ..... $ _____
33. Contingency Reserve (Rehabilitation Only) ..... $ _____
34. Relocation Expenses ..... $ _____
35. _____ $ _____
36. _____ $ _____
37. _____ $ _____
38. _____ $ _____
39. TOTAL ESTIMATED DEVELOPMENT COST (Lines 14 + 28 + 32 through 38) ..... $ _____
40. Land (Acquisition Price of Sale) ..... $ _____
41. TOTAL ESTIMATED REPLACEMENT COST OF PROJECT (Line 39 + Line 40) ..... $ _____
42. Average Cost per Living Unit (Line 41 divided by Total in Section B, Item 7) ..... $ _____

Section H — Annual Income Computations

1. Estimated Project Gross Income (Line 7, Section D, page 1 of form) ..... $ _____
2. Occupancy Rate (Entire Project) _____ percent.
3. Effective Gross Income (Line 1 x Line 2) ..... $ _____
4. Total Project Expenses (Line 6, Section I) ..... $ _____
5. Net Income to Project (Line 3 minus Line 4) ..... $ _____
6. Expense Ratio (Line 4 divided by Line 3) _____ percent.

Section I — Estimate of Annual Expense

1. TOTAL ADMINISTRATIVE (Includes Advertising, Management Fee at _____ percent and any other administrative expenses) ..... $ _____
2. TOTAL OPERATING (Includes elevator maintenance, heating fuel, domestic hot water, lighting and miscellaneous power, water, gas, garbage and trash collection, payroll and other expenses) ..... $ _____
3. TOTAL MAINTENANCE (Includes decorating, repairs, exterminating, insurance, ground expenses and other maintenance expenses. Must be based on data on comparable projects which have experienced a full cycle of maintenance expenses, i.e., three to four years experience) $ _____
4. TOTAL TAXES (Includes Real Estate, Personal Property, Employee Payroll Tax and Other Taxes) ..... $ _____
5. TOTAL FOR SPECIAL ASSESSMENTS AND GROUND RENTS ..... $ _____
6. TOTAL EXPENSES ..... $ _____
7. Average Expense per Unit per Annum (PUPA) (Line 6 divided by Total, Section B, Item 7) ..... $ _____

Section J — Total Settlement Requirements

1. Development Cost (Line 39, Section G) ..... $ _____
2. Cash Required for Acquisition or Indebtedness on Property ..... $ _____
3. SUB TOTAL (Line 1 + Line 2) ..... $ _____
4. Initial Operating Deficit Reserve ..... $ _____
5. Discounts not included in Line 23, Section G ..... $ _____
6. Interest Yield Costs (If Any) ..... $ _____
7. Working Capital Reserve ..... $ _____
8. Off-Site Construction Costs not Included in Line 1, Section G ..... $ _____
9. Other (attach explanation) ..... $ _____
10. SUBTOTAL (Sum of Lines 4 + 5 + 6 + 7 + 8 + 9) ..... $ _____
11. TOTAL COSTS (Sum of Line 3 and Line 10) ..... $ _____
12. Funds Available to Meet Total Costs:
    a. Debt Financing (Line 6d, Section K) ..... $ _____
    b. Housing Development Grant (Line 1, Section K) ..... $ _____
    c. Other Grants and In-Kind Contributions (Line 7d, Section K less any land writedowns shown in Section K) ... $ _____
    d. Owner's Funds ..... $ _____
    e. TOTAL FUNDS AVAILABLE (Lines 12a + 12b + 12c + 12d) ..... $ _____

Section K — Source of Project Funds

1. Grant Amount Requested $

2. Use of Grant Funds:

☐ Grant to Owner ☐ Loan to Owner ☐ Interest Reduction/Rental Assistance ☐ Development Cost Writedown ☐ Other (specify) _____

3. Estimated Amount of Grant, if loaned, to be repaid annually:

			Interest Rate %	Dollar Amount
a. Year 1 19____			____	$ ____
b. For Years	through	....	____	$ ____
c. For Years	through	.....	____	$ ____
d. For Years	through	....	____	$ ____
e. For Years	through	.....	____	$ ____

4. Owner's Equity Investment:

	Source:	Amount
a.		$
b.		$
c.		$
d. Total		$

5. Other Funds To Be Made Available by Owner:

	Amount
a.	$
b.	$
c.	$
d. Total	$

6. Debt Financing (other than Housing Development Grants):

Source:	Amount	Annual Debt Service Amount	Private	Federal	Other Public	FHA Ins.	11(b)	103(b) Bonds
a.	$	$	☐	☐	☐	☐	☐	☐
b.	$	$	☐	☐	☐			
c.	$	$	☐	☐	☐			
d. Total.....	$	$						

e. For FHA-insured mortgages: Applicable Section of Act _____

7. Other Grants and/or Writedowns (other than Housing Development Grants):

Source	Amount/Value	Private	Federal	Other Public
a.	$	☐	☐	☐
b.	$	☐	☐	☐
c.	$	☐	☐	☐
d. Total.....	$			

Section L — Project Schedule

1. Estimated Start of Site Preparation — MM | YY

2. Estimated Start of Construction/Rehabilitation — MM | YY

3. Estimated Completion of Development — Stage 1 — MM | YY

4. Estimated Completion of Development — Stage 2 — MM | YY

5. Estimated Final Completion of Project — MM | YY

6. Estimated Date of Initial Occupancy — MM | YY

7. Estimated Date of 50-percent Occupancy — MM | YY

8. Estimated Date of Final Occupancy — MM | YY

Section M — Project Principals

1. Owner Entity

Name:

Address:

Contact Person | Telephone Number

- ☐ Limited Partnership
- ☐ Profit-Motivated Corporation
- ☐ Not For Profit Corporation
- ☐ Joint Venture
- ☐ Sole Proprietor
- ☐ Cooperative
- ☐ Other (specify) _____

Principals	Role/Title/Partnership Status	Percentage Owned	Minority Code	Gender Code
a.		%	[ ]	[ ]
b.		%	[ ]	[ ]
c.		%	[ ]	[ ]
d.		%	[ ]	[ ]

2. Construction Lender

Name:

Address:

Contact Person | Telephone Number

3. Permanent Lender

Name:

Address:

Contact Person | Telephone Number

4. Contractor (If Known)

Name:

Address:

Contact Person | Telephone Number

5. Applicant Contact Person(s)

Name:
Telephone Number:

Name:
Telephone Number:

Name:
Telephone Number:

Name:
Telephone Number:

6. Other

Project Participation:

Name:

Address:

Contact Person | Telephone Number

7. Other

Project Participation:

Name:

Address:

Contact Person | Telephone Number

Identifier Codes (HUD Use Only)

1. FHA Project Number	2. HUD Locality Code	3. EC Identifier

4. Select: ☐ SMSA Central City ☐ SMSA Other ☐ Non-SMSA

5. Census Tract/Enumeration District	6. SMSA Code (If applicable)	7. County Census Code	8. State Census Code

9. Population Group Code (Area)	10. Population Group Code SMSA

11. Region Code	12. Field Office Code	13. State Alpha Code

Estimate of Income

Addendum to Sec D of Form HUD-90031

U.S. Department of Housing and Urban Development
Office of Housing
Federal Housing Commissioner

OMB No. 2502-0323 [redacted]
(Exp. 9/30/91)

Unit Type	No. of Living Units	No. of Units Lower-Inc.	Living Area (Sq. Ft.)	Composition of Units	Unit Rent per Mo. ($)	PBE Not In Rent (Sec. F)	Lower-Income Rents	Total Monthly Unit Rent ($)
Subtotal								

BILLING CODE 4210-27-C

HUD-90031-A (5-84)
Sec. 17PL 98-181

Exhibit M–4—Substantial Rehabilitation Eligibility Test

For projects proposing substantial rehabilitation of an existing structure or a combination of substantial rehabilitation and new construction, the rehabilitation must involve the replacement of more than one major building component OR repairs, replacements and improvements that cost more than the *greater* of:

(1) 15 percent of the property's value after completion, or,

(2) $6,500 per dwelling unit, adjusted by the appropriate supportable high-cost factor.

If the project involves the replacement of more than one major building component, it is not necessary to complete this test. Instead, provide a narrative description of the rehabilitation in Exhibit M–4.

For projects proposing a combination of substantial rehabilitation and new construction, the following test should be completed using the dollar and unit amounts *attributable to the rehabilitation portion only.* These amounts have been identified with an asterisk (*).

Test

*1. Cost approach to value after rehab per appraisal:
$_____ × 15% = $_____
*2. _____ (No. units) × $6,500 = $_____
3. $_____ (Total line 2) × _____% (HCF**) = $_____
*4. Cost of commercial space, if any $_____
5. Total of lines 3 and 4 $_____
6. Insert greater amount from line 1 or 5 $_____
*7. Amount from Exhibit M–1, line G–14 $_____
*8. Amount from Exhibit M–1, line G–33 $_____
9. Total of lines 7 and 8 $_____

If amount in line 9 exceeds the amount in line 6, the Substantial Rehabilitation Eligibility Test has been met.

** Local High Cost Factor from Attachment 4 of this Packet

Exhibit M–5—Determination of Maximum Rents for Lower Income Units

	0-BR	1-BR	2-BR	3-BR	4-BR	5-BR
1. Very Low-Income Eligibility Limit (50% of median) [1]						
2. Prototypical Adjustments to Family Income	$800	$800	$880	$1,560	$1,560	$2,040
3. Adjusted Very Low-Income Limit (line 1 minus line 2)						
4. Maximum Monthly Gross Rent for Lower-income Unit – [(.30 × line 3) divided by 12]						
5. Monthly Allowance for Tenant-Paid Utilities and Essential Housing Services [2]						
6. Maximum Monthly Net Rent for Lower-Income Unit (line 4 minus line 5) [3] (Enter in Section D, Column 8 of Form HUD—90031)						

[1] Section 8 Very Low-Income eligibility limits are available at HUD Field Offices. The applicable limits by unit size are as follows; these limits are not occupancy standards: 0-BR—1-person limit, 1-BR—2-person limit, 2-BR—3-person limit, 3-BR—5-person limit, 4-BR—7-person limit, 5-BR—8-person limit.

[2] Estimate of the monthly cost of utilities and other essential housing services to be paid for directly by the tenant. (Also referred to as Personal Benefits Expenses (PBE)).

[3] Maximum rent that owner may charge a family occupying a lower-income unit.

Exhibit M–6—Format for Determination of Maximum Value

I. Non-elevator structure:
a. Number of 0 Bedroom units _____ × $19,500 = $_____
Number of One Bedroom Units _____ × $21,600 = $_____
Number of Two Bedroom Units _____ × $25,800 = $_____
Number of Three Bedroom Units _____ × $31,800 = $_____
Number of Four or more Bedroom Units _____ × $36,000 = $_____
Total $_____
b. Item a. Total × Local High Cost Factor _____% $_____
c. Cost Not Attributable to Dwelling Use, Item B. × 10% $_____
d. Cost of Commercial Area $_____
e. Total $_____
II. Elevator structure:
a. Number of 0 Bedroom Units _____ × $22,500 = $_____
Number of One Bedroom Units _____ × $25,200 = $_____
Number of Two Bedroom Units _____ × $30,900 = $_____
Number of Three Bedroom Units _____ × $38,700 = $_____
Number of Four or More Bedroom Units _____ × $43,758 = $_____
Total $_____
b. Item a. Total × Local High Cost Factor _____% $_____
c. Cost Not Attributable to Dwelling Use, Item b. × 10% $_____
d. Cost of Commercial Areas $_____
e. Total $_____
III. Where both elevator and non-elevator buildings are involved, show the total of I.e. and II.e. $_____

The local High Cost Factor referred to in line Ib. and IIb. is included in Attachment 4, Schedule of High Cost Percentages for Base Cities. If the applicant's locality is not a Base City, the local HUD Field Office should be contacted for the appropriate High Cost Factor.

If all living units proposed are in only one building type, complete only the applicable test. If both elevator and non-elevator structures are involved, complete both tests reflecting the appropriate numbers of units for each building type and indicate the total from both tests in III.

Exhibit M–8—Determination of Maximum Grant and Minimum Equity Contribution

1. Determination of maximum grant amount in accordance with 850.37(d)

a. Estimated Total Development Cost (Exhibit M–1, line G–39) $_____

b. Total Cost of Acquisition, if applicable (see Test below) $_____

c. Total Estimated Replacement Cost (Line a plus Line b) $_____

d. Total Development Cost of Commercial Space. (See Exhibit M–6, line I.d. and/or II.d.) $_____

e. Subtract Line d. from Line c. $_____

f. Line e. divided by 2=Maximum Grant Allowed. $_____

Acquisition Test

The cost of acquisition may be included in determining the maximum grant amount if the applicant documents in the application and HUD determines that:

1. For new construction applications the special nature of the project warrants the inclusion of acquisition costs.

2. For substantial rehabilitation applications the special nature of the project must warrant inclusion of acquisition costs AND there must be refinancing of the project debt. In order to determine a "refinancing," as opposed to new financing, there must be *either:* (i) an identity of interest between the owner of the structure and the owner of the project, provided that the project owner intends to obtain new financing to pay off existing debt; or (ii) an arms-length sales transaction where the new owner will assume the existing mortgage and then refinance.

Special Nature projects must meet *one* of the following public purposes:

a. The number of lower income units is 30.0 percent or more of the total number of units (no rounding up from 29.9).

b. The average lower income bedroom count for the project is 3.0 or more (no rounding up from 2.9).

c. The project writes down the rents on the "market rate" units to 110 percent of the Section 8 Existing Fair Market Rents.

2. Determination of minimum equity requirement. (Not required for non-profit owners or cooperative and mutual projects as specified in Part M–11)

a. Total Estimated Replacement Cost (Exhibit M–1, G–41) $_____

b. Initial Operating Deficit Reserve (Exhibit M–1, J–4) $_____

c. Discounts (Exhibit M–1, J–5) $_____

d. Interest Yield Costs (Exhibit M–1, J–6) $_____

e. Working Capital Reserves (Exhibit M–1, J–7) $_____

f. Off-site Construction Costs (Exhibit M–1, J–8) $_____

g. Total $_____

h. 10 percent of Line g. $_____

The sum of Owner's Equity identified in Exhibit M–1, in accordance with the guidance provided in the instructions for Exhibit M–1, Sections K–4 and K–5, must equal or exceed the amount shown in Line h above.

Exhibit M–9—Leveraging Ratios

1. *Project Leveraging Ratio—Ratio of non-Federal public plus private contributions to the grant amount.*

a. Non-Federal Public Loans, Grants, Contributions and/or Other Writedowns (Exhibit M–1, K.7.d.) $_____

b. Owner's Equity Investment (Exhibit M–1, K.4.d.) $_____

c. Private Debt Financing and other Grants (Exhibit M–1, K.6.d.) $_____

d. Non-Federal Public and Private Investment (Sum of Lines a+b+c) $_____

e. Housing Development Grant Requested $_____

f. Project Leveraging Ratio (Line d divided by Line e) _____

2. *Private Project Leveraging Ratio—*

a. Private Investment (Sum of Line lb and Line lc) $_____

b. Private Project Leveraging Ratio (Line 2a divided by Line le) _____

Instructions

A. Enter on Line 1.a. the sum of: (1) All state or local public loans or grants—excluding the Housing Development Grant but including any Community Development Block Grant funding—for direct costs associated with project development, (2) The amount of any State or local in-kind contributions, e.g., site preparation or relocation costs incurred by the local government, or land writedowns, (3) The actual amount of public subsidy which is to be completely expended or escrowed for use *during* the development phase and/or the first four years of project operation, e.g., tax abatement, rental subsidies, operating subsidies, and interest reduction payments; and, (4) The present value of the full amount of any public subsidies—including tax abatement—which are to be disbursed over a period of more than four years, after the project is fully operational. Use a discount rate of 10% in calculating the present value.

All amounts entered on Line 1.a. should be included and identified as being "other public" in Exhibit M–1, K–6. and K–7. Such amounts may not include costs for activities, e.g. offsites, which provide a benefit to other development activities which may (be) occur(ing) in the immediate vicinity of the HDG project. Such expenditures must be prorated to reflect the direct benefit to the HDG project. Loans provided from the proceeds of tax-exempt bond issues should *not* be included in the amount on Line 1.a. (see instruction C below).

B. Enter on Line 1.b. the total amount of the owner's proposed equity investment from Exhibit M–1, K.4.d. The amount on this line should *not* include funds to be escrowed by the owner to cover working capital, operating deficits or other contingency reserves, nor should it include the value of any land writedown reflected in Line 1a.

C. Enter on Line 1.c. the total amount of all permanent debt financing and any private grants to be provided from private sources. The total amount entered on Line 1.c. should reflect all amounts identified as being "private" in Exhibit M–1, K.6 and K.7. The amount should include any permanent loan from a bank, mortgage company, insurance company, pension fund, or any other private mortgagee, regardless of whether or not the loan is insured. The amount should also include any permanent loan derived from the proceeds of tax-exempt bonds, regardless of whether the mortgagee of record is a public or private entity (e.g., a loan made by a State Housing Finance Agency from bond proceeds should be included). Construction financing should not be included on Line 1.c.

D. Enter on Line 1.d. the total of Lines 1.a., 1.b. and 1.c.

E. Enter on Line 1.e. the amount of the Housing Development Grant requested (Exhibits M–1 and K.1.)

F. Enter on Line 1.f. the ratio of Line 1.d. to Line 1.e. This amount represents the Project Leveraging Ratio.

G. Enter on Line 2.a. the sum of Lines 1.b. and 1.c.

H. Enter on Line 2.b. the ratio of Line 2.a. to Line 1.e. This amount represents the Private Project Leveraging Ratio.

Exhibit M–12—Constant Payment Project Investment Accounts

Where HDG funds are proposed to be used to fund a constant payment PIA, the Applicant must demonstrate that it is at least 10 percent more efficient than a development cost writedown based

upon the following test:

(a) For each lower income unit type, subtract the lower income rent from the market rent to obtain "assistance required."

(b) Complete the following analysis.

1. Multiply "assistance required" for each unit by the number of lower income units of each type.

Unit type	Assistance required	×	Number of lower-income units	=	Assistance required
0 bedrooms					
1 bedroom					
2 bedroom					
3 bedroom					
4 bedroom					
Total Assistance Required	$				

2. Multiply the Monthly Total in line 1 by 12 (months) $_____

3. Multiply the Occupancy Factor Exhibit M-1, Line H-2_____% times line (2) $_____

4. Net Income (Exhibit M-1) $_____

5. Total of Lines 3 and 4 $_____

6. Debt Service Factor (divide the total for all annual debt service amount from Section K, line 6(d) by the total debt amount, also from line 6(d))_____%

7. Divide Line 5 by Line 6, to produce the approximate cost writedown that would be required $_____

8. Enter the amount of the Grant which is to be used for a writedown, if any $_____

9. Subtract line 8 from line 7 $_____

10. Multiply line 9 by 90 percent $_____

(c) *If the amount on Line 10 exceeds the HDG requested to establish the PIA the applicant must use a development cost writedown.*

Exhibit M-13—Commercial Test—Required Only Where Commercial Income is Involved

a. Cost of Commercial
(Total Cost from Maximum Value Format, M-6, Line Id. and/or IId.)
$_____

b. First Mortgage Debt Service Rate
_____%

c. Annual Commercial Debt Service
(Line (a) times Line (b)) $_____

d. Annual Commercial Expense Estimate
(From Appraisal, M-3) $_____

e. Effective Gross Commercial Income Required
(Line (c) plus Line (d)) $_____

f. Commercial Occupancy Factor
(From Appraisal, M-3) _____%

g. Gross Commercial Income Required to Demonstrate Commercial As Self-Supporting
(Line (e) divided by Line (f)) $_____

h. Commercial Income
(From Exhibit M-1, Section D, Line 5)
$_____

Note: Line (h) must equal or exceed line (g).

Exhibit M-14—Format for Determining Maximum Units for Least Cost

1. Take ½ of line I.b. and/or II.b. of Exhibit M-6 $_____
2. Divide line 1 by Total Project Units (Exhibit M-1, B-7) $_____
3. Divide Grant Amount (Exhibit M-1, K.1.) by Total Project Units.
$_____
4. Divide line 3 by line 2 to determine grant to cost ratio._____

In addition, the overall average bedroom composition cannot exceed the average lower income bedroom composition by more than 20%. If it is higher, zero points will be assigned for this selection factor.

5. Determine overall bedroom composition of total project_____
6. Determine average bedroom composition of lower income units._____
7. Multiply line 6 by 1.20_____
8. Is line 7 equal to or greater than Line 5
☐ yes ☐ no
If yes—points assigned.
If no—zero points assigned.

Attachment 1—Threshold Requirements

To be determined eligible for rating and possible selection on the basis of the HUD selection factors and priorities, an application must meet a number of preliminary threshold requirements. The following summary briefly describes these threshold requirements and indicates each portion(s) of the application submission that will provide information relevant to HUD's threshold determination.

Threshold requirement	Portion(s) of application with relevant information
1. The application must be received by HUD Headquarters and the appropriate HUD field office by the deadline specified in the General Information Section, item (6), of this Packet.	Time and date of receipt issued by HUD 24 CFR 850.37(a).
2. The application must contain forms, exhibits, certifications, and other documentation required by the Packet. Documentation must be adequate in content, clarity and comprehensiveness to permit HUD to make all necessary processing determinations.	Entire Application Packet (see Checklist) 24 CFR 850.31;850.33;850.35; 850.37(b).
3. The proposed project must be located in a HUD-designated eligible area (see published list of eligible areas), *or* be determined by HUD to meet a special housing need or advance a neighborhood preservation purpose.	Part E (Eligibility of the Application) 24 CFR 850.37(c).
4. If the project is a special need or neighborhood preservation project, HUD must determine that it would not be feasible to provide the same type of lower income units (by number of bedrooms and household type) through the moderate rehabilitation of housing located in the project neighborhood.	Part F (Infeasibility of Moderate Rehabilitation-Certification and Justification) and Part H-1 (Neighborhood Identification, Description and Map) 24 CFR 850.37(c).
5. The project must be new construction and/or substantial rehabilitation. To qualify as substantial rehabilitation, the work proposed for the project must (a) involve the replacement of more than one major building component, or (b) entail a cost exceeding the greater of (i) 15 percent of the project's value after rehabilitation or (ii) $6,500 per dwelling unit adjusted by a supportable high cost factor determined by HUD.	Part M-4 (Substantial Rehabilitation Eligibility Test); Part M-3 (Appraisal); Part M-10 (Architectural Information); and Section G of Exhibit M-1 24 CFR 850.3.

Threshold requirement	Portion(s) of application with relevant information
6. The grant amount requested may not exceed the amount necessary to provide decent rental housing of modest design, taking into account the special costs of providing and maintaining the affordability of the lower income units. The requested grant may not exceed 50 percent of HUD's determination of the total development cost. Acquisition costs may be included only when the special nature and refinancing costs justify their inclusion.	Part M-8 (Assessment of Compliance with Overall Grant Limit); Section G of Exhibit M-1; and Part I (Relocation/Displacement Information) 24 CFR 850.37(d) and (f); 850.61.
7. Commercial space normally may not exceed ten percent of the project's gross floor area. With appropriate justification, HUD may allow commercial space to cover up to 20 percent of the gross floor area. In any event, however, the grant assistance may not be used to support commercial space in the project. All such space must be self-supporting.	Part M-13, Exhibit M-1 and Part M-3 (Appraisal) 24 CFR 850.37(e).
8. The estimated value of the project after rehabilitation or construction may not exceed the amount of a mortgage that could be insured for the project under Section 207 of the National Housing Act based on the sum of the statutory per-unit limits (adjusted by the appropriate supportable local high cost factor), a ten percent allowance for costs not attributable to dwelling use and an additional allowance to reflect the actual cost of commercial space.	Part M-3 (Appraisal) and Part M-6 (Maximum Value of Project Worksheet) 24 CFR 850.37(g).
9. The applicant must have a satisfactory record in meeting its assisted housing needs and have the capacity to undertake the program in a timely manner.	Part B-2 (Performance and Capacity) 24 CFR 850.37(h) and (i).
10. The proposed number of lower income units must be 20.0 percent or more of the total number of project units. Where 20 percent of the total number of units results in a fraction of a unit, the applicant must round to the next highest unit (e.g., 3.4 units = 4 units).	Section D of Exhibit M-1 24 CFR 850.37(j).
11. The proposed project must be determined to be consistent with the goals and general location provisions of any applicable local Housing Assistance Plan	Part B-3 (HAP Compliance) 24 CFR 850.37(1).
12. HUD must be satisfied that the proposed project will not have a negative effect on neighborhood development, will not cause undue relocation hardship, and will comply with limitations on displacement of the very low-income.	Part H-3 (Effect of Proposed Project on Neighborhood Development) and Part I (Relocation/Displacement Information) 24 CFR 850.37(m).
13. The applicant and owner certifications concerning nondiscrimination and equal opportunity must be acceptable, and HUD must consider the past efforts of applicant, city, and owner in implementing the civil rights and equal opportunity provisions of HUD programs to be satisfactory. All such certifications must be signed by the same Chief Executive Officer or official who signs Standard Form 424.	Parts K-1 and K-2 (Nondiscrimination and Equal Opportunity Certifications.) K-3 (MBE/WBE Certification) 24 CFR 850.37(n); 850.33(g); 850.33(r).
14. Other required applicant and owner certifications must be submitted and deemed acceptable by HUD. These address, in part, legal authority to submit, public consultation, very low-income displacement, building code conformance, previous HUD assistance, project management after completion and miscellaneous Federal Goverment-wide requirements applicable to this program.	Exhibits C-1 and C-2 (Applicant and Owner Certification) and Exhibit J (Environmental Certification) 24 CFR 850.33(r).
15. The project must contain firm project commitments for all financial and other resources necessary to develop the project, whether the resources are private or public, and must be considered financially feasible for the project term. Financing commitments must be for a minimum of the Project Term (20 years or more) and must not contain provisions for a call, sale or refinancing earlier than the Project term. Aside from the strength of financial and other commitments project feasibility will be determined based on HUD s projections as to coverage by project income of expenses and debt service over the project term. Issues related to this include: are the project units marketable at rents proposed, and, are project costs and operating expenses accurately estimated and reasonable?	Part M-2 (Narrative Feasibility Assessment); Part M-3 (Appraisal) Part M-7 (Firm Commitments, Financial Statements and Evidence of Site Control); Sections D-K of Exhibit M-1; and Part M-12 Pro Forma and Investment Plan 24 CFR 850.37(k)(l)
16. The project costs, terms and conditions of financing must be considered reasonable and owner's equity investment must equal to at least 10 percent of project costs except for cooperatives, mutuals and non profits.	Part M-2 (Narrative Feasibility Assessment); Part M-7 (Firm Commitments, Financial Statements, and Evidence of Site Control); Part M-8; and Exhibit M-1, Section K 24 CFR 850.37(k)(2).
17. The project must be developed for "residential rental purposes." This may include cooperative or mutual housing that has a resale structure enabling the cooperative to maintain affordability for lower income families.	Box 3 of Section A of Exhibit M-1 and Part M-11 24 CFR 850.17(a).
18. The number of units in the project is at least 20 but no greater than 200	Exhibit M-1 The Invitation for Applications.
19. The project must conform with all requirements and/or restrictions of the Application Packet and the applicable regulations.	Entire Application Packet 24 CFR 850.

Attachment 2—Project Selection Factors

Criteria	Points
A. *Shortage of housing.* Based on a review of part G of the application; HUD will award points on a sliding scale, with higher points awarded for lower vacancy rate. Projects in areas with an overall rental vacancy rate of less than 4.5 percent will be entitled to half the points or more. Projects with lower income or overall vacancy rate of over seven percent will not be entitled to any points in the respective category	28
1. *Lower Income Vacancy Rates.* The average rental vacancy rate for census tracts in the unit of general local government (or market area, if applicable) with median family incomes below 80 percent of the area median. Maximum points in this subcategory will be awarded to projects with a 2.5 percent vacancy rate or less. (10 points)	
2. *Overall Vacancy Rate.* Overall rental vacancy rate within the unit of general local government (or market area, if applicable). Maximum points in this subcategory will be awarded to projects with a 2.5 percent vacancy rate or less. (18 points)	
B. *Leveraging Ratios.* Points will be awarded on a sliding scale—highest ratios receive the highest points based on HUD's review of Exhibit M-9. For maximum points, the average of the two ratios described below must equal or exceed 6:1. Leveraging ratios of 2.5:1 will receive half the points and no points will be assigned for an average leveraging ratio of less than 1.3:1	20
1. Project leveraging ratio (10 points). Non-Federal public *plus* private contributions divided by the grant amount.	
2. Private leveraging ratio (10 points). Private contributions divided by the grant amount.	
C. *Neighborhood Development/Mitigation of Displacement*	2
1. Neighborhood Development (1 point)—For all projects HUD will consider the effect of the proposed project on neighborhood development.	
2. Mitigation of Displacement (1 point)—Based on Part I, HUD will grant the maximum points to projects which cause no displacement or provide effective mitigation of displacement. Applicants will be rated according to the level of assurance provided that potential displacement will be mitigated.	
D. *Applicant Performance and Capacity*	2

Criteria	Points
1. Performance (1 point)—Based on Part B-2 and HUD's own experience, HUD will rate the applicant's past performance in meeting Housing Assistance Plan goals, where they exist, and in administering Federally assisted housing programs.	
2. Capacity (1 point)—HUD will review Part B-2 to assess the applicant's ability to administer the program (i.e., to start and monitor the project through to completion and to meet the grantee's responsibilities under Subparts D, E and F of the regulations).	
E. *Maximum Units for the Least Cost to the Federal Government.* Based on HUD's processing of data in Exhibit M-1	10
1. HDG Loan (2 points)—Points will accrue if the applicant proposes to loan rather than grant the HDG funds to the owner. To receive points in this category, at least fifty percent of the HDG must be repaid and payments on the HDG loan principal must begin no later than the twenty-first year of project operations. For any portion of the HDG which is invested in a PIA, "fifty percent of the HDG" means fifty percent of the sum of all funds disbursed to the project from the PIA during the Project Term.	
2. Adjusted Per Unit Grant Amount (8 points)—HUD will adjust the per unit grant amount for construction cost differences among geographic areas and among units of various bedroom sizes. Based on a sliding scale, lowest adjusted per unit grant amount will receive the most points. (Refer to discussion in Part M-14 of this Packet.)	
F. *Mechanism to Assure Affordable Rents*	3
1. Maintenance of Affordable Rents (1 point)—HUD will review Part B-2 as to how well the applicant's proposed method to supervise rent increases for designated units and resale structures for cooperative or mutual housing shares will enforce program requirements concerning lower income occupancy and rents. Failure to sign the Rent Mechanism Exhibit B-1 will render the application ineligible for points under Selection Factor F.2.	
2. Additional Assistance to Lower or Very Low-Income Tenants (2 points)—HUD will award additional points for applicants who propose (at their option) in Part B-3: (a) a financial source to assist tenants below 50 percent of the area median income with additional local or state subsidy for at least 20 years; and/or (b) a commitment to extend designated lower income rents and occupancy for at least five years beyond the 20 year required period. In order to earn any points under this factor, the applicant must qualify for the one point in Selection Factor F.1.	
G. *Financial Feasibility.* "Based on a review of Part M of the Application, HUD will score the project as to overall feasibility based on the following:	10
1. Firmness of Financial Commitments (4 points)—While all projects must present adequate documentation of firm financial commitments to meet program threshold requirement 15, the strength of these commitments, e.g., the level of documentation and absence of qualifying conditions above and beyond the minimum threshold, will determine how many points the project receives in this sub-category.	
2. Rents, Costs and Expenses (6 points)—Based on application data, especially Parts M-1, M-3, M-10, and M-12, and HUD's review, projects will be rated as to: (a) plausibility of rents, costs and expenses, e.g., is there any question of unit marketability at the rents proposed? Are costs and expenses underestimated? Are project costs too high resulting in an inflated grant request?; and, (b) Financial feasibility over the project term, e.g., will project income be sufficient to cover debt service and expenses over the life of the project?"	
H. *Equitable Share of Funds for Families especially Large Families with Children.* Points will be assigned in this category based upon the average bedroom count. There are two criteria: (1) if the average overall (total project) bedroom count is equal to at least 2.0, up to 10 points will be assigned with the highest average receiving the full 10 points; (2) if the average lower income bedroom count is at least 2.5, up to 5 points will be assigned, however, to qualify for the full five points the average lower income bedroom count must be 3.0 or more	15
I. *Minority and Women's Business Enterprise.* This is an all or nothing category. Based on HUD's review of Exhibit K-3 and Exhibit M-1, points will be awarded to applications which demonstrate that controlling project ownership will be vested in and exercised by minority persons or women.	5
J. *Locational Housing Opportunities.* Points will be awarded to projects which meet at least one of three criteria listed in Part H-2 of the application	5
Factor a alone or combined with b or c (5 points)	
Factor b and c combined (4 points)	
Factor b only (3 points)	
Factor c only (3 points)	

Priority Projects

Up to 15 priority bonus points will be awarded where:

(a) Based on a review of Section D of Exhibit M-1, HUD finds that more than 25 percent of project units are designated for lower income rents and occupancy, *AND*

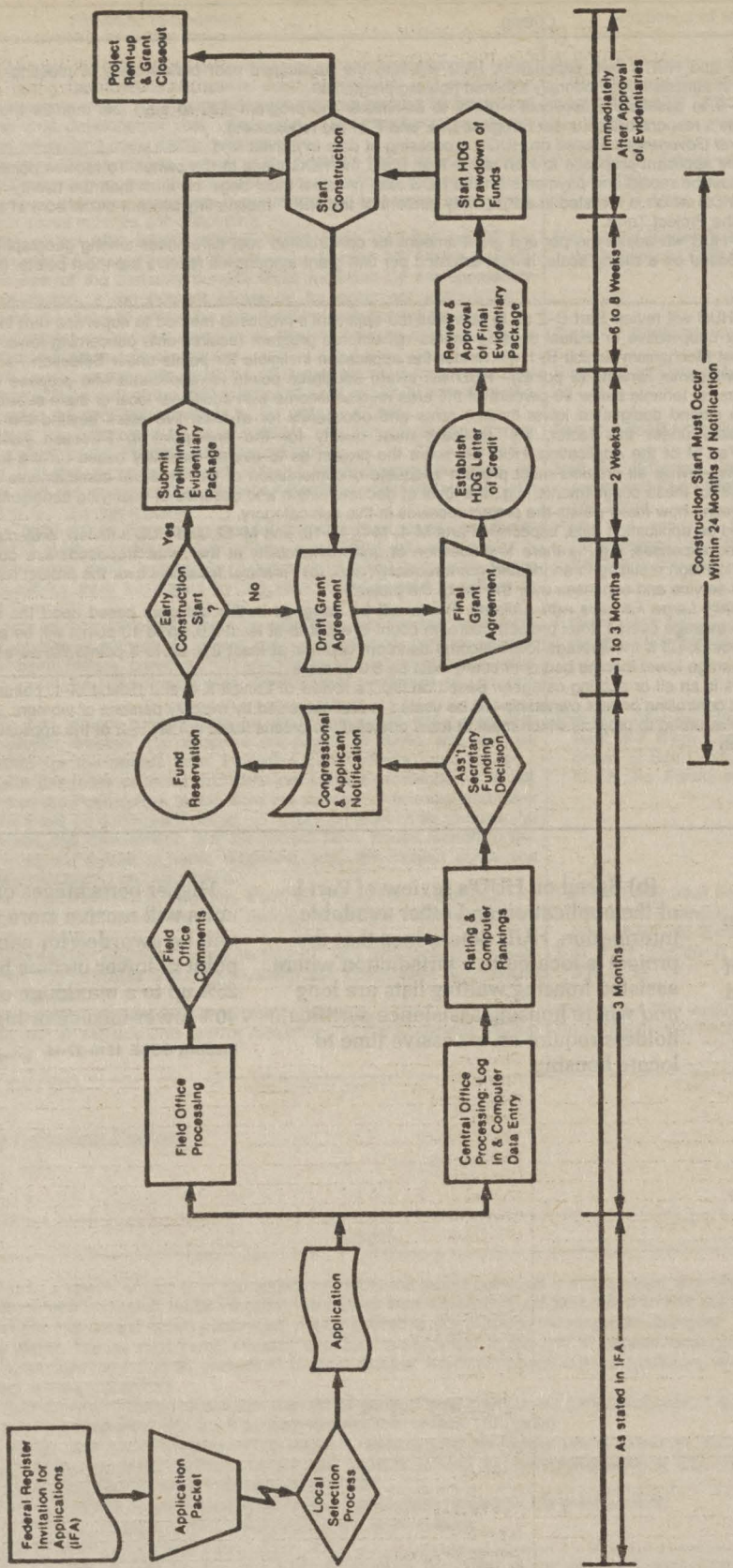
(b) Based on HUD's review of Part L of the application and other available information, HUD determines that the project is located in a jurisdiction where assisted housing waiting lists are long *and* where housing assistance certificate holders require an excessive time to locate housing.

Higher percentages of lower income units will receive more points. One point will be awarded for each full percentage point of lower income households above 25% up to a maximum of 15 points for 40% lower income or higher percentage.

BILLING CODE 4210-27-M

ATTACHMENT 3

Housing Development Grants: Program Flow



BILLING CODE 4210-27-C

Attachment 4—The attached list of supportable high cost factors is being provided for use in preparing housing development grant applications. These factors are to be used for the completion of Exhibits M-4 and M-6 for the HDG application only and are not the high cost factors approved for use by field offices in processing under other HUD programs where they exceed 175.

The following high cost factors (HCF) may be used within the stated base cities. For the appropriate HCF for any other area, the applicant must contact the local HUD field office and have the cost analyst determine whether an applicable locality adjustment would change the factor for the proposed location.

HOUSING DEVELOPMENT GRANT PROGRAM—SCHEDULE OF HIGH COST PERCENTAGES FOR BASE CITIES

Field office	Base city	H.C.P. Non-elev. and elev.	H.C.P. elev. only
Region I:			
Hartford, CT	Hartford	172	232
Boston, MA	Boston	231	
Manchester, NH	Manchester	194	
	Bangor, ME	201	
	Portland, ME	182	
	Burlington, VT	198	
Providence, RI	Providence	209	
Region II:			
Newark, NJ	Camden	175	
	Newark	202	
Buffalo, NY	Albany	176	
	Buffalo	175	
New York, NY	Manhattan	240	
San Juan, PR	San Juan	157	164
Region III:			
Wilmington, DE	Wilmington	176	
Washington, DC	Washington	213	
Baltimore, MD	Maryland	207	
Philadelphia, PA	Philadelphia	227	
Pittsburgh, PA	Pittsburgh	175	
Richmond, VA	Richmond	178	
Charleston, WV	Charleston	176	
Region IV:			
Birmingham, AL	Birmington	167	
Jacksonville, FL	Jacksonville	141	142
	Miami	152	195
	Tampa	147	
Atlanta, GA	Atlanta	155	161
Louisville, KY	Louisville	131	159
Jackson, MS	Jackson	171	
Greensboro, NC	Greensboro	167	
Columbia, SC	Columbia	167	
Knoxville, TN	Knoxville	136	
Memphis	154		
Nashville, TN	Nashville	145	
Region V:			
Chicago, IL	Chicago	208	—
	Springfield	211	217
Indianapolis, IN	Indianapolis	164	240
Detroit, MI	Detroit	181	
Grand Rapids, MI	Grand Rapids	142	
Minneapolis, MN	Minneapolis	176	
Cincinnati, OH	Cincinnati	168	208
Cleveland, OH	Cleveland	176	
Columbus, OH	Columbus	162	200
Milwaukee, WI	Milwaukee	175	
Region VI:			
Little Rock, AR	Little Rock	140	
New Orleans, LA	New Orleans	175	240
	Shreveport	160	211
Oklahoma City, OK	Oklahoma City	156	
	Tulsa	156	
Fort Worth, TX	Fort Worth	175	
	Dallas	175	
	Albuquerque, NM	175	
Houston, TX	Houston	164	
San Antonio, TX	San Antonio	142	
	Lubbock	171	
Region VII:			
Des Moines, IA	Des Moines	145	
Kansas City, MO	Topeka, KS	157	
	Kansas City, MO	180	
St. Louis, MO	St. Louis	206	
Omaha, NE	Omaha	167	
Region VIII:			
Denver, CO	Denver	170	
	Billings, MN	166	

HOUSING DEVELOPMENT GRANT PROGRAM—SCHEDULE OF HIGH COST PERCENTAGES FOR BASE CITIES—Continued

Field office	Base city	H.C.P. Non-elev. and elev.	H.C.P. elev. only
	Fargo, ND	161	
	Sioux Falls, SD	150	
	Salt Lake City, UT	166	
	Casper, WY	135	
Region IX:			
Phoenix, AZ	Phoenix	142	
Los Angeles, CA	Los Angeles	240	
	San Diego	205	
	Santa Ana	219	
Sacramento, CA	Sacramento	204	
San Francisco, CA	San Jose	229	
	Reno, NV	175	
Honolulu, HI	Honolulu	240	
Region X:			
Anchorage, AK	Anchorage, AK	240	
Portland, OR	Boise, ID	138	
	Portland, OR	151	
Seattle, WA	Seattle	233	
	Spokane	197	240

Attachment 5—Required Forms and Exhibits Housing Development Grant Program Application

	Applicant	HUD field office	HUD headquarters
A. 1. Standard Form 424			
2. Copy of Applicant's Transmittal Letter required by Executive Order 12372			
B. Applicant (and jurisdiction) information:			
1. Eligibility of Applicant			
2. Performance and Capacity			
3. Assistance to lower or very-low income tenants (below 50% of median) if any			
4. HAP Compliance			
C. Applicant and Owner Certifications:			
Applicant Certification—Exhibit C-1			
Owner Certification—Exhibit C-2			
D. Applicant's Project Selection Method and Program Description			
E. Eligibility of the Application			
F. Infeasibility of Moderate Rehabilitation—Special Needs and Neighborhood Preservation only—Exhibit F			
G. Housing Shortage Data			
H. Neighborhood Information:			
1. Neighborhood Identification and Description Including Map			
2. Locational Opportunities Data			
3. Effect of Proposed Project on Neighborhood Development			
I. Relocation/Displacement Information (if required)			
J. Environmental Determination—Exhibit J			
K. E.O. Certification and Minority Business Enterprise/Women Business Enterprise.			
Applicant's Equal Opportunity and Non-Discrimination Certifications—Exhibit K-1			
Owner's Equal Opportunity and Non-Discrimination Certification—Exhibit K-2			
MBE/WBE Ownership Information—Exhibit K-3			
L. Assisted Housing Waiting List/Certificate Holders Search Time			
M. Project Information:			
1. Project Application Exhibit M-1			
2. Narrative Feasibility Assessment			
3. Appraisal:			
a. Independent Appraisal or			
b. HUD Conditional or Firm Mortgage Insurance Commitment and Form HUD-92264			
4. Eligibility as Substantial Rehabilitation-Project Test for Rehab Projects Only Exhibit M-4, or Narrative Statement			
5. Determination of Maximum Lower Income Rents—Exhibit M-5			
6. Maximum Value of Project Exhibit M-6			
7. Firm Commitments, Financial Statements and Evidence of Site Control—Exhibit M-7			
8. Assessment of Compliance With Overall Grant Limit and Equity Determination—Exhibit M-8			
9. Leveraging Ratios—Exhibit M-9			
10. Architectural, Site Plan, elevations, typical unit floor plans, and outline specifications—Exhibit M-10			
11. Cooperative and Mutual			
12. Use of Grant for PIAs—Exhibit M-12			
13. Determination of Acceptability of Commericial Space—Exhibit M-13			
14. Determination of Maximum Units for Least Cost—Exhibit M-14			
15. Rent Control			

[FR Doc. 89-16530 Filed 7-17-89; 8:45 am]
BILLING CODE 4210-27-M

federal register

Tuesday
July 18, 1989

Part III

Department of Education

Talent Search Program; Final Priority

DEPARTMENT OF EDUCATION

Talent Search Program

AGENCY: Department of Education.

ACTION: Final priority.

SUMMARY: The Secretary of Education establishes a priority for a fiscal year 1989 grant competition under the Talent Search Program for two-year awards. Under this priority, approximately $2.9 million will be made available for proposals from 177 current Talent Search Program grantees to attract project participants in the seventh and eighth grades in order to encourage them to complete high school and continue their education at the postsecondary level after graduation.

EFFECTIVE DATE: This priority takes effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Jowava M. Leggett, Office of Postsecondary Education, Department of Education (Room 3060, ROB–3), 400 Maryland Avenue SW., Washington, DC 20202–5249. Telephone: (202) 732–4804.

SUPPLEMENTARY INFORMATION: The Talent Search Program is authorized under Title IV, Part A, Section 417B of the Higher Education Act of 1965, as amended. The purpose of the program is to identify and encourage low-income individuals, two-thirds of whom must be potential first-generation college students, to pursue or re-enter a program of postsecondary education. Grantees may be institutions of higher education, public or private agencies, and, under exceptional circumstances, secondary schools. Program participants must be at least 12 years old and not older than 27 must have completed the sixth grade. The Talent Search projects provide services including academic services, admissions and financial aid counseling, career exploration, and general information on postsecondary education.

On May 5, 1989, the Secretary published a notice of proposed priority for the Talent Search Program in the **Federal Register** (54 FR 19534). No changes have been made to the proposed priority.

Analysis of Comments and Changes

In response to the Secretary's invitation in the notice of proposed priority, ten parties submitted comments on the proposed priority. An analysis of the comments follows.

Comments: Six commenters expressed support for the proposed priority as stated in the **Federal Register.**

Discussion: None.

Change: None.

Comments: The Secretary received three comments concerning the eligibility of applicants for grants under this Talent Search priority. Two commenters suggested that Educational Opportunity Centers that do not have Talent Search projects in their areas be eligible to apply for the $2.9 million available for service to seventh and eighth grades. One commenter suggested that the competition be open to all applicants rather than the 177 current Talent Search grantees.

Discussion: The Secretary has decided to limit the competition for these two-year awards to current grantees under the Talent Search Program because current grantees already have a mechanism in place for serving students who are at risk of dropping out. Existing Talent Search projects have operative methodology to provide services to resolve problems faced by older adolescents who are likely to drop out of high school. These existing mechanisms may be extended to provide appropriate services to seventh and eighth graders. By limiting the universe of applicants, this priority will ensure that seventh and eighth grade students and dropouts are served by projects with operative methodology and staff. If entities that did not have current grants were allowed to receive grants, start-up time would be needed before the new projects could become fully operative.

In addition, students served in the seventh and eighth grades by such grantees would be at increased risk of dropping out because there would be no support services available to those students after eighth grade.

Changes: None.

Comments: One commenter stated that services should be extended to sixth grade students because patterns of growth and development would indicate that students in that age group would appear to require services as well.

Discussion: The current Talent Search Program regulations define eligible project participants as individuals who have completed the sixth grade or who are at least 12 years old and are not older than 27 and meet other eligibility criteria for participants. To retain consistency among Talent Search projects, the Secretary has decided not to extend services under this priority to sixth graders.

Changes: None.

Final Priority

Current grantees under the Talent Search Program may compete for 2-year projects that focus on serving seventh and eighth grade students and dropouts in order to encourage them to complete high school and continue their education at the postsecondary level after graduation, without regard to 34 CFR 643.3(a)(5).

Authority: 20 U.S.C. 1070d, 1070d–1.

Dated: July 7, 1989.

Lauro F. Cavazos,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number: 84.044–Talent Search Program)

[FR Doc. 89–16773 Filed 7–17–89; 8:45 am]

BILLING CODE 4000–01–M

federal register

Tuesday
July 18, 1989

Part IV

Department of Education

34 CFR Part 203

Chapter 1 Program for Neglected or Delinquent Children; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 203

RIN 1810-AA46

Chapter 1 Program for Neglected or Delinquent Children

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The U.S. Secretary of Education (Secretary) issues final regulations implementing the portion of Chapter 1 that provides financial assistance to State agencies responsible for the education of neglected or delinquent children in institutions. Under Part D of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965, as amended, the U.S. Department of Education provides financial assistance to meet the special educational needs of children in institutions for neglected or delinquent children, children attending community day programs for neglected or delinquent children, and children in adult correctional institutions.

EFFECTIVE DATES: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Mr. James R. Ogura, Chief, Program Policy Branch, Compensatory Education Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW. (Room 2043), Washington, DC 20202-6132. Telephone: (202) 732-4701.

SUPPLEMENTARY INFORMATION:

Title I of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. 100-297) amended the Elementary and Secondary Education Act of 1965 (ESEA) to include a number of new and reauthorized programs. One of these programs is Chapter 1 of Title I of the ESEA, which reauthorizes programs previously contained in Chapter 1 of the Education Consolidation and Improvement Act of 1981 (ECIA). Part D of Chapter 1 of the ESEA, as amended, which is implemented by these final regulations, provides financial assistance to State agencies for projects designed to meet the special educational needs of children in institutions for neglected or delinquent childen, children attending community day programs for neglected or delinquent children, and children in adult correctional institutions.

On December 2, 1988, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the **Federal Register** (53 FR 48856-48863). The preamble to the NPRM included a discussion of the changes enacted by the Congress to improve services for children participating in the program. In addition, the preamble presented five issues the Secretary particularly requested comments on: (1) Reservation of funds for transition services; (2) definitions of institutions; (3) maintenance of effort; (4) State regulations; and (5) the applicability of relevant parts of the Education Department General Administrative Regulations (EDGAR).

The only major changes from the NPRM in these final regulations are the following:

1. Supplement, not Supplant—Section 203.43

As provided in section 1242(b) of the Act, § 203.43(b) of the proposed regulations required that, for the purposes of determining compliance with the supplement, not supplant requirement, a program under this part is considered supplementary to the regular education program on the basis of the number of hours students receive instruction from State sources regardless of the subject areas of instruction. Several commenters were concerned that in an institution that provides a full school day of instruction in its regular program, the addition of instructional time for services under this part may not be appropriate. On the other hand, other institutions, particularly adult correctional institutions, may provide less than a full school day of instruction, and the addition of time for services under this part may be appropriate. The Secretary has revised § 203.43 to provide an additional way to demonstrate compliance with the basic supplement, not supplant requirements.

2. State Regulations—Section 203.50

The final regulations make a number of changes to the provisions concerning the committee of practitioners in § 203.50. Section 1451(b) of the Act requires review by a State committee of practitioners "[b]efore publication of any proposed or final State rule or regulation." The proposed regulations attempted to minimize any burden caused by this provision by requiring review by the committee of practitioners only before publication of either a proposed rule, if State law required issuance of proposed rules, or a final rule, if no proposed rule was required. Moreover, the proposed regulations did not require a State to convene the committee except after issuance of an emergency rule if review prior to publication was not possible.

Although no comments were received on these proposed requirements, upon further consideration the Secretary has revised § 203.50(e) to require that a State convene the State committee of practitioners to review before publication any major proposed or final rule or regulation. The State must also ensure that any other rules or regulations be reviewed by the committee but not necessarily in a meeting. In addition, if a State does not issue rules or regulations relating to programs under this part but issues policies that the State educational agency (SEA) and State agencies must follow, the State must comply with the consultation requirements for issuing rules and regulations in § 203.50(e).

3. State Complaint Procedures—Sections 203.52 through 203.54

Section 203.52 of the proposed regulations contained requirements concerning complaint procedures that each SEA would have to adopt. Those regulations were developed, in part, in response to Congress' suggestion in the Conference Report accompanying the Act that the Secretary "issue amended regulations making 34 CFR 76.780-76.783 applicable to Chapter 1." See H.R. Rept. 567, 100th Cong., 2d Sess. 341 (1978). However, subsequent to enactment of the Act but before the proposed Chapter 1 regulations were published, the Secretary published an NPRM proposing changes to EDGAR. See 53 FR 31580 (Aug. 18, 1988). One of those proposed changes was the removal of the general complaint procedures in 34 CFR 76.780 through 76.782 of EDGAR and the transfer of those procedures to the regulations implementing Part B of the Education of the Handicapped Act, which had shown the greatest need for the complaint procedures. As a result, the Secretary proposed separate Chapter 1 complaint procedures. In response to comments on the EDGAR NPRM, the Secretary is reconsidering whether to remove the complaint procedures from EDGAR. Because this issue has not yet been resolved, the Secretary has decided on an interim basis to make the general complaint procedures from EDGAR applicable to programs under this part. For the convenience of SEAs, State agencies, and other interested parties, the procedures are included in §§ 203.52

through 203.54. However, paragraphs (b) and (c) of § 76.780 are not included as the statutory references are no longer appropriate. In addition, the acronym "SEA" replaces the term "State" and term "State agency" replaces the term "subgrantee" to be consistent with the remaining regulations under this part.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 20 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

Section 203.5—What regulations apply?

Comment: Two commenters recommended that the provisions of EDGAR not apply to programs under this part as the requirements placed additional time-consuming demands on State staff members.

Discussion: In order to provide additional guidance and to ensure that Chapter 1 funds are spent only for authorized program purposes, the Secretary has made certain provisions of EDGAR applicable to programs under this part. In determining which provisions to apply, the Secretary carefully balanced the need for basic program accountability with the important principle of minimum Federal interference in State affairs. In particular, the final regulations allow States to use their own procedures to ensure accountability with respect to matters governed by two Office of Management and Budget (OMB) circulars: A–102 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), codified for programs of the Department in 34 CFR Part 80; and A–87 (Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments) as amended on January 28, 1981. Only if a State chooses not to apply its own procedures would the provisions in these parts of EDGAR apply to programs under this part.

If a State wishes to use its own procedures instead of the two OMB circulars implemented in EDGAR, the final regulations require that the State's procedures meet three general criteria, set forth in § 203.5(a)(4) (i)–(iii), that are designed to ensure the minimal standards necessary for proper management of Chapter 1 funds. A State may adopt new procedures, or may use accountability procedures applicable to the use of its own funds, if those procedures meet the general criteria. The State's procedures do not have to be submitted to the Secretary for approval, but must be available for Federal inspection. If a State does not have its own written requirements implemented by July 1, 1989, but wishes to develop them, the requirements in Part 80 and Appendix C to Part 74 apply until such time as the State's written requirements are adopted. In the event a State's requirements are determined to be insufficient, the enforcement provisions in Part E of the General Education Provisions Act (GEPA) apply, including the due process provisions in that part. During the transition period provided for in section 1491(c) of the Act, a State may continue to comply with the requirements under Chapter 1 of the ECIA.

The Secretary wishes to emphasize that State have complete discretion, subject to meeting the general criterai set forth in § 203.5(a)(4)(i)–(iii), to use their own procedures instead of the procedures in the two OMB circulars. Moreover, on further consideration of the criteria in the NPRM, the Secretary has determined that the criterion in § 203.5(a)(4)(ii) of the proposed regulations was unnecessary because the criterion was redundent with the other criteria.

In addition, the final regulations make applicable a limited number of provisions from Part 76 (State-Administered Programs); Part 77 (Definitions That Apply to Department Regulations); Part 78 (Education Appeal Board); and Part 81 (General Education Provisions Act—Enforcement). The Secretary believes these minimal requirements will help to ensure basic accountability without imposing undue burden and paperwork on SEAs and State agencies.

Changes: The criterion that a State's procedures must "result in the efficient and effective administration of programs under this part" has veen deleted from § 203.5(a)(4).

Comment: One commenter suggested that the regulations provide additional guidance on how State agency institutions relate to community day programs. The commenter stated the definition in § 203.6(c) was unclear.

Discussion: Section 1242 of the Act provides that a State agency shall use funds received under this part "to meet the special educational needs of children in institutions for neglected or delinquent children, children attending community day programs for neglected or delinquent children, or children in adult correctional institutions." Because the children eligible to receive services under this part are those for whom the State agency has the rsesponsibility to provide a free public education, the definition in § 203.6(c) defines a community day program "as a regular program of instruction provided by a State agency at a community day school operated for neglected or delinquent children." The Secretary is aware that some State agencies operate community day schools for delinquent children and, therefore, the children are eligible to be counted for allocation purposes and to receive services under this part.

Changes: None.

Section 203.6—What definitions apply?

Comment: Several commenters recommended that the definitions of "institution for delinquent children" and "institution for neglected children" be revised to exclude the requirement that the children in institutions have an average length of stay of at least 30 days. Commenters were primarily concerned that facilities such as detection centers, which hold children for less than 30 days, are not considered eligible institutions. Commenters stated that even though children are in the centers for short periods of time, immediate intake assessment and placement are possible, and this information is important in the children's placement in regular school district programs. Other commenters stated that effective instruction could be provided in less than 30 days.

Discussion: Section 1241 of the Act clearly establishes the program under this part to serve a very specific and needy population of children—neglected or delinquent children in institutions for which a State agency has the responsibility to provide an elementary and secondary educaetion. Section 1242(a) of the Act requires that the services provided with funds under this part must be "supplementary to the basic educaetion of such children which must be provided by the State." Although there are some unique detention, diagnostic, and reception centers that provide basic educational services for children on a short-term basis, the Secretary believes that the limited funds available must be directed to institutions serving childen that have an average stay of at least 30 days. Although children may benefit from additional services provided over short periods of time, the Secretary believes that the most effective and efficient use of the funds requires that children have

an average stay in the institution of at least 30 days.

Changes: None.

Section 203.21—How does the Secretary determine the amount of a State agency grant?

Comment: Although supporting the provision in § 203.21(b)(4) of the proposed regulations, one commenter requested that the issue of services to be provided by programs under this part and services provided by programs for handicapped children under 34 CFR Part 302 should be addressed in a policy manual. Another commenter requested that § 203.21(b)(4) be revised to clarify that collaboration between the two programs is encouraged, and that any prohibitions against the commingling of funds not defeat the intent of this provisions.

Discussion: Section 1292 of the Act states that "[n]eglected or delinquent children under [this subpart] who are eligible for programs for handicapped children [under 34 CFR Part 302], may be counted under each subpart for purposes of grant determination and may be served under each program." The Secretary interprets this provision to mean that neglected or delinquent children under this part, who are also eligible for services under 34 CFR Part 302 (Chapter 1 Programs for Handicapped Children), may receive supplementary services under both programs. The Secretary agrees that there must be collaboration among State agencies responsible for the two programs, if more than one agency has the responsibilities. In all cases, the Secretary recognizes the need for coordinating services provided by the Federal grants with the service provided by the State. The Secretary does not believe that the regulations need to provide additional clarification for this requirement. However, the Secretary will consider providing examples of coordination of services in the policy manual required by section 1436 of the Act.

Changes: None.

Section 203.22—What funds are available for an SEA to carry out its responsibilities?

Comment: One commenter asked whether the 15 percent limitation on indirect costs in § 203.22(b) of the proposed regulations applied to State applicant agencies.

Discussion: Section 1404 of the Act authorizes a grant to each SEA to carry out its responsibilities for programs under the Act. This 15 percent limitation on indirect costs applies only to the SEA's administrative grant. The limitation does not apply to other grants received under this part.

Changes: None.

Section 203.31—What are the State agency needs assessment requirements?

Comment: One commenter believed that the proposed regulations interpret the Act in a manner that is contrary to the needs of the children in correctional facilities. Specifically, the commenter noted that although the Act provides that all children in institutions who meet the age requirements are eligible to be counted for allocation purposes and are eligible for services, only designated children may benefit from the services. The commenter recommended that the regulations be revised to ensure that more of the children benefit from the services.

Discussion: Section 1242(a) of the Act requires that programs under this part be carried out in a manner consistent with section 1014 of the Act. Section 1014(b) includes the local educational agency (LEA) requirements for conducting an annual needs assessment. The Secretary has determined that not all of the requirements that apply to LEAs in section 1014(b) of the Act are applicable to State agencies implementing programs under this part. For example, section 1014(b) requires that LEAs identify educationally deprived children in all eligible attendance areas. A State agency carries out its program in institutions rather than attendance areas. In addition, children are eligible for services if they are in an eligible institution and meet the definition of "children" in § 203.6(c) of the regulations. Therefore, § 203.31 of the regulations does not require the identification of educationally deprived children. Rather, the State agency must annually assess the needs of all children in eligible institutions. On the basis of the needs assessment, the State agency must select for participation those children with the greatest need. If there are sufficient resources to serve all of the children, the State agency could include all of them in programs under this part. The Secretary believes that § 203.31 provides this flexibility to the State agency.

Changes: None.

Section 203.32—Under what conditions does an SEA approve a State agency's application?

Comment: Two commenters were concerned that § 203.32(a) of the proposed regulations appeared to require that a State agency maintain fiscal effort in order to have its application approved rather than requiring a reduction in the agency's allocation as provided in section 1018(a) of the Act. The commenters recommended that the requirement in § 203.32(a) be deleted or revised to reflect section 1018(a).

Discussion: The Secretary agrees that section 1018(a) of the Act provides that if a State agency fails to maintain effort, the SEA shall reduce the amount of the agency's allocation of funds under this part rather than disapprove the application.

Changes: Section 203.32(a) has been revised to clarify that a State agency's allocation must be reduced if it fails to maintain effort.

Section 203.40—What costs are allowable?

Comment: A number of commenters supported the interpretation in § 203.40(b) that allows the State agency to reserve 10 percent or less of the funds it receives under this part for projects designed to facilitate the transition of children from State institutions into locally opoerated elementary and secondary education programs. However, two commenters believed that projects should not be restricted to the transition of children into locally operated elementary and secondary education programs. According to the commenters, the overall goal for children in institutions should be to successfully return the children to the community, which could include using a wider range of resources and placements such as private institutions with LEAs paying tuition; vocational education, both public and private; and adult basic education and General Education Development (GED) preparation offered by community college systems. One commenter also cited the recent emphasis placed on "transition-to-work" programs as a viable alternative for many older children transitioning from institutions to local communities.

Discussion: Section 1243(a) of the Act states that transition services should "support projects that facilitate the transition of children from State operated institutions for neglected and delinquent children into locally operated programs." Section 1243(c) of the Act limits the transition services to children in schools other than State operated institutions. On further review, the Secretary believes that statutory language in section 1243(a) provides the flexibility State agencies need to develop projects to facilitate the transition of children from State institutions to local communities. For many children, the transition will be to

regular local elementary and secondary education programs. However, other children (section 1242(d) (Evaluation) recognizes special programs) may be helped by placement in special programs, including vocational and adult basic education programs and job training programs.

Changes: The phrase "elementary and secondary education" has been deleted from § 203.40(b)(1).

Comment: One commenter recommended that, because section 1471 of the Act included definitions of "pupil services" and "pupil services personnel," paragraphs (a)(2) and (b)(2)(ii) of § 203.40 of the proposed regulations be revised to include pupil services. The commenter believed that SEA and State agency personnel need to be aware that pupil services are allowable costs under this part. In addition, the commenter further stated that, in assessing the needs of children in transition projects, a State agency must consider the pupil services needs, including counseling, psychological, and school social work services.

Discussion: The Secretary agrees that pupil services are allowable costs under this part and that pupil services, as defined in section 1471 of the Act, represent important resources for a State agency to consider as it designs its program.

Changes: Paragraphs (a)(1) and (b)(2)(ii) of § 203.40 have been revised to include pupil services.

Section 203.41—What is the maintenance of effort requirement?

Comment: A number of commenters supported the Secretary's attempt to clarify the expenditures to include in determining whether a State agency has maintained effort. However, in response to the Secretary's specific request for comments on this issue, several commenters requested that the expenditures be broadened to include the salaries of school administrators and support staff, including guidance counselors, school psychologists, speech clinicians, and school clerical staff. In addition, some commenters requested that expenditures for fringe benefits also be included.

Discussion: Section 1242(a) of the Act requires that programs and projects under this part be carried out in a manner consistent with the maintenance of effort requirements in section 1018(a) of the Act. In § 203.40(a)(3) of the proposed regulations, the Secretary attempted to limit the expenditures to be considered in determining whether a State agency has properly maintained effort to those expenditures directly related to providing a free public education for children in institutions. The Secretary agrees with the commenters' requests that expenditures for instructional staff salaries include expenditures for educational administrators and school support staff, including pupil services personnel and school clerical staff. In addition, the Secretary interprets salary expenditures to include costs for wages and related fringe benefits.

Changes: Section 203.41(a)(3) has been changed to include expenditures for salaries of educational administrators and other school support staff.

Section 203.43—What is the supplement, not supplant requirement that applies to the program?

Comment: Several commenters were concerned that § 203.43(d) of the proposed regulations would require that in order to meet the supplement, not supplant requirement under section 1018(b) of the Act, a program under this part must provide more hours of instructional time for participating children than is provided by the regular instructional program. The commenters stated that in many institutions, particularly those for juveniles, the regular program includes a full school day, and that it would not be feasible to add more time to the school day. Another commenter supported the provision because it provided additional flexibility for State agencies to meet the uniqueness of institutions.

Discussion: Section 1242(a) of the Act requires that programs under this part be carried out in a manner consistent with section 1018(b) of the Act. Section 1018(b) requires that funds received under this part be used "to supplement, and to the extent practicable, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this chapter." Although this basic Chapter 1 fiscal requirement is applicable to programs under this part, section 1242(b) of the Act and § 203.43(a)(2)(ii) contain a special interpretation of how this provision applies to State agencies under this part, which permits the determination of the supplement, not supplant requirement to be based on the total number of hours of instruction without regard to the subject area of instruction. Both the House and Senate reports accompanying the Act make reference to this special interpretation. H.R. Rept. 95, 100th Cong., 1st Sess. 48 (1987); S. Rept. 222, 100th Cong., 1st Sess. 24 (1987). The Secretary believes that the intent of this provision is to continue the basic supplement, not supplant requirement for programs under this part, and to also preclude the application of a narrow interpretation that requires that services under this part only be provided in instructional or support areas that are included in a regular State agency program. For example, under this narrow interpretation, a State agency could not provide reading instruction with funds under this part unless the State agency provided reading instruction in the regular program. On the basis of the comments received and upon further review, the Secretary recognizes the problem a State agency could have if the only way to comply with the supplement, not supplant requirement is to add to the length of the school day, particularly State agencies that provide a full day of instruction. Therefore, the only way to give meaning to the special interpretation to section 1242(b) of the Act is to consider it as an additional interpretation of the requirement.

Changes: Section 203.43(a) has been revised to clarify that § 203.43(a)(2)(ii) is an additional means for determining compliance with the supplement, not supplant requirement in § 203.43(a)(1).

Section 203.46—What are the requirements for evaluating and reporting project results?

Comment: Two commenters asked the meaning of the term "school credit" as used in § 203.46(a)(1)(ii). A commenter indicated that the term could refer to academic, curricular, attendance, or individual class credit, and recommended that the school credit be maintained for the purpose of completing high school requirements

Discussion: The Secretary interprets section 1242(d) of the Act to require that a State agency include in its annual evaluation a determination of the impact the program has on participants earning credits in courses required by the State to successfully complete elementary and secondary education programs. Section 203.46(a)(1)(ii) provides the necessary flexibility for State agencies to determine the impact of programs under this part at both the elementary and secondary school levels.

Changes: None.

Comment: Several commenters recommended that the evaluation criterion in § 203.46(a)(1)(iii) of the regulations be broadened to include the transition of participants into programs other than those operated by LEAs. The commenters suggested that participation in programs such as those operated by private institutions under a tuition arrangement with an LEA, privately

sponsored adult education programs for children above age 16, vocational educational programs not operated by an LEA, and adult basic education and GED preparation courses offered by community colleges also be considered.

Discussion: Although section 1242(d) of the Act refers specifically to programs "operated by a local education agency," the Secretary agrees that in evaluating the impact of programs under this part, a State agency should determine, to the extent feasible, the success former participants experienced in transitioning into special or regular educational programs operated by LEAs or other public or private educational agencies. The important criterion is that the children transition from the institution to local, rather than State, education programs.

Changes: Section 203.46(a)(1)(iii) has been revised to include transition to other public or private educational agency programs.

Section 203.50—Does a State have authority to issue State regulations for the program?

Comment: None.

Discussion: Section 1451(b) of the Act requires that a State committee of practitioners review before publication any proposed or final State rule or regulation relating to the administration and operation of programs under this part. In addition, the Act requires that the State convene the committee to review an emergency regulation prior to issuance in final form. On further consideration, the Secretary recognizes the inconsistency in requiring a State to convene to committee to review emergency rules and regulations while not requiring that the committee be convened to review other regulations. However, the Secretary is concerned with the undue burden that will be placed on States if the committee must be convened to review all rules and regulations. Therefore, the Secretary believes that the most appropriate way to carry out the intent of the Act and reduce undue burden is to require that the State convene the committee to review all major rules and regulations. All other rules and regulations must be reviewed by the committee before publication but not necessarily in a meeting. In addition, in a State that does not issue rules or regulations relating to the administration and operation of programs under this part but issues policies that the SEA and State agencies are required to follow, the State must comply with the consultation requirements for issuing rules and regulations.

Changes: Section 203.50(e) has been revised to require a State to convene the committee of practitioners to review any major proposed or final rule or regulation that the SEA and State agencies are required to follow in administering and implementing programs under this part. In addition, a change has been made to require that, for a State that does not issue rules or regulations but only issues policies that the SEA and State agencies must follow, the State must comply with the consultation requirements for issuing rules and regulations.

Comment: A commenter stated that § 203.50(e)(3)(ii) of the regulations, which requires that a majority of the committee of practitioners represent State agencies, goes beyond the statute and should not be included.

Discussion: As discussed in the preamble to the NPRM, section 1242 of the Act requires that programs under this part be administered in a manner consistent with section 1451(b). Section 1451(b) requires that a majority of the members of the committee of practitioners be representatives of LEAs. Because funds under this part go to State agencies rather than LEAs, the Secretary believes it is consistent with the purposes of the statute to require that the majority of the committee represent State agencies rather than LEAs.

Changes: None.

Comment: One commenter stated that children in adult correctional institutions are usually 18 years of age and older and, therefore, are considered responsible for their own actions. The commenter noted that it may be inappropriate to require that parents be included on the committee of practitioners. The same commenter also indicated that parents may be appropriate for juvenile programs, but parents of juveniles may be located many miles from the institutions or State agency.

Discussion: Section 1451(b) of the Act requires that parents be included as members of the committee of practitioners. The Secretary believes that parents can and should play a central role in the education of their children. Even though children are placed in institutions, parents can still make significant contributions to the educational progress of the children. Although children above the age of 18 years may be responsible for their own actions, parents still have a role in the educational process. The Secretary also believes that since the committee of practitioners is a State group, proximity of parents to an institution or State agency is not a deciding factor for determining whether parents should be members. However, States may select parents who reside nearer to the location of the meetings.

Changes: None.

Section 203.52—What complaint procedures must an SEA adopt?

Comment: One commenter was concerned about § 203.52(c)(2) of the proposed regulations, which provided the opportunity for a complainant who is dissatisfied with the decision of the State agency to file an appeal with the SEA. The commenter stated that the provision would require additional time and effort by the SEA, particularly in adult correctional institutions, where there are numerous "jail house lawyers" who enjoy challenging the "system." The commenter suggested that rather than specify a complaint process, the regulations process should require that the SEA establish a complaint procedure through recommendations from the committee of practitioners.

Discussion: Section 203.52 of the proposed regulations, including § 203.52(c)(2), has been deleted, and §§ 203.52 through 203.54 of the final regulations incorporate and make applicable to programs under this part the general complaint procedures in §§ 76.780 through 76.782 of EDGAR. Section 203.52 of the proposed regulations contained requirements concerning complaint procedures that each SEA would have to adopt. Those regulations were developed, in part, in response to Congress' suggestion in the Conference Report accompanying the Act that the Secretary "issue amended regulations making 34 CFR 76.780–76.783 applicable to Chapter 1." See H.R. Rept. 567, 100th Cong., 2d Sess. 341 (1978). However, subsequent to enactment of the Act but before the proposed Chapter 1 regulations were published, the Secretary published an NPRM proposing changes to EDGAR. See 53 FR 31580 (Aug. 18, 1988). One of those proposed changes was the removal of the general complaint procedures in 34 CFR 76.780 through 76.782 of EDGAR and the transfer of those procedures to the regulations implementing Part B of the Education of the Handicapped Act, which had shown the greatest need for the complaint procedures. As a result, the Secretary proposed separate Chapter 1 complaint procedures. In response to comments on the EDGAR NPRM, the Secretary is reconsidering whether to remove the complaint procedures from EDGAR. Because this issue has not yet been resolved, the Secretary has on an interim basis

decided to make the general complaint procedures from EDGAR applicable to programs under this part. For the convenience of SEAs, State agencies, and other interested parties, the procedures are included in § § 203.52 through 203.54. However, paragraphs (b) and (c) of § 76.780 are not included as the statutory references are no longer appropriate. In addition, the acronym "SEA" replaces the term "State" and the term "State agency" replaces the term "subgrantee" to be consistent with the remaining regulations under this part. In addition, § 203.52 of the regulations requires that an SEA's written procedures for resolving complaints include any complaint that the SEA or a State agency is in violation of the Federal statute or regulation that applies to a program. Section 203.53 of the regulations also requires that an SEA's complaint procedures include the right to request the Secretary to review the final decision of the SEA. Comments received on the proposed Chapter 1 complaint procedures will be given additional consideration in whatever final action the Secretary takes regarding the EDGAR complaint procedures.

Changes: The separate Chapter 1 complaint procedures in § 203.52 of the proposed regulations have been deleted, and § § 203.52 through 203.54 incorporate and make applicable to programs under this part the general complaint procedures in § 76.780 through 76.782 of EDGAR.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Executive Order 12606—The Family

The Secretary certifies that these regulations have been reviewed in accordance with Executive Order 12606 and that they do not have a significant negative impact on family formation, maintenance, and general well-being. To the contrary, the program provides educational and support services for children removed from families because of delinquency or neglect and supports activities that facilitate children's return to family and local school programs.

List of Subjects in 34 CFR Part 203

Education, Education of disadvantaged, Elementary and secondary education, Grant programs—education, Juvenile delinquency, Neglected, Reporting and recordkeeping requirements.

Dated: June 29, 1989.

(Catalog of Federal Domestic Assistance Number 84.013—Chapter 1 Program for Neglected or Delinquent Children)

Lauro F. Cavazos,

Secretary of Education.

The Secretary revises Part 203 of Title 34 of the Code of Federal Regulations to read as follows:

PART 203—CHAPTER 1 PROGRAM FOR NEGLECTED OR DELINQUENT CHILDREN

Subpart A—General

Sec.
203.1 What is the Chapter 1 Program for Neglected or Delinquent Children?
203.2 Who is eligible for a grant?
203.3 Who is eligible for a subgrant?
203.4 What kind of activities may be assisted?
203.5 What regulations apply?
203.6 What definitions apply?
203.7–203.9 [Reserved]

Subpart B—How Does A State Apply For a Grant?

203.10 What assurances must a State submit to receive a grant?
203.11–203.19 [Reserved]

Subpart C—How Does the Secretary Determine the Amount of a Grant?

203.20 How does the Secretary determine the amount of a grant to an SEA?
203.21 How does the Secretary determine the amount of a State agency grant?
203.22 What funds are available for an SEA to carry out its responsibilities?
203.23–203.29 [Reserved]

Subpart D—How Does a State Agency Apply for and Receive a Subgrant?

203.30 How does a State agency apply for a subgrant?
203.31 What are the State agency needs assessment requirements?
203.32 Under what conditions does an SEA approve a State agency's application?
203.33–203.39 [Reserved]

Subpart E—What Post-Award Conditions Must Be Met by a State Agency?

203.40 What costs are allowable?
203.41 What is the maintenance of effort requirement?
203.42 Under what circumstances may a SEA waive the maintenance of effort requirement?
203.43 What is the supplement, not supplant requirement that applies to the program?
203.44 What is included in the records of transferred students?
203.45 How may personnel be assigned supervisory duties?
203.46 What are the requirements for evaluating and reporting project results?
203.47–203.49 [Reserved

Subpart F—What Are Other State Responsibilities for the Program?

203.50 Does a State have authority to issue State regulations for the program?
Sec.
203.51 How can State personnel paid with Chapter 1 funds be assigned to State programs?

Complaint Procedures of the SEA

203.52 What complaint procedures shall an SEA adopt?
203.53 What are the minimum complaint procedures?
203.54 How does an organization or individual file a complaint?
203.55–203.59 [Reserved]

Authority: 20 U.S.C. 1232(b) (2), (5), 2721(a), 2724(b), 2728 (a), (b), (d), 2729(b), 2801–2804, 2811–2812, 2824 (a), (b), 2831(a), 2835 (a), (d), 2838 (a), (b), (c), 2851, 2853, 2891, unless otherwise noted.

Subpart A—General

§ 203.1 What is the Chapter 1 Program for Neglected or Delinquent Children?

Under the Chapter 1 Program for Neglected or Delinquent Children, the Secretary provides Federal financial assistance for projects designed to meet the special educational needs of neglected or delinquent children—

(a) In institutions for neglected children;

(b) In institutions for delinquent children;

(c) Attending community day programs for neglected or delinquent children; and

(d) In adult correctional institutions.

Authority: 20 U.S.C. 2802(a))

§ 203.2 Who is eligible for a grant?

The Secretary provides funds under this part to State educational agencies (SEAs) for State agencies directly responsible for providing free public education for children referred to in § 203.1.

Authority: 20 U.S.C. 2801(a))

§ 203.3 Who is eligible for a subgrant?

(a) A State agency that is responsible for providing free public education for children in institutions for neglected or delinquent children, children attending community day programs for neglected or delinquent children, or children in adult correctional institutions is eligible to receive a subgrant under this part.

(b) The SEA shall annually notify each eligible State agency of the amount of funds the State agency is eligible to receive under the Chapter 1 Neglected or Delinquent Program.

Authority: 20 U.S.C. 2801 (a), (b))

§ 203.4 What kind of activities may be assisted?

Under the Chapter 1 Neglected or Delinquent Program, the Secretary makes payments to SEAs to assist State agencies in conducting—

(a) Programs and projects that are designed to meet the special educational needs of children in institutions for neglected or delinquent children, children attending community day programs for neglected or delinquent children, and children in adult correctional institutions; and

(b) Projects that facilitate the transition of children from State institutions for neglected or delinquent children into programs operated by local educational agencies (LEAs).

(Authority: 20 U.S.C. 2802(a), 2803(a))

§ 203.5 What regulations apply?

The following regulations apply to the Chapter 1 Neglected or Delinquent Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR Part 76 (State-Administered Programs) as follows:

(i) Subpart A (General), except for § 76.3 (ED general grant regulations apply to these programs).

(ii) Sections 76.125 through 76.137 (Consolidated Grant Applications for Insular Areas).

(iii) Section 76.401 (Disapproval of an application—opportunity for a hearing).

(iv) Subpart F (What Conditions Must Be Met by the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.580–76.581 (Coordination).

(B) Sections 76.650 through 76.662 (Participation of Students Enrolled in Private Schools).

(C) Section 76.684 (Day care services).

(D) Section 76.690 (Energy conservation awareness).

(v) Subpart G (What Are the Administrative Responsibilities of the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.770 through 76.772 (State Administrative Responsibilities).

(B) Section 76.780 (A State shall adopt complaint procedures).

(C) Section 76.781 (Minimum complaint procedures).

(D) Section 76.782 (An organization or individual may file a complaint).

(vi) Subpart H (What Procedures Does the Secretary Use to Get Compliance?).

(2) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR Part 78 (Education Appeal Board).

(4) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), unless a State formally adopts its own written fiscal and administrative requirements for expending and accounting for all funds received by SEAs and State agencies under this part. These requirements must be available for Federal inspection and must—

(i) Be sufficiently specific to ensure that funds received under this part are used in compliance with all applicable statutory and regulatory provisions;

(ii) Ensure that funds received under this part are only spent for reasonable and necessary costs of operating programs under this part; and

(iii) Ensure that funds received under this part are not used for general expenses required to carry out other responsibilities of State or local governments.

(5) 34 CFR Part 81 (General Education Provisions Act—Enforcement).

(b) The regulations in this Part 203.

(Authority: 20 U.S.C. 2831(a))

§ 203.6 What definitions apply?

(a) *Definitions in the Act.* The following terms used in this part are defined in section 1471 of the Act:

Average daily attendance
Average per pupil expenditure
Construction
Current expenditures
Equipment
Free public education
Local educational agency
Parent
Pupil services
Pupil services personnel
Secretary
State
State educational agency

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

GEPA
Grant
Nonprofit
Private
Project
Supplies

(c) *Other definitions.* The following definitions also apply to this part:

"Act" means Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965, as amended.

"Adult correctional institution" means a facility in which persons are confined as a result of a conviction of a criminal offense, including persons under 21 years of age.

"Children" means—

(1) Persons up to age 21 who are entitled to a free public education not above grade 12; and

(2) Preschool children.

"Community day program" means, as determined by the SEA, a regular program of instruction provided by a State agency at a community day school operated specifically for neglected or delinquent children.

"ECIA" means the Education Consolidation and Improvement Act of 1981.

"Fiscal year" means the Federal fiscal year—a period beginning on October 1 and ending the following September 30—or another 12-month period normally used by the SEA for recordkeeping.

"Institution" means either an institution for neglected children or an institution for delinquent children, or an adult correctional institution.

"Institution for delinquent children" means, as determined by the SEA, a public or private residential facility that is operated for the care of children who—

(1) Have been determined to be delinquent or in need of supervision; and

(2) Have had an average length of stay in the institution of at least 30 days.

"Institution for neglected children" means, as determined by the SEA, a public or private residential facility, other than a foster home, that is operated for the care of children who—

(1) Have been committed to the institution or voluntarily placed in the institution under applicable State law because of abandonment, neglect, or death of the parents or guardians; and

(2) Have had an average length of stay in the institution of at least 30 days.

"Regular program of instruction" means an educational program (not beyond grade 12) in an institution or a community day program for neglected or delinquent children that consists of classroom instruction in basic school subjects such as reading, mathematics, and vocationally oriented subjects, and that is supported by non-Federal funds. Neither the manufacture of goods within the institution nor activities related to institutional maintenance are considered classroom instruction.

"State agency" means an agency of State government directly responsible for the free public education of children in institutions for neglected or delinquent children or in adult correctional institutions, or in community day programs for neglected or delinquent children. Although the term generally refers to an agency other than an SEA, the term includes an SEA that receives a specific State appropriation for the education of neglected or delinquent children but transfers the funds to another agency that has responsibility for providing the educational services. The educational services may be provided in schools operated by the SEA or the State agency

or in schools under contract or other arrangement with the SEA or the State agency.

(Authority: 20 U.S.C. 2831(a), 2891)

§§ 203.7–203.9 [Reserved]

Subpart B—How Does a State Apply for a Grant?

§ 203.10 What assurances must a State submit to receive a grant?

(a) A State that wishes to receive funds under this part for State agency projects designed to meet the special educational needs of neglected or delinquent children shall submit to the Secretary, through its SEA, assurances that the SEA will—

(1) Meet the requirements in section 435(b) (2) and (5) of the General Education Provisions Act (GEPA) relating to fiscal control and fund accounting procedures;

(2) Carry out the evaluation requirements in § 203.46; and

(3) Ensure that its State agencies comply with all applicable statutory and regulatory requirements.

(b) The assurances submitted under paragraph (a) of this section remain in effect for the duration of the SEA's participation in programs under this part.

(Authority: 20 U.S.C. 1232d(b) (2), (5), 2729 (b), (c), (d), 2838(c))

§§ 203.11–203.19 [Reserved]

Subpart C—How Does the Secretary Determine the Amount of a Grant?

§ 203.20 How does the Secretary determine the amount of a grant to an SEA?

(a) The Secretary annually determines the amount of funds under this part that State agencies in a State are eligible to receive in accordance with sections 1241(b) and 1291 of the Act.

(b) The Secretary annually notifies the SEA of the amount each State agency is eligible to receive under this part.

(Authority: 20 U.S.C. 2801(b), 2811)

§ 203.21 How does the Secretary determine the amount of a State agency grant?

(a) *Amounts of grants.* The Secretary determines the amount of a State agency grant according to section 1241 of the Act and the following data:

(1) Average daily attendance data, determined according to the provisions of paragraph (b) of this section, in the schools operated or supported by the State agencies in the State, including community day schools for neglected or delinquent children.

(2) The applicable average per pupil expenditure data.

(3) The amount appropriated for programs for neglected and delinquent children for the relevant fiscal year.

(b) *Determination of average daily attendance.* (1) Average daily attendance is computed for each institution or community day program serving neglected or delinquent children by—

(i) Calculating from daily attendance records the total number of days of attendance of children in the regular educational program, as defined in § 203.6(c), during the most recently completed school year; and

(ii) Dividing that total by 180.

(2) For the purpose of computing average daily attendance—

(i) A child is counted as being in a full day of attendance for each day the child attends the regular educational program for three or more hours; and

(ii) A child is counted as being in one-half day of attendance for each day the child attends the regular educational program for at least one hour, but less then three hours.

(3) To be counted in average daily attendance, a child must be—

(i) One for whom a State agency is providing a free public education; and

(ii) Enrolled for at least 10 hours a week in a regular educational program for which daily attendance records are kept.

(4) Neglected or delinquent children under this part, who are eligible for programs for handicapped children under 34 CFR Part 302, may be counted for grant determinations under both programs and may be served under both programs.

(Authority: 20 U.S.C. 2801(b))

(Approved by the Office of Management and Budget under control number 1810–0060.)

§ 203.22 What funds are available for an SEA to carry out its responsibilities?

(a) Except for programs under Part C of Chapter 1, an SEA shall use funds received under section 1404(a) of the Act for the proper and efficient performance of its duties under Chapter 1.

(b) The SEA may use not more than 15 percent of the funds referred to in paragraph (a) of this section for indirect costs.

(Authority: 20 U.S.C. 2824 (a), (b))

§§ 203.23–203.29 [Reserved]

Subpart D—How Does a State Agency Apply For and Receive a Subgrant?

§ 203.30 How does a State agency apply for a subgrant?

(a) A State agency shall submit an application to the SEA for a period of not more than three fiscal years.

(b) The application submitted by the State agency must include the following:

(1) A description of the procedures to be used to conduct an annual assessment of educational needs that meets the requirements of § 203.31.

(2) A description of the project to be conducted, including a budget for the initial project year.

(3) Data showing that the State agency has maintained fiscal effort as required by § 203.41.

(4) Other information the SEA may request.

(c) A State agency shall annually update an application that has been approved for more than one year by submitting the following information to the SEA:

(1) Data showing that the State agency has maintained fiscal effort as required by § 203.41.

(2) A budget for the expenditure of funds received under this part.

(d) If there are substantial changes in the numbers or the needs of children to be served or the services to be provided, the State agency shall submit a description of the changes to the SEA.

(Authority: 20 U.S.C. 2721(a), 2724(b), 2728 (a), (b), (d), 2802 (a), (c))

(Approved by the Office of Management and Budget under control number 1810–0060.)

§ 203.31 What are the State agency needs assessment requirements?

A State agency may receive funds under this part only if it conducts an annual assessment of all children in eligible institutions to—

(a) Identify the special educational needs of children in the institutions and children attending community day programs for neglected or delinquent children;

(b) Identify the general instructional areas on which the program will focus;

(c) Select for participation those children with the greatest need for special assistance; and

(d) Determine the special needs of participating children with sufficient specificity to ensure concentration on those needs.

(Authority: 20 U.S.C. 2724(b))

§ 203.32 Under what conditions does an SEA approve a State agency's application?

(a) An SEA shall approve a State agency's application for funds under this part if—

(1) The application meets the requirements in §§ 203.30 and 203.31; and

(2) The SEA determines that the State agency—

(i) Maintained fiscal effort in accordance with § 203.41; or

(ii) Has modified its application to take into account its reduced allocation if the State agency failed to maintain effort.

(b) An SEA may approve an application for a grant to a State agency for one year or for a period of up to three years if a State agency operates programs for children who participate for more than one year.

(c) SEA approval of an application under paragraph (a) of this section does not relieve the State agency of its responsibility to comply with all applicable requirements.

(Authority: 20 U.S.C 2802 (a), (c))

§§ 203.33–203.39 [Reserved]

Subpart E—What Post-Award Conditions Must Be Met by a State Agency?

§ 203.40 What costs are allowable?

(a) A State agency shall use funds under this part only for programs and projects (including the acquisition of equipment and, if necessary, the construction of school facilities) that are designed to—

(1) Meet the special educational and pupil services needs of children in institutions for neglected or delinquent children, children attending community day programs for neglected or delinquent children, or children in adult correctional institutions; and

(2) Support educational services supplemental to the basic education of neglected or delinquent children that must be provided by the State.

(b) (1) A State agency may reserve 10 percent or less of the funds it receives for any fiscal year under section 1241 of the Act for projects designed to facilitate the transition of children from State institutions or community day programs for neglected or delinquent children into locally operated programs.

(2) The services provided from the funds reserved under paragraph (b)(1) of this section may include, but are not limited to, the following:

(i) Supplemental instruction to improve achievement in basic and more advanced skills.

(ii) Pupil services, including counseling, psychological, and social work services designed to meet the needs of the children.

(iii) The services of persons with special responsibilities to act on behalf of individual children (ombudspersons).

(iv) Tutoring.

(v) Re-entry orientation programs.

(3) Projects funded under paragraph (b)(1) of this section may be conducted directly by the State agency, or by contracts or other arrangements with one or more of the following:

(i) One or more LEAs.

(ii) Other public agencies.

(iii) Private, nonprofit organizations.

(4) The special educational services funded under paragraph (b) of this section shall be provided to neglected or delinquent children in schools other than those operated for children in State institutions or community day programs for neglected or delinquent children.

(Authority: 20 U.S.C. 2802(a), 2803)

§ 203.41 What is the maintenance of effort requirement?

(a) (1) *Basic standard.* Except as provided in paragraph (b) of this section, an SEA shall pay a State agency its allocation of funds under this part if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of State funds with respect to the provision of free public education by the State agency for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or the aggregate expenditures for the second preceding fiscal year.

(2) *Meaning of "preceding fiscal year."*—For purposes of determining maintenance of effort, the "preceding fiscal year" is the Federal fiscal year or the 12-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Example: For funds first made available on July 1, 1989, if a State is using the Federal fiscal year, the "preceding fiscal year" is Federal fiscal year 1988 (which began on October 1, 1987) and the "second preceding fiscal year" is fiscal year 1987 (which began on October 1, 1986). If a State is using a fiscal year that begins on July 1, 1989, the "preceding fiscal year" is the 12-month period ending on June 30, 1988 and the "second preceding fiscal year" is the period ending on June 30, 1987.

(3) *Expenditures.* (i) *To be considered.* In determining a State agency's compliance with the maintenance of effort requirement, the SEA shall consider the State agency's expenditures from State funds for free public education. These include expenditures for the following:

(A) Instructional staff salaries.

(B) Salaries for educational administrators.

(C) Salaries for school support staff, including pupil services personnel and school clerical staff.

(D) Instructional supplies and materials.

(ii) *Not to be considered.* The SEA may not consider the following expenditures in determining a State agency's compliance with the maintenance of effort requirement:

(A) Any expenditures related primarily to the care of children in institutions rather than for free public education.

(B) Any expenditures for community services, capital outlay, or debt service.

(C) Any expenditures from funds provided under Chapter 1 and Chapter 2 of Title I of the Act or Chapter 1 and Chapter 2 of the ECIA.

(b) *Failure to maintain effort.* (1) If a State agency fails to maintain effort and a waiver under § 203.42 is not granted, the SEA shall reduce the State agency's allocation of funds under this part in the exact proportion by which the State agency fails to meet 90 percent of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the State agency) for the second preceding fiscal year.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year in which the State agency failed to maintain effort, the SEA shall consider the State agency's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the State agency) for the third preceding fiscal year.

Example: In Federal fiscal year 1990, a State agency fails to maintain effort because its fiscal effort in the preceding fiscal year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987). In assessing whether the State agency maintained effort during the next fiscal year (1991), the SEA may consider the State agency's expenditures for the second preceding fiscal year (1988) (the year that caused the State agency's failure to maintain effort) to be no less than 90 percent of the State agency's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a), 2802(a))

§ 203.42 Under what circumstances may an SEA waive the maintenance of effort requirement?

(a) (1) An SEA may waive, for one fiscal year only, the maintenance of effort requirement in § 203.41 if the SEA determines that a waiver would be equitable due to exceptional or uncontrollable circumstances. These circumstances include, but are not limited to, the following:

(i) A natural disaster.

(ii) A precipitous and unforeseen decline in the financial resources of the State agency.

(2) An SEA may not consider tax initiatives or referenda to be exceptional or uncontrollable circumstances.

(b) (1) If the SEA grants a waiver under paragraph (a) of this section, the SEA shall not reduce the amount of funds under this part the State agency is otherwise entitled to receive.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year for which the waiver was granted, the SEA shall consider the State agency's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the State agency) for the third preceding fiscal year.

Example: In fiscal year 1990, a State agency secures a waiver because its fiscal effort in the preceding year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987) due to exceptional or uncontrollable circumstances. In assessing whether the State agency maintained effort during the next fiscal year (1991), the SEA may consider the State agency's expenditures for the second preceding fiscal year (1988) (the year for which the State agency needed a waiver) to be no less than 90 percent of the State agency's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a), 2802(a))

§ 203.43 What is the supplement, not supplant requirement that applies to the program?

(a) (1) Except as provided in paragraph (b) of this section, a State agency may use funds available under this part only to supplement and, to the extent practical, increase the level of non-Federal funds that would, in the absence of funds under this part, be made available for the education of pupils participating in projects funded under this part, and in no case may funds available under this part be used to supplant those non-Federal funds.

(2) In determining compliance with paragraph (a)(1) of this section, a program is considered to have met the requirement if funds under this part are used to either—

(i) Provide services that are supplemental to the services that would, in the absence of funds under this part, be provided to children participating in the program under this part; or

(ii) Increase the total number of hours of instruction that students receive with State funds and without regard to the subject area the additional instruction is provided.

Example: The regular program of instruction in an institution provides classes with State funds in English, mathematics, and vocational education. Each student receives three hours of instruction each day. The Chapter 1 program provides a remedial reading class for children selected to receive Chapter 1 services. Although reading is not part of the regular program of instruction, the Chapter 1 remedial reading class is supplemental to the regular program because the Chapter 1 services provide additional instructional time for participating children.

(b) To meet the requirements in paragraph (a) of this section, a State agency is not required to provide services under this part through use of a particular instructional method or in a particular instructional setting.

(c) A State agency may exclude, for the purpose of determining compliance with the supplement, not supplant requirement in paragraph (a) of this section, State and local funds spent to carry out special programs that the Secretary has determined, in advance and in writing, meet the requirements of section 1018(d)(1)(B) of the Act.

(Authority: 20 U.S.C. 2728(b), (d) 2802(a), (c))

§ 203.44 What is included in the records of transferred students?

A State agency shall include any individualized education plans in the records of students who transfer to another State or local education agency.

(Authority: 20 U.S.C. 2802(c))

(Approved by the Office of Management and Budget under control number 1810-0060.)

§ 203.45 How may personnel be assigned supervisory duties?

(a) A State agency may assign personnel paid entirely with funds available under this part to limited supervisory duties that may provide some benefit to children not participating in the Chapter 1 project if—

(1) Similarly situated personnel at the same site, who are not paid with funds available under this part, are assigned these duties; and

(2) The time spent by Chapter 1 personnel on these duties does not exceed the least of the following:

(i) The proportion of total work time that similarly situated non-Chapter 1 personnel at the same site spend performing these duties.

(ii) One period per day.

(iii) Sixty minutes per day.

(b) The amount of time referred to in paragraph (a)(2) of this section may be calculated on a daily, weekly, monthly, or annual basis.

(c) The limited supervisory duties in paragraph (a) of this section need not be limited to classroom instruction and may include but are not limited to the following:

(1) Supervision of halls, playgrounds, lunchrooms, study halls, bus loading and unloading, and homerooms.

(2) Participation as a member of a school curriculum committee.

(3) Participation in the selection of regular curriculum materials and supplies.

(Authority: 20 U.S.C. 2853)

§ 203.46 What are the requirements for evaluating and reporting project results?

(a) *State agency evaluations.* (1) A State agency that receives funds under this part shall annually conduct an evaluation to determine the impact of the project on the ability of the participants to—

(i) Maintain and improve their educational achievement;

(ii) Maintain school credit in compliance with State requirements; and

(iii) Make the transition to regular or special education programs operated by LEAs or other public or private educational agencies.

(2) If an evaluation shows that a project is not making substantial progress in meeting the goals in paragraph (a)(1) of this section, the State agency shall make changes in the project, with the approval of the SEA, that will enable the project to meet those goals.

(b) *SEA evaluation.* (1) An SEA shall conduct an evaluation of programs under this part that is based on State agency data collected under paragraph (a) of this section at least once every two years.

(2) The SEA shall inform its State agencies, in advance, of the specific data that will be needed and how the data may be collected.

(3) The SEA shall—

(i) By a date established by the Secretary, submit the results of that evaluation to the Secretary; and

(ii) Make public the results of that evaluation.

(c) *Performance report.* (1) An SEA shall—

(i) Collect data specified in the Act and by the Secretary in the SEA's performance report; and

(ii) Submit those data to the Secretary.

(2) A State agency receiving funds under this part shall provide to the SEA any data needed by the SEA to complete its performance report.

(d) *Average daily attendance.* On a date specified by the Secretary each year, the SEA shall submit to the Secretary the average daily attendance data required under § 203.21(a).

(Authority: 20 U.S.C. 2729(b), 2802(d), 2835(a), (d))

(Approved by the Office of Management and Budget under control number 1810–0060.)

§§ 203.47–203.49 [Reserved]

Subpart F—What Are Other State Responsibilities for the Program?

§ 203.50 Does a State have authority to issue State regulations for the program?

(a) (1) Except as provided in paragraph (b) of this section, Chapter 1 does not preempt, prohibit, or encourage State rules, regulations, or policies issued pursuant to State law.

(2) If a State issues rules, regulations, or policies, they may not be inconsistent with the provisions of the following:

(i) The Chapter 1 statute.

(ii) The regulations in this part.

(iii) Other applicable Federal statutes and regulations.

(b) A State may not issue rules, regulations, or policies that limit a State agency's decisions regarding—

(1) Grade levels to be served;

(2) Basic skill areas to be addressed;

(3) Instructional settings, materials, or teaching techniques to be used;

(4) Instructional staff to be employed, as long as this staff meets State certification and licensing requirements for educational personnel; or

(5) Other essential support services.

(c) Nothing in paragraph (b) of this section limits an SEA's authority to review and approve State agencies' applications or to ensure that State agencies use Chapter 1 funds in accordance with all applicable requirements.

(d) The State shall identify any State rule, regulation, or policy relating to the administration and operation of Chapter 1 programs, including those based on State interpretation of any Federal law, regulation, or guideline, as a State-imposed requirement.

(e)(1) (i) Except as provided in paragraph (e)(1)(ii) and (iii) of this section, if a State issues major rules or regulations relating to the administration or operation of programs funded under this part, the State shall convene a State committee of practitioners to review before publishing any major proposed or final rule or regulation.

(ii) In an emergency situation in which a major rule or regulation must be issued within a very limited time to assist State agencies with the operation of programs under this part, the State—

(A) May issue the regulation without consulting the committee of practitioners; but

(B) Shall immediately thereafter convene the State committee of practitioners to review the emergency rule or regulation prior to issuance in final form.

(iii) The State shall ensure that the committee of practitioners reviews non-major rules or regulations before publication.

(2) If a State does not issue rules or regulations relating to the administration or operation of programs under this part but issues policies that the SEA and State agencies are required to follow, the State must comply with the requirements in this section for issuing rules and regulations.

(3) (i) The committee of practitioners must include—

(A) Administrators;

(B) Teachers; and

(C) Parents.

(ii) The majority of the committee must be representatives of State agencies.

(4) SEAs are encouraged to request from appropriate organizations recommendations for membership on the committee.

(Authority: 20 U.S.C. 2851)

§ 203.51 How can State personnel paid with Chapter 1 funds be assigned to State programs?

(a) As provided in paragraph (b) of this section, an SEA may use funds received under § 203.22(a) to pay the salary costs for any employee assigned to programs funded under this part and special State programs that meet the requirements of section 1018(d)(1) of the Act.

(b) Salary costs are allowable charges to funds received under § 203.22(a) if the following conditions are met:

(1) An employee's assignments are related to the SEA's administrative, training, and technical assistance responsibilities under the programs.

(2) The SEA maintains contemporaneous time distribution records reflecting the actual amount of time the employee spends on the programs.

(3) The time distribution records are signed by the employee's supervisor.

(4) Actual costs are charged to the programs on the basis of the employee's time distribution records.

(c) If an employee is assigned administrative, training, and technical assistance duties that jointly benefit programs funded under this part and special State programs that meet the requirements of § 200.45(a)(1)(i) and (a)(2), costs may be charged to the programs on a basis other than the time spent on each of the programs, provided charges are equitably distributed among funding sources.

Example: An employee spends three hours developing a manual for State agencies to use to improve reading instruction in compensatory programs supported with funds under this part and under a State compensatory education program. Since only one manual is produced, the employee is unable to divide the actual time spent on each program. Therefore, the SEA may prorate costs, for example, to each program on the basis of the proportion of funds allocated for each of the programs benefiting from the manual.

(Authority: 20 U.S.C. 2728(d), 2853)

Complaint Procedures of the SEA

§ 203.52 What complaint procedures shall an SEA adopt?

An SEA shall adopt written procedures for—

(a) Receiving and resolving any complaint that the SEA or a State agency is violating a Federal statute or regulations that apply to programs under this part;

(b) Reviewing an appeal from a decision of a State agency with respect to a complaint; and

(c) Conducting an independent on-site investigation of a complaint if the SEA determines that an on-site investigation is necessary.

(Authority: 20 U.S.C. 2831(a))

(Approved by the Office of Management and Budget under control number 1810–0600.)

§ 200.53 What are the minimum complaint procedures?

An SEA shall include the following in its complaint procedures—

(a) A time limit of 60 calendar days after the SEA receives a complaint:

(1) If necessary, to carry out an independent on-site investigation; and

(2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the SEA.

(Authority: 20 U.S.C. 2831(a))

§ 203.54 How does an organization or individual file a complaint?

An organization or individual may file a written signed complaint with an SEA. The complaint must include—

(a) A statement that the SEA or a State agency has violated a requirement of a Federal statute or regulations that apply to programs under this part;

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 2831(a))

§§ 203.55–203.59 [Reserved]

[FR Doc. 89–16771 Filed 7–17–89; 8:45 am]

BILLING CODE 4000–01–M

Reader Aids

Federal Register

Vol. 54, No. 136

Tuesday, July 18, 1989

INFORMATION AND ASSISTANCE

Federal Register

Index, finding aids & general information	523-5227
Public inspection desk	523-5215
Corrections to published documents	523-5237
Document drafting information	523-5237
Machine readable documents	523-5237

Code of Federal Regulations

Index, finding aids & general information	523-5227
Printing schedules	523-3419

Laws

Public Laws Update Service (numbers, dates, etc.)	523-6641
Additional information	523-5230

Presidential Documents

Executive orders and proclamations	523-5230
Public Papers of the Presidents	523-5230
Weekly Compilation of Presidential Documents	523-5230

The United States Government Manual

General information	523-5230

Other Services

Data base and machine readable specifications	523-3408
Guide to Record Retention Requirements	523-3187
Legal staff	523-4534
Library	523-5240
Privacy Act Compilation	523-3187
Public Laws Update Service (PLUS)	523-6641
TDD for the deaf	523-5229

FEDERAL REGISTER PAGES AND DATES, JULY

27855-28016.....3
28017-28408.....5
28409-28664.....6
28665-28794.....7
28795-28998.....10
28999-29316.....11
29317-29528.....12
29529-29700.....13
29701-29874.....14
29875-30006.....17
30007-30204.....18

CFR PARTS AFFECTED DURING JULY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

1 CFR

302.....28964
305.....28964
310.....28964

3 CFR

Proclamations:
5995.....28409
5996.....28993
5997.....28999
5998.....29313

Executive Orders:
11958 (Amended by EO 12680).....28995
12163 (Amended by EO 12680).....28995
12171 (Amended by EO 12681).....28997
12680.....28995
12681.....28997
12682.....29315

Administrative Orders:
Presidential Determinations:
No. 89-16 of June 22, 1989.....28017

5 CFR

1201.....28632
1202.....28657
1203.....28658
1204.....28658
1205.....28662
1206.....28664
1209.....28654

Proposed Rules:
900.....28426

7 CFR

2.....28665
29.....27855
33.....29317
400.....28019, 28411
401.....28795
455.....30007
905.....29318
910.....28796, 29701
916.....27856
917.....27856, 29321
921.....29319
922.....29319
923.....29319
924.....29319
928.....29318
929.....29323
946.....27862
948.....29324
955.....29325
958.....29324
989.....29326
1040.....29327
1260.....28019
1822.....29329
1823.....29329
1910.....29329
1941.....28019, 29329
1942.....29329
1943.....28019, 29329
1944.....29329
1945.....29329
1951.....28019, 28020, 28411, 29329
1955.....29329
1965.....29329
1980.....28021

Proposed Rules:
29.....27883
319.....29566
401.....28019, 28428, 28820
449.....28429
911.....29338
927.....29340
947.....29341
987.....29342
989.....29343
1762.....27883
1864.....29569
1930.....29901
1944.....29901
1956.....29569
1965.....29569

8 CFR

100.....29438
103.....29438, 29440, 29875
210a.....29875
242.....29438
245.....29440
245A.....29434, 29442
264.....29438
299.....29438

Proposed Rules:
103.....29344
242.....29050

9 CFR

92.....29003

Proposed Rules:
54.....29576
75.....28070

10 CFR

2.....27864, 29008
7.....28554
26.....29139
51.....27864
60.....27864

Proposed Rules:
2.....28822
30.....30049
40.....30049
50.....30049
60.....30049
70.....30049

72.....30049
150.....30049
764.....29732

12 CFR

226.....28665

Proposed Rules:

5.....28072
202.....29734
32.....30054
561.....27885
563.....27885

14 CFR

39.....28022, 28023, 28025, 28026, 28028, 28554, 29008, 29009, 29529, 29530, 29534, 29535, 29537, 29538, 30007, 30009
71.....28029, 29539, 29540, 29817, 29888–29891
91.....28769, 29698, 29892
97.....28029, 30010
107.....28765
108.....28985

Proposed Rules:

Ch. I.....28074
1.....28978
14.....29978
39.....29050–29056, 29577, 30059–30062 29579, 29580, 29582
71.....28074, 29057–29059, 29907
75.....29908, 29909
91.....28978
108.....28982
121.....28978
125.....28978
129.....28978
135.....28978

15 CFR

50.....29010
771.....29011
774.....28665
786.....29011
799.....30011

Proposed Rules:

25.....28430

16 CFR

305.....28031

Proposed Rules:

703.....29910

17 CFR

200.....28796
201.....28797
211.....29333
240.....28799, 30013
241.....28799

Proposed Rules:

230.....30063, 30076
240.....30087
250.....29739
259.....29739

19 CFR

10.....28412
134.....29540
141.....28412
178.....28412

20 CFR

655.....28037

21 CFR

177.....29018
310.....28772, 28780
520.....29543
522.....29543
524.....29543
556.....28051
558.....28051, 28154, 29335, 29544
573.....29019
1308.....28414

Proposed Rules:

10.....28872
310.....28872
314.....28872
320.....28823, 28872
341.....28442
610.....30093
640.....30093

22 CFR

34.....28415
514.....30033

23 CFR

Proposed Rules:

625.....29910, 30095
645.....29910
658.....29060

24 CFR

203.....28053

26 CFR

1.....28576
602.....28576

Proposed Rules:

1.....28075, 28683, 29061

27 CFR

5.....29701

Proposed Rules:

9.....29739

29 CFR

1910.....28054, 28154, 29142, 29545, 29546
1915.....29142
1917.....29142
1918.....29142
1926.....29546
2610.....27872, 28944, 29702
2619.....29703
2622.....27872
2644.....27872
2670.....29025
2675.....29025
2676.....29892

Proposed Rules:

1602.....30097
1627.....30097

30 CFR

938.....29704

Proposed Rules:

715.....28443
916.....29742
920.....30098
936.....29583

31 CFR

103.....28416
344.....28752

Proposed Rules:

800.....29744

33 CFR

100.....28814, 29547, 30034–30037
117.....30038
165.....28814
167.....28061

Proposed Rules:

100.....29348

34 CFR

203.....30190
222.....30039

35 CFR

103.....29335
117.....29335
135.....29335

Proposed Rules:

103.....29584
133.....29584

36 CFR

13.....30005

37 CFR

1.....29548
2.....29548
201.....27873

38 CFR

3.....28445
17.....28667, 28673
19.....28445
21.....28676

Proposed Rules:

1.....30099
36.....28683

39 CFR

111.....27879
221.....29706
222.....29706
223.....29706
224.....29706
225.....29706
226.....29706
227.....29706
228.....29706
229.....29706

40 CFR

52.....27880, 29310, 29554, 30040 29555, 29893–29895
82.....28062, 29336
131.....28662
141.....29998
228.....29034, 29712
271.....28677, 29557
761.....28418
763.....29460
796.....29715
797.....29715

Proposed Rules:

22.....29516
52.....28684, 28689, 29061, 29063, 29349
60.....28447, 29352
81.....29349
82.....29353
142.....29516
300.....29820
302.....29306
355.....29306
707.....29524

41 CFR

302–1.....29716

42 CFR

57.....28065
405.....29717
442.....29717
447.....29717
483.....29717
488.....29717
489.....29717
498.....29717

43 CFR

Proposed Rules:

5450.....29357
5460.....29357

46 CFR

502.....29036

47 CFR

1.....29037
2.....30041
22.....28815, 28816
73.....28677, 28678, 29038 29559–29561, 29719, 29720, 30041, 30042
74.....29039, 30043
80.....29040
90.....28678

Proposed Rules:

Ch. I.....28789
2.....28823
15.....28690, 28691, 28693
73.....27904, 28077, 28695, 28696, 29067, 29587, 29588, 29755, 29756
87.....28823

48 CFR

1.....29278
4.....29278
7.....29278
8.....29278
14.....29278
15.....29278
17.....29278
19.....29278
22.....29278
25.....29278
36.....29278
37.....29278
38.....29278
47.....29278
51.....29278
52.....29278
53.....29278
204.....28419
503.....29720
505.....29720
552.....29720
705.....28068
706.....28068
715.....28068
752.....28068
809.....30043
810.....30043
814.....30043
816.....30043
828.....30043
852.....30043
870.....30043
Ch. 18.....28186

Proposed Rules:

15.....29296

43.....29296
47.....29984
52.....29296, 29984
219.....30101
246.....30101
917.....29757
935.....29757

49 CFR

89.....28680
171.....28750
172.....28750
173.....28750
176.....28750
178.....28750
192.....27881
193.....27881
195.....27881
390.....28818
391.....28818
393.....28818
571.....29041-29045
1011.....29337

Proposed Rules:

390.....29912
512.....28696
571.....29067-29071, 29915
572.....29071

50 CFR

204.....30045
17.....29652, 29655, 29658, 29726
285.....29896
299.....29896
640.....30045
642.....29561
661.....28818, 29730
663.....30046
672.....28422, 28681
674.....28423

Proposed Rules:

17.....29915
20.....29640
285.....29359, 29916
672.....30102
675.....30102

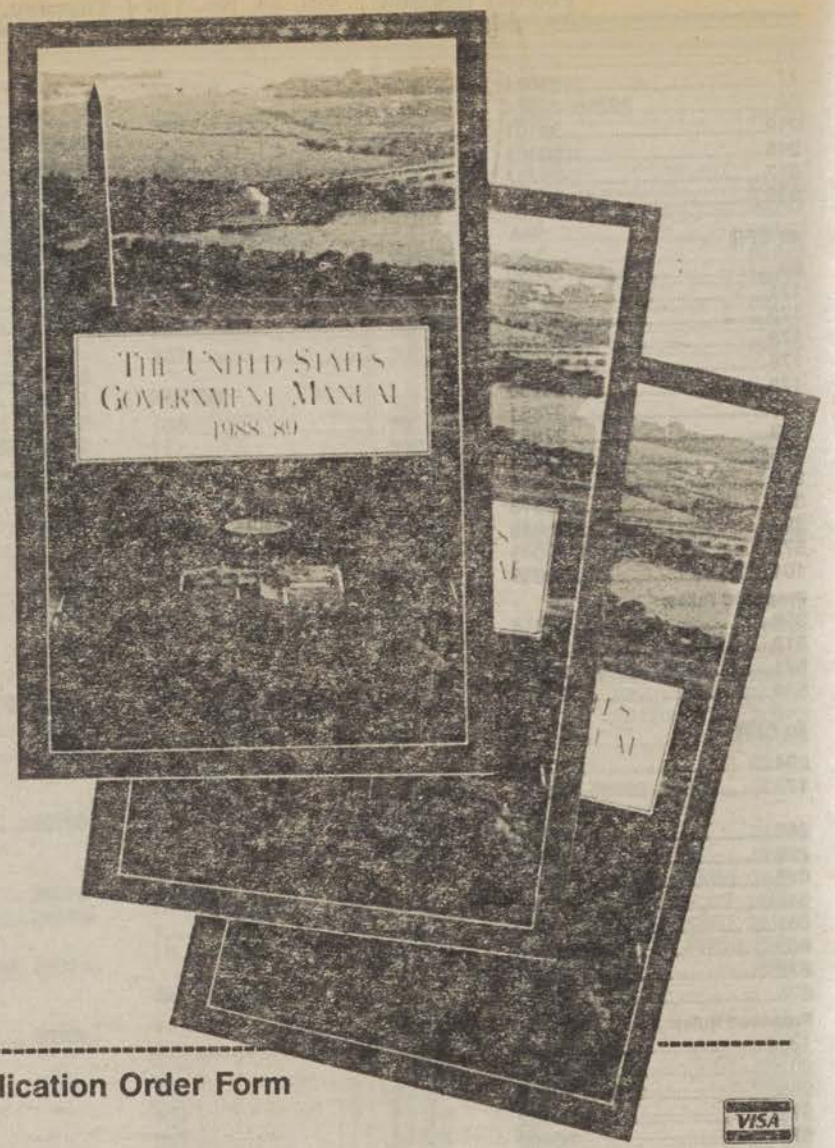
LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws.**

Last List July 13, 1989.

Order Now!

The United States Government Manual 1988/89



As the official handbook of the Federal Government, the *Manual* is the best source of information on the activities, functions, organization, and principal officials of the agencies of the legislative, judicial, and executive branches. It also includes information on quasi-official agencies and international organizations in which the United States participates.

Particularly helpful for those interested in where to go and who to see about a subject of particular concern is each agency's "Sources of Information" section, which provides addresses and telephone numbers for use in obtaining specifics on consumer activities, contracts and grants, employment, publications and films, and many other areas of citizen interest. The *Manual* also includes comprehensive name and agency/subject indexes.

Of significant historical interest is Appendix C, which lists the agencies and functions of the Federal Government abolished, transferred, or changed in name subsequent to March 4, 1933.

The *Manual* is published by the Office of the Federal Register, National Archives and Records Administration.

$20.00 per copy

Publication Order Form

Order processing code: *6450

☐ **YES,** please send me the following indicated publications:

_____ copies of THE UNITED STATES GOVERNMENT MANUAL, 1988/89 at $20.00 per copy. S/N 069-000-00015-1.

1. The total cost of my order is $_____ International customers please add 25%. All prices include regular domestic postage and handling and are good through 3/89. After this date, please call Order and Information Desk at 202-783-3238 to verify prices.

Please Type or Print

2. _____
(Company or personal name)

_____
(Additional address/attention line)

_____
(Street address)

_____
(City, State, ZIP Code)

( )
_____
(Daytime phone including area code)

3. Please choose method of payment:

☐ Check payable to the Superintendent of Documents

☐ GPO Deposit Account ☐☐☐☐☐☐☐–☐

☐ VISA, or MasterCard Account

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

_____
(Credit card expiration date)

Thank you for your order!

_____
(Signature)

(Rev. 8-88)

4. **Mail To:** Superintendent of Documents, Government Printing Office, Washington, D.C. 20402-9325